



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 421 OF 2006

IN THE MATTER OF THE ESTATE OF ANGELO TITITA KILUNGU (DCD)

BETWEEN

1. ANNASTACIA MBULA KILUNGU.....1ST PETITIONER

2. ATERNAS KITATI KILUNGU.....2ND PETITIONER/RESPONDENT

=AND=

FRANCIS NYUMU KILUNGU.....1ST APPLICANT

VALERIE NICOLE MUKAMI.....2ND APPLICANT

FREDRICK NGILA MUENDO.....3RD APPLICANT

RULING

1. By a Petition filed on 6th September, 2006 allegedly made by **Anastacia Mbula Kilungu** and **Aternas Kitati Kilungu**, the two sought for grant of letters of administration in respect of the estate of **Angelo Titita Kilungu** (deceased). In the affidavit filed in support of the petition, it was disclosed that the deceased left ten beneficiaries surviving him though it was indicated that three of them were since deceased. The said beneficiaries were disclosed as Anastacia Mbula Kilungu (wife), Anthony Mwendu Kilungu (deceased son) Martin Nzioka Kilungu (son), Colleta Nzilani Kioko (daughter married), Killian Mwangangi Kilungu (deceased son), Francis Nyumu Kilungu (son), Victoria Nthenya Kilungu (son), Christine Ndunda Kilungu (deceased daughter), Michael Mutune Kilungu (son) and Aternas Kitati Kilungu (son).

2. The Grant of Letters of Administration Intestate was on 19th May, 2011 issued to the said Petitioners. On 16th October, 2012 Summons for Confirmation of Grant was filed signed by A. Mbula Kilungu though the supporting affidavit was sworn by Aternas Kitati Kilungu in which it was proposed that Land Parcel Katelembo Plot 20 be registered in the names of Angelo Ngui Kilungu, Kusyomuomo Land Parcel Plot No. 25 be registered in the names of Aternas Kitati Kilungu, Land Parcel Katelembo Plot No. 2107 be registered in the names of Justus Makeke Muumbi, Mua Settlement Scheme No. 250 be shared equally amongst Anastacia Mbula Kilungu, Michael Mutune Kilungu, Aternas Kitati Kilungu and Angelo Ngui Kilungu and Motor Vehicle Reg. No. KKA 143 be registered in the names of Anastacia Mbula Kilungu. A consent to the confirmation of the said grant was filed signed by Martin Nzioka Kilungu, Colleta Nzilani Kioko and Michael Mutune Kilungu and on 16th November, 2012 a Certificate of Confirmation of Grant was issued to that effect.

3. By Summons for Revocation or Annulment of Grant dated 27th February, 2019, Francis Nyumu Kilungu (hereinafter referred to as the Applicant) sought the following orders:

1) THAT, this application be certified as urgent and service of the same be dispensed with in the 1st instance.

2) THAT, an order do issue directing the Land Registrar to register a prohibition preventing Transfer, charging and any other dealings with the parcel of land known as *MACHAKOS / MUAHILLS/250* pending the hearing and determination of this Application.

3) THAT, the Certificate of Confirmation of Grant issued on 16th November 2012 and the Grant of Letters of Administration

intestate issued on 19th May 2011 to ANNASTACIA MBULA KILUNGU and ATERNAS KITATI KILUNGU be annulled and/or revoked.

4) THAT, all title deeds and transfers effected by use of the said Certificate of Confirmation of Grant issued on 16th November 2012 and the Grant of Letters of Administration intestate issued on 19th May 2011 be recalled and cancelled.

5) THAT the Court does appoint the Applicant herein as the administrator of the Estate of ANGELO TITITA KILUNGU

6) THAT, the costs of this Application be in cause.

4. In support of that application, the Applicant averred that though he is a biological son of the Deceased herein, he was not informed of these proceedings. He therefore neither signed the consent to the said grant and/or its confirmation nor did he renounce his rights prior to the issuance thereof despite being a person of prior or equal rights. He lamented that his interests have not been taken care of in the said grant since he was not given any single portion of the Estate despite having permanent house on land parcel number **MACHAKOS / MUAHILLS/250** thus rendering him a squatter on his father's land.

