REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PROBATE AND ADMINISTRATION CAUSE NO.43 OF 1976

IN THE MATTER OF: THE ESTATE OF ABDULREHMAN BIN MIRAN (DECEASED)

AND

IN THE MATTER OF: AN APPLICATION FOR GRANT OF LETTERS OF

ADMINISTRATION BY SHAMSA ABDULRAHMAN

MIRAN AND FATU ABDULREHMAN

AND

IN THE MATTER OF: APPLICATION FOR ANNULMENT /REVOCATION OF

THE GRANT OF LETTERS OF AMINISTRATION

IN PROBATE AND ADMINISTRATION CAUSE NO.43 OF 1976

BETWEEN

ASHA ABDALLA ABDULRAHMAN MIRAN

MOHAMED ABDALLA ABDULRAHMAN MIRAN.....APPLICANTS

VERSUS

SHAMSA ABDULRAHMAN MIRAN.....RESPONDENT

JUDGEMENT

1. From the onset, I wish to make it clear that this is an old file whose proceedings commenced on 14th April 1976. Having been concluded in the late seventies, the file went to the archives. It was until 9th March 2021 that this file was revived but the original file could not be found hence parties agreed to proceed on a reconstructed file (skeleton file) at the risk of not having complete record of the file including the court proceedings.

2. Briefly, the deceased herein Abdulrehman died testate on 16th March 1976 while domiciled in Mombasa. He executed a will dated 20th September 1975 naming his two daughters the only surviving children Shamsa Abdulrehman Miran and Fatu Abdulrehman miran as joint executrixes and trustees of his estate. He also bequeathed his entire estate to the two to share equally. Subsequently, on 14th April 1976, the Executrixes petitioned the court for a grant of probate. The same was gazetted on 7th May 1976 vide gazette notice number 1391. Consequently, a grant of probate was made on 22nd July 1977 and issued on 30th July 1977. From the record, it would appear the estate devolved to the two petitioners and the file got closed.

3. However, sometime 2011, Asha Abdalla Abdulrehman Miran and her brother Mohamed Abdalla Abdulrehman Miran being children to one of the deceased's children the late Abdalla Abbdulrehan Miran filed an intestate succession cause No.93 of 2011 in respect of the deceased's estate herein. They obtained a grant of letters of administration on 12th March 2012 and had it confirmed on 1st November 2012 thus sharing out the estate comprising of Mombasa /Block/XV/166 to the named beneficiaries.

4. Upon discovering that another grant had been obtained, Shamsa the only surviving executrix to the estate filed an application dated 16th July 2015 under file No. 93 of 2011 seeking revocation of the said grant on grounds that it was fraudulently obtained. On 16th October 2018, the court revoked and nullified the grant by consent of all parties declaring all acts, deeds, and documents executed by the holders of the revoked grant null and void.

5. Subsequently, Asha Abdalla and her brother Mohammed Abdalla the applicants herein, moved this court under this file vide a chamber summons dated 13th November,2020 supported by their affidavit jointly sworn on 8th February ,2020 seeking the following orders;

a) Spent

b) That a conservatory order to issue restraining the respondent, its agent or Servant from selling, leasing, mortgaging, alienating or in any other manner interfering with the deceased's estate pending the hearing and determination of the summons for revocation of grant issued on 31st July, 1977.

c) That the grant of letters of administration issued to Shamsa Abdulrahman Bin Miran and Fatu Abdulrahman Miran on 31st July 1977 be annulled/revoked on the grounds that the same was obtained through concealment of material facts to this honourable court.

d) That the court file in this suit be reconstructed and the same kept under lock and key.

e) That the costs of this application be borne by the respondents.

6. The application is based on the grounds stated on the face of it and further amplified by the content contained in the supporting affidavit in which they averred that the deceased was survived by the following children; **Mohammed Abdulrahman Miran –Son (Deceased), Abdalla Abdulrahman Miran-Son (Deceased), Asha Abdulrahman Miran –Daughter (Deceased), Fatuma Abdulrahman Miran-Daughter (Deceased), Fatu Abdulrahman Miran-Daughter (Deceased), Shamsa Abdulrahman Miran-Daughter.**

7. They averred that; the only son of the deceased ,the late Abdalla Bin Miran predeceased the deceased herein and left behind the applicants as beneficiaries; the deceased herein was survived by two daughters and the children of the late son, the applicants herein ;at the time of petitioning the grant for letters of administration, the respondent herein did not disclose the applicants as beneficiaries herein which amounts to non-disclosure material facts; the will that was used by the respondent to obtain the grant herein is a forgery because it was executed by way of thumb print while the deceased was a literate person with the ability to read ,write and sign; the respondent deliberately concealed the knowledge of the applicants herein and deliberately swore a false oath that the deceased died testate when he did not; the applicants have therefore been wholly omitted from the shares of the estate.