5. According to him, when the letters of Administration were taken out his other siblings were not notified of the same and neither was their consent sought and that the 2nd Petitioner, **Aternas Kitati Kilungu**, concealed that he was a son of the deceased and thus entitled to equally share the Estate.

6. He disclosed that he only realized that letters of Administration were taken out after, together with the other siblings, went to Settlement Office at Machakos to get a letter confirming that the land belonged to their late father to enable them start the process of succession. Upon perusing the file of land parcel number **MACHAKOS / MUAHILLS/250**, the settlement officer informed them there was grant already in the Estate and gave them the papers pertaining to this cause. He stated that had he been served with the Summons for Confirmation of Grant, he would have protested.

7. There was a similar summons filed by Valerie Nicole Mukami and Fredrick Ngila Muendo, the 2nd Applicant and 3rd Applicant respectively.

8. According to the 2nd Applicant, she is a granddaughter of the Deceased herein by virtue of being the biological daughter of Killian Mwangangi Kilungu who is a son of the deceased herein. According to her, the grant was obtained fraudulently through concealment of material facts that Killian Mwangangi Kilungu was entitled to a share of the Estate and that he had left behind a family which was entitled to take up his share as she was not informed of the proceedings herein notwithstanding the fact that she did not sign the consent to making and/or confirmation of the grant herein and neither any representative of her father's house. Further, even during confirmation, nobody from her father's house was called to court or informed of the same. Had she been informed, she would have protested as they have not been given anything from the Estate despite being entitled and her interests and those of her father have not been taken care of in the said grant as they have not been given any single share thereof.

9. That application was also supported by an affidavit sworn by the 3rd Applicant who deposed that he is a grandson of the Deceased herein by virtue of being the biological son of **Antony Muendo** who is a son of the deceased herein. He also expressed similar sentiments as the 2nd Applicant.

10. Similar affidavits were sworn by Pauline Mbulwa Mwangangi in her capacity as a granddaughter of the deceased being the biological daughter of Killian Mwangangi Kilungu, Pascal Muema Kilungu a grandson of the deceased being a biological son of Victoria Nthenya Kilungu, Lawrence Mutitu Muendo a grandson of the deceased being a biological son of Anthony Muendo and Patrick Kilungu Muendo a grandson of the deceased being a biological son of Anthony Muendo.

11. The Summons were supported by an affidavit sworn by the 1st Petitioner who deposed that she did not authorize the 2nd Petitioner/Respondent to swear the Affidavit on her behalf. According to her, the Respondent has in custody her title deeds which he has declined to return to her and she has since reported to police for his arrest.

12. It was her averment that when the grant and distribution was obtained, the Respondent lied to her that he wanted to get for her title deeds for her husband's properties so that she could distribute the same to her children only to be surprised that the land was distributed leaving out her other children namely:

i. Antony Muendo (deceased)—survived by 3 Children (Ngila Muendo, Kilungu Muendo and Titita Muendo)

ii. Martin Nzioka (deceased)---survived by wife Esther Ngina Nzioka and Children

iii. Colleta Nzilani Kioko--- daughter

iv. Killian Mwangangi Kilungu ----survived by daughters, Nicole Mukami Mwangangi and Pauline Mbulwa Mwangangi

v. Francis Nyumu Kilungu

vi. Victoria Nthenya Kilungu (dcd) survived by Pascal Muema, Salome Mueni and Angelo Ngui.

13. According to her, her marriage to the deceased was blessed with the following children:

- i. Antony Muendo (deceased)—survived by 3 Children (Ngila Muendo, Kilungu Muendo and Titita Muendo)
- ii. Martin Nzioka (deceased)---survived by wife Esther Ngina Nzioka and Children
- iii. Colleta Nzilani Kioko--- daughter
- iv. Killian Mwangangi Kilungu ----survived by daughters, Nicole Mukami Mwangangi and Pauline Mbulwa Mwangangi
- v. Francis Nyumu Kilungu
- vi. Victoria Nthenya Kilungu (dcd) survived by Pascal Muema, Salome Mueni and Angelo Ngui
- vii. Michael Mutune
- viii. Christine Ndinda (dcd)
- ix. Aternas Kitati kulungu

14. She confirmed that the Objector/Applicant was not aware of these proceedings as she thought that the process was to obtain title deed of the parcels of land in her name only then later distribute to all her children equally. However, the Respondents took advantage of her illiteracy to defraud the other children.

15. It was her position that as a widow, she also entitled to a share of the Estate thus not true that she agreed for her name to be deleted from the Estate as suggested by the Responded.

16. She therefore expressed her wish that the Certificate of Confirmation of grant be revoked and she be directed to file fresh summons to confirmation of grant within a specified period of time and that any party not agreeable to her mode of distribution do protest for determination by the Court.

17. In reply to the Summons, the Respondent denied the allegation that the Grant issued to them was obtained fraudulently or through concealment of material facts. According to him, the 1st Applicant is simply insincere because they duly informed and involved him in all these proceedings but he deliberately declined and refused to append his signature on the Consent To Confirmation of Grant dated 16/10/12 due to arrogance, ignorance and violence. According to the Respondent, in 2006 the Objector stoned his mother's house and broke a door thus prompting her to report the incident at Machakos Police Station and he was arrested and on 19/06/06 he wrote a Letter to his mother tendering his apology while in the said Police Station. In the same year, the 1st Applicant herein assaulted his brother by the name MARTIN NZIOKA KILUNGU thus causing him to lose one tooth.

18. The Respondent therefore averred that due to the Objector's violent acts, the mother gave him one of her Parcels of Land in LUKENYA being P/NO. MAVOKO TOWN BLOCK 3/3533 measuring 20 acres so that he could migrate. He averred that the Proceedings of 16/11/12 clearly confirms that, through his Advocates on record, his mother had given the 1st Applicant the said Parcel of land. He disclosed that on diverse dates in 2007 and 2008 their MUMIA FAMILY COMMITTEE met and it was resolved that the 1st Applicant should migrate and settle in the aforementioned Parcel of land and the mother also prepared a speech concurring with the abovementioned position. However, the 1st Applicant ignored the family Committee's position together with the mother's advise and constructed a permanent house on Land Parcel NO. MACHAKOS/MUA HILLS/250.

19. According to the Respondent, the reason why the Objector's name is not captured in the Certificate of Confirmation of Grant issued on 16/11/12 is because owing to his arrogance and ignorance, the other beneficiaries agreed that his share should be registered in the mother's name until the time he will show interest in the same. However, they are ready and willing to have the said Certificate of Confirmation of Grant rectified by deleting the mother's name and substituting the same with the 1st Applicant's name because the mother has no interest in Land Parcel No. MACHAKOS/MUA HILLS/250.

20. According to the Respondent, Deceased herein who passed away on 22/01/1984, left the following surviving him:-

- A) ANNASTACI MBULA KILUNGU – WIFE
- B) ANTONY MUENDO KILUNGU –SON (DECEASED)
 - i. Fredrick Ngila Muendo -son
 - ii. Patrick Kilungu Muendo -son surviving the late Antony
 - iii. Lawrence Titita Muendo -Son Muendo Kilungu
- C) MARTIN NZIOKA KILUNGU- SON (DECEASED)

i. Esther Ngina Nzioka-wife surviving the late Martin

ii. Children Nzioka Kilungu.

D) COLLETA NZILANI KIOKO – DAUGHTER

E) KILLIAN MWANGANGI KILUNGU – SON (DECEASED)

i. Valarie Nicole Mukami Mwangangi-Daughter Surviving the late

ii. Pauline Mbulwa Mwangangi - Daughter Killian Mwangangi Kilungu

F) FRANCIS NYUMU KILUNGU –SON

G) VICTORIA NTHENYA KILUNGU DAUGHTER (DECEASED)

i. Pascal Muema Kilungu - Son

ii. Salome Mueni - Daughter Surviving the late Victoria

iii. Angelo Ngui Kilungu - Son Nthenya Kilungu

H) MICHAEL MUTUNE KILUNGU –SON

I) CHRISTINE NDINDA KILUNGU – DAUGHTER(DECEASED)