8. In response, the respondent herein filed grounds of opposition dated 24th February,2021 and a replying affidavit sworn on 10th March,2021 stating that; the applicants lack the locus standi to file the application herein as their father predeceased the deceased Abdulrehman Bin Miran and do not qualify as dependants or beneficiaries of the estate; at the time of his death, the deceased was survived by only two daughters ,Fatu Abdulrahman Miran and herself and they were the legal dependants and beneficiaries of the deceased; the father of the applicants herein predeceased the death of her father and therefore did not qualify as dependants nor beneficiaries of the estate of the deceased and therefore the applicants are not legally entitled to inherit the estate of the deceased herein.

9. The respondent further stated that the deceased while alive gave the applicants' mother properties including the house they currently reside in Tudor as he knew they could not inherit him under the law; that the deceased left a valid will appointing her and her sister Fatu Abdulrahman Miran his only surviving children and as the executrixes of his estate which they used to petition for grant of probate which was gazetted on 27th April,1976 under gazette notice number 1391; no objection was filed within the stipulated time leading to the issuance of the grant of probate by the court on 30th July,1977 which was never challenged for the past 45 years until the filing of the applicant's application.

10. The respondent stated that the applicants' application suffer from undue laches as the application for revocation /annulment of the grant is brought after inordinate delay for 45 years after the issuance of the grant and the same should be revoked; the applicants were aware of the will ,the issuance of the grant and confirmation thereof and the attempt to challenge the same after 45 years on fictitious grounds is mischievous aimed at camouflaging their dubious criminal and shady dealings in the estate .

11. That a thumb print is one way of execution of documents and the same cannot be a ground for revocation of grant issued to the rightful executrixes and dependants of the deceased; the will was drawn and witnessed by two independent witnesses who have sworn affidavits. The deceased was old and feeble prior to his death and could not be in a position to sign documents by appending both his two names and, overtime it was reduced to one name and later to thumb print.

12. She averred that the applicants did not come before this honourable court with clean hands as they have not made full disclosure of all material facts on their illegal criminal activities in dealing with her father's property; That they fraudulently and in concealment of material facts petitioned court in **Mombasa HCC Succession Cause No.93 Of 2011** and obtained fraudulent grant of letters of administration to the estate of the deceased on 12th march,2012 and confirmed on 1st novemebr,2012 claiming to be the only surviving heirs of the estate whereas they were all aware she existed; they used the said grant to transmit to themselves and their brother Bahram Abdalla Abdulrahman a property title number MOMBASA BLOCK XVI/166 which is the genesis of the current dispute between the parties; upon transmission in their name ,they transferred the same to their brother in law Mohamed Adam Abdulrahim.

13. She deposed that the grant issued in the year 2015 was revoked via consent order adopted as an order of court issued on 16th October,2018 on grounds that the same was obtained by fraud and concealment of material facts to the honourable court which order

nullified all acts, deeds and documents executed pursuant to the said grant.

14. The respondent averred that she lodged a forgery complaint at Makupa Police Station registered as **OB.NO.28/19/05/2015** but the applicants have been frustrating her efforts to have the police conclude their investigations; That she also lodged a restriction at the land's office over property **PLOT NO.MSA/BLOCK XVI/166** and a notice by chief land's registrar confirming that a caveat has been lodged against the title was issued on 24th july,2018 though they went missing and a gazette notice to reconstruct the file and green card relating the said property issued.

15. It was further stated that the applicants refused to vacate the suit property leading to the filing of an application in succession cause no.93/2011 seeking breaking in order to enable her take possession of the property. That they purported that their brother in law sold the property to **JEILANI OMAR ABU** who took possession and started construction thus prompting her to filing **ELC Cause No. E011 of 2020** in the **Chief Magistrates** court seeking restraining orders against the current owner in which the court granted injunction orders pending the hearing and determination of the suit.

16. She averred that she stands to suffer substantial loss unless there is intervention from this honourable court. She termed the application as; frivolous, a mere sham based on misrepresentation of facts and law; an act amounting to forum shopping in a bid to defeat the conservatory orders issued in the Environment and Land Court and, the same is an abuse of the court process and therefore fit for dismissal.

17. When the matter came up for hearing, parties agreed to dispose the application by way of written submissions.

Applicants' Submissions

18. The applicants filed their written submissions dated 6th april,2021 through the firm of Khatib and Co. Advocates citing three issues for determination as follows;

a) Whether the applicants are beneficiaries of the estate of the late Abdulrehman Bin Miran (deceased)?

b) Whether the will is valid?

c) Whether the grant issued to the respondent should be revoked.

19. Regarding the first issue, the applicant reiterated the content of paragraph 3 and 4 of the supporting affidavit. The court was referred to **Sura Nissah Versus 1 of The Holy Quran** to express the point that the share for the two daughters of the deceased is 2/3 and the grandchildren to inherit the remaining 1/3 in accordance to Islamic law. They contended that as grandchildren of the deceased, they are entitled to a share of the deceased's estate.

20. On the 2nd issue, counsel relied on section 7 of the Law of Succession Act to express the position that a will obtained through coercion, induced by mistake, fraud or such importunity as it takes away the free will of a testator is null and Void. To further fortify that submission, counsel relied on the holding in the case of **In re Estate of Julius Mimano (deceased) (2019) eKLR.** Learned counsel submitted that since there are other beneficiaries, the testator could not bequeath all the estate to the respondents and deny the applicants any share thus the will is discriminative and against the Islamic law hence offending principles of fairness and justice contrary to the constitution and the holy **Quran Surah Nisah 4:11**

21. They further relied on the case of **Saifudean Mohammedali Noorbhai V Shehnaz Abdehussein Adamji (2011) eKLR** where the court said that**;**

"The limit on Muslims Testamentary freedom, up to one third is seen in Islam as a means to ensuring balance between a Muslim freedom in this regard and responsibility to his heirs…heirs should not be left destitute"

22. Counsel contended that the will is invalid on the grounds that; it violates the whole Quran Surah Nissah Chapter 4 Versus 11 by bequeathing to only daughters all the deceased property despite there being other beneficiaries; the will is discriminative and contravenes the constitution's dictate on the right to equality; the will was made /executed under suspicious circumstances as the deceased was in a weakened and feeble condition due to old age and sickness hence invalid**.**

23. On whether the grant should be revoked (3rd issue), it was submitted that the applicants have met the grounds and conditions set out under Section 76 of the Law of Succession Act in that; it was obtained through fraud and without disclosing the existence of other beneficiaries entitled to the estate hence concealment of material information.

Respondent's Submissions

24. The Respondent through Garane and Somane Advocates filed their written submissions dated 15th April, 2021 raising the following issues for determination;

a) Whether there was fraud by the applicants

b) Whether the applicants are beneficiaries

c) Whether the applicants were sufficiently provided for as grandchildren

d) Whether the will is valid?

e) Whether the applicants are guilty of laches; and

f) Whether the applicants meet the threshold for the revocation of the grant?

25. It was submitted that having established that the applicants obtained the 2012 grant fraudulently and the same having been revoked, the applicants had no basis to hold a good title and the subsequent alleged purchasers also had no basis in law to hold that they were innocent purchasers for value without notice.

26. She urged the court to use its inherent powers granted under article 159 of the constitution and rule 73 of the probate and administration rules and pronounce itself on the fraudulent activities of the applicant in defrauding the respondent of property Mombasa BLOCK XVI/166. Learned counsel contended that, he who comes to court must come with clean hands.

27. As to whether the applicants are beneficiaries, she relied on Section 26 of the law of Succession Act. Reliance was placed in the holding in the case of **Mohamed Juma vs Fatuma Rehan Juma &6 others (2017) eKLR** to express the point that the applicants do not have standing to bring this application for revocation of grant since they are not the primary beneficiaries of the estate under both the will and the Islamic law as their father had pre-deceased the deceased. However, she went further to submit that the applicants were at liberty to apply for reasonable provision under section 26 of the law of succession.