J) ATERNAS KITATI KILUNGU - SON

21. It was his case that in 1950's the Deceased herein bought Six (6) Shares in Lukenya Ranching & Farming Co-operative Society each of which had a Plot and that the Deceased registered the said Shares and/or Plots as hereunder:-

i) ANGELO TITITA KILUNGU (Deceased) - 1 Share and Plot.

ii) ANNASTACIA MBULA KILUNGU - 1 Share and Plot.

iii) ANTONY MUENDO KILUNGU - 1 Share and Plot

iv) MARTIN NZIOKA KILUNGU - 1 Share and Plot

v) COLLETA NZILANI KIOKO - 1 Share and Plot

vi) KILLIAN MWANGANGI KILUNGU - 1 Share and Plot

22. He averred that the Shares belonging to COLLETA NZILANI KIOKO and KILLIAN MWANGANGI KILUNGU disappeared and the records have never been traced. The other children of the Deceased were however not captured solely because they were not born yet. According to him, ANNASTACIA MBULA KILUNGU got Membership NO. 211, MARTIN NZIOKA KILUNGU got Membership NO. 258 and ANTONY MUENDO KILUNGU got Membership NO. 259 and since the 1st Administrator herein ANNASTACIA MBULA KILUNGU is their mother and the next of kin, they agreed as a family that all the Title Deeds should be registered in her name and that COLLETA NZILANI KIOKO should get their late father's Membership Share which bore Land Parcel No. MAVOKO TOWN BLOCK 3/3536. As well as another piece of land in JOSKA being Land Parcel NO. MAVOKO TOWN BLOCK 3/35.

23. It was his deposition that the above mentioned children of their Deceased father are settled in their respective parcels of land and that when their late brother ANTONY MUENDO KILUNGU passed on, his body was interred in Land Parcel NO. MAVOKO TOWN BLOCK 3/3539.

24. It was therefore his averment that the foregoing explains why his siblings appended their respective signatures on the Consent To Confirmation of Grant dated 16/10/12 save for FRANCIS NYUMU KILUNGU owing to arrogance and violence.

25. According to the Respondent, one of her late sisters by the name VICTORIA NTHENYA KILUNGU is survived by Pascal Muema Kilungu, Salome Mueni and Angelo Ngui Kilungu and Pascal Muema Kilungu was given a piece of land in JOSKA being Land Parcel NO. MAVOKO TOWN BLOCK 3/38 and even sold part of it. This explains why ANGELO NGUI KILUNGU was given PLOT NO. 20 KATELEMBO as shown in The Certificate of Confirmation of Grant dated 14/12/12.

26. It was therefore his position that the 1st Administrator herein should transfer Land Parcel No. Mavoko Town Block 3/3533 to **Francis Nyumu Kilungu** or in the alternative the said **Francis Nyumu Kilungu** should get an equal share of Land Parcel No. Machakos/ Mua Hills/250. Similarly, the 1st Administrator herein should transfer Land Parcel No. Mavoko Town Block 3/3535 to the Estate of **Martin**

Nzioka Kilungu being represented by his wife **Esther Ngina Nzioka** and children. She should also transfer Land Parcel No. Mavoko Town Block 3/3539 to the Estate of **Antony Muendo Kilungu** being represented by **Fredrick Ngila Muendo, Patrick Kilungu Muendo and Lawrence Titita Muendo**.

27. He deposed that the Estate of his late brother **Killian Mwangangi Kilungu** being represented by **Valarie Nicole, Mukami Mwangangi and Pauline Mbulwa Mwangangi** have their Share of their father's Estate and there is a pending Cause in the High Court at Nairobi vide Succession Cause NO. 1647 OF 2001: Estate of **Killian Mwangangi Kilungu** in that record.

28. The Respondent therefore averred that the Objections dated 27/02/19, 01/07/19 and the Supporting Affidavits thereto are based on misleading information geared towards concealing and suppressing material facts to this Court hence should be dismissed with Costs.