28. On the 3rd issue, it was submitted that the deceased transferred the following properties to the applicants' mother Mariam widow of Abdullah Abdulrehman Miran(their father) to hold in trust for his grandchildren before making his will namely; **Title No.Msa/Block X/136 and Title No.Msa/Block Xix /137 to Yusuf Musa Mirdor as grandson**.

29. She further submitted that the applicants whose father predeceased the deceased had adequately been provided for by the deceased as grandchildren before his death. That the deceased having executed a valid will to bequeath what remained of his estate to his surviving children, the applicants have no capacity to challenge the grant issued to the rightful beneficiaries of the deceased in accordance with the will and the law of succession.

30. On the aspect of validity of the will (issue 4), the respondent submitted that majority of the properties of the estate were disposed of as gifts by the deceased during his lifetime and only a fraction of the estate was what was willed away to the 2 surviving children.

31. She relied on Section 11(c) and 5 of the Law Succession Act thus submitting that the burden of proving lack of capacity of either mental or physical illness, or drunkenness, or any other cause is cast on the person alleging that the deceased lacked such capacity. In this regard, counsel relied on the case of Christopher **Maina Kimaru vs Josephine Wairimu Ngari & another [2016] eKLR and Mary Wanjiru and two others vs Naom Wanjiku Ngigi(2017)eKLR** where it was held that a person alleging influence on a testator when making a will must prove. He went further to submit that; the applicants failed to tender evidence on the alleged suspicion in making of the will; they failed to demonstrate on the lack of competence of those witnesses to the attestation and whether these two witnesses stood to benefit from the will.

32. She further submitted that the claim that the will is discriminative and contravenes the law is unfounded and unsubstantiated and if anything the deceased only willed what was left of his properties after gifting his grandchildren a portion of his properties; the deceased's intention was clearly to jealously protect the share of his daughters after his death and as such made them the executrixes of the estate.

33. The court was further referred to the case of **Re estate of Rahab Murugi Kigaa (deceased) [2019] eKLR** in which the court held that where a will is properly executed and the same is valid, a court exercising discretion in determining sufficiency in provision should be cautious not to interfere with the testator's wishes. Counsel opined that no evidence was led to demonstrate that the deceased had discriminated the beneficiaries and even grandchildren both before and after his death and that the deceased was just a person and out of love and affection for his grandchildren transferred the properties left out of his will to his grandchildren.

34. Concerning the aspect of thumb printing the will by the deceased, it was submitted that it is not sufficient ground to invalidate a will considering that there were two witnesses which fact is not denied. In support of this argument, reliance was placed on the case of **In re Estate of Julius Mimano (Deceased) [2019] eKLR** and **In Re Estate of MKK(Deceased)(2016) eKLR**.

35. On the issue regarding whether the applicants are guilty of laches, the respondent asserted that 45yrs down the line since the grant and confirmation of the grant was made with the knowledge of the applicants, they cannot wake up now and seek to undo everything even after their fraudulent acquisition of afresh grant had failed. Counsel urged that the applicants had sat on their rights for far too long. To support this position, counsel invited the court to the holding in the case of **Tabitha Wanjiru Versus Jotham Kithiko Hika and two others (2017) eKLR** where the court dismissed an application for revocation on grounds that it was brought after 20years.

36. She submitted that the probate court is a court of equity and has very wide discretion to aid the interest of justice and relied on the maxim **"equity aids the vigilant and not the indolent".**

37. On the issue whether the grant should be revoked, it was submitted that the grounds set out under Section 76 have not been proved to the required degree. It was contended that failure to provide for a dependant in a will is not sufficient ground to revoke a will. In this regard reference was made in respect to the case of **James Maina Anyanga vs Lorna Yimbiha Ottaro &4 others [2014] eklr and Mary Wanjiru &2 others vs Naomi Wanjiku Ngigi (supra)**

Analysis and Determination

38. I have considered the application, responses herein and rival submissions of both counsel for the respective parties. The following are the issues that emerge for determination;

(a)Whether the will dated 20th September, 1975 is valid.

(b)Whether the will is discriminative.

(c)Whether the applicants have locus standi.

(d)Whether the applicants are beneficiaries of the estate of Abdulrehaman Bin Miran (Deceased).