29. On behalf of the Applicants, it was submitted that the petitioner herein did proceed to file a petition for letters of administration ad litem over the estate of **Angelo Titita Kilungu** herein. Whilst it is within the purview of the law to petition for letters of administration, it is trite that all material facts ought to be outlined in the petition for the Honourable court to make a correct and proper finding based on the facts presented before it. A certificate of confirmation of grant dated the 16th day of November 2012 was issued to the Petitioners/Respondents herein in which the 2nd and 3rd Objectors herein among other beneficiaries of the deceased were not included in the list.

30. It was submitted that though 5 of the deceased's children are deceased, neither of them were cited in the grant. In this case, the Petitioners/Respondents left out the names of the 2nd Objector herein and her sister **Pauline Mbulwa**, the 3rd Objector herein together with his siblings, **Patrick Kilungu Muendo** and **Lawrence Titita Muendo** from the list of beneficiaries yet they are children of the deceased's sons **Killian Mwangangi Kilungu** (deceased) and **Antony Muendo** (deceased) respectively, hence entitled to take up their share. In addition, the 2nd Administrator/Respondent admits that, the 1st Objector/Applicant herein declined to append his signature on the Consent to Confirmation of Grant dated 16/10/12 due to arrogance, ignorance and violence, which is a merely a falsehood solely aimed at further justifying his non- disclosure of material facts to this Court.

31. While in his Replying Affidavit, the 2nd Administrator deposes that it was agreed by all the family members that all the Title deeds were to be registered in the name of the 1st Administrator herein, from the Schedule of Distribution of Assets, the same is different and this clearly creates a controversy as to how the Estate of the Late **Angelo Titita Kilungu** was shared out among the beneficiaries. It is also the 2nd Administrator/Respondents position that, at the chief's office all beneficiaries agreed to equally share the Estate, but what is undisputable your Honour is that the Administrators/Respondents concealed that and instead had all the properties transferred to them absolutely with the exclusion of the other beneficiaries yet the 2nd Administrator/Respondent admits that indeed his late brother **Killian Mwangangi Kilungu** left behind beneficiaries being the 2nd Objector and 3rd Objectors herein. From the schedule of distribution of assets, there is no indication that any share of the estate was distributed to the deceased **Killian's** estate and/or beneficiaries.

32. The Court was therefore urged to revoke the said Certificate of Confirmed grant so that the family can agree on a fresh mode of distribution of the Estate of the late **Angelo Titita Kilungu**.

33. It was noted that the 1st Objector/Applicant herein who is a biological son of the deceased, was not given any single portion of the Estate despite having put up a permanent house on land parcel number **Machakos/Mua Hills/250** and unless the orders are issued, he will become a squatter on his father's land. While the Respondent admits that the 1st Administrator was to transfer Land Parcel No. **Mavoko Town Block 3/3533** or in the alternative, an equal share of **Land Parcel No. Machakos/Mua Hills /250** to **Francis Nyumu Kilungu**, the 1st Objector/ Applicant from the schedule of distribution of assets annexed to the application for Confirmation of grant, the 1st Objector/ Applicant was not accorded any share from the Estate of his late father **Angelo Titita Kilungu**. Though he is also a person of prior or equal rights, he neither consented nor renounced his rights prior to the issuance of the letters of administration. His interests have not been catered for in the grant as the same was obtained without his knowledge and he was never served with the Summons for the Confirmation as he would have protested.

34. From the foregoing it was submitted that the grant was obtained through fraud and concealment of material facts and the same needs to be revoked and reliance was placed on the case of **Jamleck Maina Njoroge vs. Mary Wanjiru Mwangi [2015] eKLR**.

35. It was submitted that even where third parties have bought land based on the Grant, the court still has jurisdiction to cancel it that notwithstanding based on the case of **Monica Adhiambo vs. Maurice Odera Koko [2016] eKLR**.