(e)Whether the applicants were sufficiently provided for by the deceased.

(f)Whether the applicants are guilty of laches.

(g)Whether the applicants committed fraud.

(h)Whether the grant issued on30th July 1977 should be revoked.

Whether the will dated 20th September 1975 is valid

39. In determining the above questions, I am guided by the Law of Succession Act Section 2 (3) and (4) which provides;

(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that *in lieu* of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.

40. On the issue of validity of the Will , the applicants submitted that the will is invalid on the following grounds ;**It violates the whole Quran Surah Nissah Chapter 4 Verse 11 by bequeathing to only daughters all the deceased property despite there being other beneficiaries; The will is discriminative and contravenes the constitution on the right to equality and that the will was made/executed under suspicious circumstances as the deceased was in a weakened and feeble condition due to old age and sickness hence invalid.**

41. Section 5 of the Law of Succession Act provide as follows;

(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.

(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.

42. Section 11 of the Law of Succession Act goes further to provide as provides:

"No written will shall be valid unless—

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of

the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

43. In this case, the deceased executed his will by way of a thumb print and the same was attested to by Messrs Karim Kurbhai Hussein Mulla Karimbhai and Omar Salim Ahmed both of whom swore affidavits marked as annexture **SABM-4** in the respondent's Replying Affidavit towards the same. This fact has not been disputed and thus the deceased's will meet the requirements of section 11. The law of succession does not mandatorily demand execution of a will by way of a signature if the testator is literate. What is material under section 11 above quoted is fixing a mark signifying free will in execution. The applicants have not claimed that the thumb print in the will was not that of the deceased. They are claiming that the will was forged but fell short of explaining how and by who while in the presence of two witnesses.

44. In the case of **In Re Estate of Samuel Ngugi Mbugua (deceased) [2017] eKLR,** the court had this to say regarding allegations of forgery during execution of a will;

'the allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In Elizabeth Kamene Ndolo vs George Matata Ndolo Nairobi Court of Appeal civil appeal number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the alleger is higher than that required in ordinary civil cases.'

The allegation of forgery placed a heavy burden upon the applicant to prove beyond reasonable doubt, or at least beyond balance of probability, that indeed the signatures were forged. He led no evidence on the alleged forgery. It is clear, therefore, that he failed to discharge the burden of proof and thus his allegation of forgery cannot succeed. It was said in Karanja and another vs. Karanja (supra_ that where a will is regular on its face with an attesting clause and the signature of the testator, a rebuttable presumption of due execution or omnia esse vite atta arises. In the context of the instant case, I am satisfied that the will before me was regular on the face of it and the presumption applied to it, but the applicant did not rebut the presumption through concrete evidence"

45. In this case, the burden of proof lies with the applicants who alleged forgery of the affixed mark by the deceased in the will. The applicants did not call nor produce any report by a document examiner or finger print expert or produce any concrete evidence to prove the allegation of forgery. It is trite that the mere fact that a person, who is literate, thumb prints a document rather than putting down his signature in writing, is not sufficient proof that he lacked mental capacity.

46. There was no evidence tendered to prove that the will was executed by a person who did not have the requisite testamentary capacity or was under undue influence interalia; drunkenness or coercion. Further, there was no proof that old age ever incapacitated the deceased to the extent that he did not understand what he was doing. See **Karanja and another vs Karanja(2002)eKLR** where the court held that, where the will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of a testator, there is a rebuttable presumption of the due execution(Omnia Esse vite atta)"

47. **In Re Estate of Krishna Kumari Bhatti (deceased) [2018] eKLR** the court held that**,**

"The law on capacity is stated in section 5 of the Law of Succession Act. The maker ought to be a person of sound mind, who is not a minor. The provision goes on to state that the soundness of mind of the maker shall be presumed unless at the time of executing the will he was not in a state of mind as not to know what he was doing, on account of either mental or physical illness, or drunkenness, or any other cause. The burden of proving lack of capacity on account of lack of a sound mind is cast on the person alleging that the deceased lacked such capacity. Related to that is the provision in section 7 of the said Act, with regard to wills caused by fraud or coercion or importunity or mistake. Such wills are stated to be void.

48. Further, **In re Estate of Julius Mimano (deceased) [supra],** the court stated that**;**

"In the instant case, the applicant pointed essentially at the fact that the executrix was the sole beneficiary of the will. He pointed too at the fact that executrix accompanied the deceased to the advocates' chambers for execution of the will, and that the deceased disclosed the contents of the will to her. In the first place, I reiterate that there is no evidence that the deceased was at that point weak due to old age or disease or intoxication. The advocate who prepared the will was not shown to have been the executrix's advocate, but that of the deceased himself. Secondly, it was not demonstrated that it was the executrix's idea that the deceased made a will, and, in a particular, suggested the advocate to draft the will and took the deceased to that advocate. It would appear that the executrix merely accompanied her husband, the deceased, to the execution ceremony. There was nothing pointing to the deceased being manipulated or coerced or pressurized by the executrix in anyway in the whole process. Indeed, the applicant led no evidence at all on what exactly transpired at the chambers of the advocates where the will was executed. The only available evidence, according to the record, is that from the executrix, and from what I have on record I do not find anything extraordinary about the circumstances that would raise eyebrows.

49. The burden of proof lies with the applicants to establish their case on lack of testamentary capacity on account of lack of sound mind. The applicants in their pleadings and submissions did not give an account of the circumstances that led to the execution of the subject will neither did they attach a medical report to show the impairment of mental capacity of the deceased at the time of execution. The documents attached to show that the deceased was executing documents via signature were signed 7 and 4 years respectively before the death of the deceased who died on 16th march 1976. However, there is no evidence or account on the deceased's mental impairment or physical ill health at the time of the execution of the will and therefore the applicants' allegations on the testamentary capacity and suspicious circumstances

cannot succeed.

Whether the will is discriminative

50. The applicants have also raised allegations that the defendant cannot bequeath all his property under a will and that the will is discriminative as it appointed the respondent as the only beneficiary excluding the applicants herein thus making it invalid. **In re Estate of Julius Mimano (Deceased) [supra]**the court stated that**,**

> **"the applicant pointed at the fact that the will did not provide for the children of the deceased, and especially himself, being the only son of the deceased. According to him that was unusual, and raised suspicion. Section 5 of the Law of Succession Act gave the deceased freedom of testation, to dispose of his property as he pleased to whomsoever he pleased. It was within his freedom or discretion to determine who was to benefit from his bounty. The mere fact that a will leaves out children from benefit and benefits the spouse substantially should not be ground for invalidation of a will. A party aggrieved by such provision has a remedy in section 26 of the Law of Succession Act, but not in the nullification of the will.**

51. Taking into consideration the wisdom espoused in the above quoted case law, it is my finding that the deceased had the freedom of testation, to dispose of his property as he pleased to whomsoever he pleased and the mere fact that the will left out the grandchildren from benefitting from the estate of the deceased is not a ground for nullification of the will. At most, they can only seek reasonable provision under Section 26 &29 which is also not automatic. In this case the applicants seem to have a problem with the fact that the beneficiaries of the deceased's estate are daughters which is unfortunate considering the fact that the world is moving towards the elimination of all forms of discrimination against women. In the circumstances, it would be discriminatory and unfair for the daughters to be snatched of their inheritance for the benefit of grandchildren. To that extent, the issue of discrimination does not arise hence this court can not interfere with the will as doing so will amount to rewriting the will.

Whether the applicants lack locus standi to file this application,

52. With regard whether the applicants lacks locus standii to file this application, I will seek guidance from the finding in the case of **In re Estate of Hellen Wangari Wathiai (Deceased)[2021]eKLR where the courtstated that, " it is trite law that pleadings filed in court by persons with no locus standi are void ab initio and the court does not have jurisdiction over such. As it was rightfully observed by R. Nyakundi J** in **Ibrahim v Hassan & Charles Kimenyi Macharia; interested party [2019] eKLR:**

> ***"Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues."***

53. The respondent submitted that the applicants lack locus standi to bring this application for the reasons that; since they were grandchildren of the deceased and the deceased applicant's father having predeceased the deceased are therefore not beneficiaries of the deceased's estate. It is not in dispute that the applicants are grandchildren of the deceased and that their father predeceased the deceased thus it's my view that the applicants have locus standi to bring this application before this court to claim beneficial interest as dependants under section 26 and 29 of the law of succession but not as primary beneficiaries as the Islamic law does not allow grandchildren whose parents have pre-deceased their parent whose estate is the subject of distribution to inherit such property. See the persuasive authority in the case of **Mohamed Juma v Fatuma Rehan Juma and 6 others (supra)** where the court stated that;