36. The Applicants also relied on the case of **Ibrahim vs. Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR** where the court revoked the certificate of confirmed grant for failure to disclose all the beneficiaries to the Estate of the deceased, including his grandchildren, where their parents were deceased. Though the Respondent admits that indeed his late brother **Killian Mwangangi Kilungu** left behind beneficiaries being the 2nd Objector and 3rd Objectors herein, from the schedule of distribution of assets, there is no indication that any share of the estate was distributed to the 2nd and 3rd Objectors herein despite them being the granddaughters to the late **Angelo Titita Kilungu** through his deceased son **Killian Mwangangi Kilungu**.

37. It was therefore submitted that the grant be revoked and all titles deeds and transfers effected by the use of the said confirmed grant be recalled and cancelled based on the case of **Munyasya Mulili & 3 others vs. Sammy Muteti Mulili [2017] eKLR** and the case of **Monica Adhiambo vs. Maurice Odera Koko [2016] eKLR**.

38. According to the Applicants, Section 76 of the **Law of Succession Act** provides for the instances when a grant can be revoked and/or annulled by the court. The objectors herein have demonstrated how the petitioner concealed material information prior to the confirmation of the grant and being granted the certificate of confirmation of grant dated the 16th day of November 2012. In their view, the above material information is so essential and imperative for this Honourable court to annul and/or revoke the grant of letters of administration made on the

19th day of May 2011 to **Annastacia Mbula Kilungu** and **Aternas Kitati Kilungu** and confirmed on the 16th day of November 2012 and they prayed that this Honourable court do proceed to annul and/or revoke the same by allowing the 2 applications as prayed.

39. On behalf of the Respondent, it was submitted based on the facts deposed to in the replying affidavit that the said Grants were neither obtained fraudulently nor were the proceedings to obtain the Grant defective in substance and that the Applications dated 27/02/19 and 01/07/19 and all the Supporting Affidavits thereto are anchored on deceit, half-truths and mendacious averments.

40. According to him, it is not in contention that the Deceased herein **Angelo Titita Kilungu** passed away on 22/01/84 and that had only One (1) Wife and Nine (9) Children. In the same vein, there is no contention to the fact that the 1st Objector herein by the name the late **Francis Nyumu Kilungu** was a child (son) to the aforementioned Deceased Person herein.

41. According to the Respondent, the 2nd and 3rd Objectors herein by the name **Valarie Nicole Mukami** and **Fredrick Ngila Muendo** respectively are grandchildren of the Deceased herein hence their respective shares lie with their respective parents who are children of the Deceased herein. It follows therefore, the 2nd & 3rd Objectors herein don't rank in priority as encapsulated under Sections 26 & 29 of **The Law of Succession Act** as read with Rule 26 of the **Probate and Administration Rules**.

42. It was therefore the Respondent's view that the Applicants have not brought forth sufficient cause to precipitate and/or necessitate Revocation of the Grant herein hence their Applications dated 27/02/19 and 01/07/19 are destitute of merit. In his view, it is the Objectors who have concealed and/or suppressed material facts from this Honourable Court. In support of his submissions, the Respondent relied on **In the Matter of The Estate P.W.M(Deceased) [2013] eKLR, In Re Estate of Ikubu Kinyingu Mwaga(Deceased)[2017] eKLR and In Re Estate of Okumu Wambundo Waysabina (Deceased) [2019] eKLR.**

43. As regards the orders which the Court ought to give, it was submitted that in the interests of justice this Court ought to direct any of the Administrators herein to file an Application for Rectification of Grant herein and to issue:-

i) An Order directing the 1st Administrator herein to transfer Land Parcel No. Mavoko Town Block 3/3533 to the wife/widow of the 1st Objector herein (**Francis Nyumu Kilungu**) by the name **Agnes Nzisa Mumo**.

ii) An Order directing the 1st Administrator herein to transfer Land Parcel No. Mavoko Town Block 3/3535 to the Estate of **Martin Nzioka Kilungu** being represented by his wife **Esther Ngina Nzioka** and children.

iii) An Order directing the 1st Administrator to transfer Land Parcel No. Mavoko Town Block 3/3539 to the Estate of **Antony Muendo Kilungu** being represented by **Fredrick Ngila Muendo, Patrick Kilungu Muendo & Lawrence Titita Muendo**.