> **"It could be clearly evinced and gauged from the overwhelming evidence of the plaintiff that the 3rd,4th, 5th, 6th, and 7th defendants are grandchildren of the deceased, a relative of the 3rd class, they cannot inherit if there is among the survivor relative of first class-the 1st and 2nd defendant who are the daughters of the deceased"**

whether the applicants are beneficiaries of the estate of the deceased

54. A dependant under the Law of Succession Act is defined in section 29 as follows:

> **For the purposes of this Part, "dependant" means—**
>
> **(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
>
> **(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**
>
> **(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

55. The applicants submitted that the deceased was only survived by two daughters and the shares of the two daughters is 2/3 of the estate and they cannot inherit the whole estate thus the grandchildren of the deceased inherit the 1/3 share. They cited Surah Nissah Versus 11 of The Holy Quran which provides, **"Allah (thus) directs you as regard your children's inheritance; to make a portion equal to that of**

two female;but if there are only daughters , or more ,for them is two third of one's estate and if there is only one daughter ,for her is half of the estate. These shares are an obligation imposed by Allah. Indeed, Allah is ever knowing and wise."

56. It's not in dispute that the applicants' father predeceased the death of their grandfather. The bone of contention therefore is whether the grandchildren whose father predeceased the grandfather and who were sufficiently provided for by the deceased before his will and subsequent death, can be held to be beneficiaries of the estate.

57. The respondent submitted that under Islamic law, the deceased's spouse, children and parents are primary quranic sharers as survivors of first class and that grandchildren fall under the third class and cannot inherit if there exist survivors of first class. **In re Estate of Hellen Wangari Wathiai (Deceased) [2021] eKLR the court stated that;**

> **"looking at both parties' submissions, my appreciation of the matter at hand is that the Applicant herein brought this summons before court as a Beneficiary of the Estate of his late father who predeceased the deceased herein. A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent's share in the estate of the grandparents as was enunciated in the case of Re Estate of Wahome Njoki Wakagoto (2013) eKLR where it was held: -**
>
> > ***"Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."***

58. Accordingly, it's my finding that the applicants being grandchildren of the deceased and their father having predeceased the deceased qualifies them as beneficiaries.

whether the applicants were sufficiently provided for,

59. **Section 26 of the law of succession provides**;

> **Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.**

60. **Section 28 goes further to provide that;**

> **In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—**
>
> **(a) the nature and amount of the deceased's property;**
>
> **(b) any past, present or future capital or income from any source of the defendant;**
>
> **(c) the existing and future means and needs of the dependant;**
>
> **(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;**
>
> **(e) the conduct of the dependant in relation to the deceased;**
>
> **(f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;**
>
> **(g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant**.

61. The applicants quoted section 26 and submitted that the will ought to have made provision for them and that the court has the jurisdiction to make provisions for them in the alternative thereto in accordance to the Islamic law.

62. The respondent in her replying affidavit paragraph 8 stated her late father gave properties to the mother of the applicants including the applicants' house they currently reside in Tudor when he was alive as he knew that the applicants could not inherit him under Islamic law as their father died while he was still alive as evidenced in the transfer annexed in the applicants' affidavit marked as AAM-4 in their supporting affidavit therein. She listed the following properties as the properties transferred to the grand-children together with the house the applicants reside in Tudor; T**ITLE NO.MSA/BLOCK X/136** to the applicants' mother to be held in trust for them as grandchildren and **Title NO.MSA/BLOCK XIX/137 Yusuf Musa Mirdor as Grandson**

63. Indeed, in exercise of its discretionary powers to make reasonable provision, a court is duty bound to act judiciously and not

capriciously. However, the discretion under Section 26 is not to be exercised suo moto but on application by the affected party. In this case, the applicants herein have not brought any specific application before this honourable court under Section 26. However, since parties have extensively submitted on that aspect, I will endeavour to address the same so as to bring this issue to rest considering that this is an old matter. It is not in dispute that the deceased provided for the applicants by way of gifts to be held in trust by their mother thus making it clear that the deceased was conscious of the fact that the applicants' father predeceased him and that the applicants were his dependants thus the need to provide for them. It is therefore my finding that Section 26 does not apply in this case and that the deceased sufficiently provided for the applicants before his death. To make further provision will disfranchise the respondents while benefitting the applicants more than they deserve.

Whether the applicants are guilty of laches

64. As to whether the applicants are guilty of laches, the respondents argued that this an old file spanning over a period of 45 years since the estate was shared out hence the applicants cannot wake up now to reverse the clock. It is trite that succession matters do not have a limitation period. However, where an injustice is apparent on the face of it, a court faced with an application that is filed after an extremely prolonged period of time after the cause of action accrued, can grant orders of costs against a party accused of unreasonable delay in seeking his or her rights. See **In re Estate of Stephen Gichoi Githaiga(deceased) (2019) eKLR** where the court held that limitation of Actions Act does not apply in succession matters which are special proceedings in nature.

65. Similar position as above was held in the case of **In re estate of Josephine Magdalena (deceased) [2016] eKLR,** the court had this to say;

> **"My reading of this is that an application founded on section 76 of the Law of Succession Act can be made at any time. There is no limitation set by the provision for the making of the application. The provision is open-ended. Of course there is room for bringing in the test of reasonableness into the play. That, however, does not introduce time limitation; it merely requires the court to bring in to bear reasonableness in its exercise of discretion on whether or not to revoke a grant…"**

66. From the above cited case law, it is clear that there is no time limitation for applications brought under section 76 of the law of succession neither does the limitation of Actions Act limit matters under succession Act. For those reasons, that ground fails.

Whether the applicants committed fraud

67. The respondent submitted that the applicants fraudulently obtained a grant of letters of administration of the estate on 12th march 2012 in Mombasa succession 93 of 2011 stating that they were the only surviving beneficiaries of the estate of the deceased despite being well aware of the existing grant of probate issued to the surviving children of the deceased herein. The grant was revoked on the 16th October 2018 and all transactions by the applicants declared null and void ab initio. I do not find the subject of fraud relevant for discussion in this file as it was fully dealt with under the relevant file no 93 of 2011.

Whether the grant issued on 30th July,1977 should be revoked

68. The applicants submitted that the grant was obtained in a fraudulent manner as the executed will is nothing but a forgery and or invalid due to violation of the law and the Holy Quran and the applicants' concealment of material facts to the court as they did not disclose the existence of the applicants as beneficiaries.

69. The grounds for revocation of a grant are well set out under Section 76 of the Law of Succession. The Onus to prove those elements squarely lie in the hands of the Applicants. **The Court of Appeal in *Matheka and Another vs. Matheka* (2005) 2 KLR 455** laid down the following guiding principles on revocation of grant either on application by an interested party or by the court on its own motion. It was stated that even when the revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate"

70. Having found that the deceased left a valid will, the executrixes had the absolute right in priority to petition for a grant of probate without seeking permission from the applicants who are grandchildren of the deceased who rank lower in preference both under Section 66 of the Law of Succession Act and Chapter 11 of the Holy Quran. See **In the estate of Julius Mimano (DECEASED) [supra]** the court stated that;

> **"It was the applicant's case that the grant of probate made herein on the 12th May 2005 and confirmed on the 21st February 2006 to the executors ought to be annulled on the ground that the same was obtained fraudulently. In her testimony the executrix stated that the deceased had left a will and thus his estate was subject to testate succession. Having found that the deceased died testate, and that therefore the will on record was valid, l find that the executors were the proper persons to apply for probate. I cannot fault whatever they did. I shall therefore decline to revoke the grant"**

71. I have already found that the will herein was valid and it's also my finding that the executrix who is the respondent and her sister who is now deceased were the right persons to apply for the grant and that the deceased died testate. Therefore, the applicants' application for revocation of grant fails.

72. The upshot of the analysis is;

a) The will dated 20th September, 1975 is valid.

b) The applicants have locus standi

c) The applicants are beneficiaries of the estate of the deceased Abdulrehman Bin Miran.

d) The applicants were sufficiently provided for by the deceased by way of gifts.

e) The applicants have committed illegalities which amount to intermeddling and are accountable to the executrix.

f) The application for revocation of grant lacks merit and therefore is dismissed with costs.

Dated, signed and delivered in Mombasa on this 31st day of August 2021

J.N. ONYIEGO

JUDGE