44. As for costs the Respondent relied on Rule 69 of the **Probate and Administration Rules** and submitted that since costs follow the event, the Applications dated 27/02/19 and 01/07/19 be dismissed with Costs.

Determination

45. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

46. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

47. In this case it is not in doubt that the 1st Applicant was one of the sons of the deceased herein. He says that he was never informed when the Petition for Grant was made and was not aware of the same. The Respondent however states that they duly informed and involved the 1st Applicant in all these proceedings but he deliberately declined and refused to append his signature on the Consent to Confirmation of Grant dated 16/10/12 due to arrogance, ignorance and violence. The Respondent is silent on the issue whether the 1st Applicant was aware of the intention to apply for grant. The Respondent's contention is however disputed by the 1st Administrator, his mother with whom he jointly petitioned for grant. In fact, according to the 1st Administrator, the 1st Applicant's contentions are correct since the Respondent misled the 1st Administrator into believing that the Respondent intended to have the titles transferred into the 1st Administrator's name in order to enable her distribute the estate.

48. Assuming that the Respondent's position as regards the conduct of the 1st Applicant is true, section 51 of the **Law of Succession Act** provides as follows:

(1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

49. In this case, it is clear that the Respondent herein did not rank in priority to the 1st Applicant since they are both brothers, the sons of the deceased. Part VI Rule 26(1) of the *Probate and Administration Rules* provides that:

Letters of administration shall not be granted to any applicant without notice of every other person entitled in the same degree as or in priority to the applicant.

50. Therefore, what the law requires is that a notification be given to every person entitled in the same degree as or in priority to the applicant. Rule 22(1) of the *Probate and Administration Rules* (hereinafter referred to as “the Rules”) however provides that:

A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.

51. A citation, it was held in the Estate of Sheikh Fazal Ilahi [1957] EA 697 in which the Court relied on *Henderson on Testamentary Succession (4th Edn)*, is an instrument issued by the court, citing persons to come in and show cause why a grant should not issue to a particular person. It was therefore held in Maamun Bin Rashid Bin Salim El-Ruhmy vs. Haider Mohamed Bin Rashid El-Basamy [1963] EA 438 that:

“Where a person claiming to be an heir (or the heir of an heir) of a deceased person applies for a grant of administration, citations should not be issued to other heirs whose existence is disclosed in the petition having an equal right as a matter of course but only when for some special reason the court sees fit to make such an order. The object of a non-contentious citation is to call upon a person who has a superior right to a grant to take the grant. Thus any person who is interested in having an estate administered may apply for a grant of representation, but if there are persons who have a superior right to obtain the grant, he must cite such persons calling upon them to apply for the grant. If the person cited fails to apply for a grant or renounce their right to it, the grant may, subject to the usual conditions, be given to the *citor*. It follows that, save in cases where the court thinks it necessary to do so; non-contentious citations should not be issued unless the petition discloses that the person seeking the grant has a lesser right than some other person who has failed to take the necessary steps to obtain it... If on the other hand the person cited concedes that the person who has applied has a right to the grant but contends that he has a superior right, then, the proper course for him to adopt (after he has been served with citation) is to enter appearance to the citation and himself apply for a grant to be made to him if he so wishes. If the person cited enters appearance but takes no further step, the *citor* may apply on summons for an order that the person cited to take the grant within a stated time and in the event of the latter neglecting to do so, the grant will be ordered to be made to the *citor*...The only issue before the court in a cause brought as a result of a caveat being entered is whether or not the person who has applied for the grant is entitled to it and there is no issue as to whether he or some other person has a better right to the grant.”
[Emphasis supplied].

52. It was therefore held by **Kneller, J** (as he then was) in Kiboko vs. Assistant Land Registrar and Others [1973] EA 290 that:

“Citations need not be ordered to issue to all persons shown as heirs in the petition of the deceased for a grant of letters of administration of the estate. They need not be ordered as a matter of course to issue for heirs shown in the petition to have an equal right. They should go forth to anyone shown to have a superior right to take up the grant or for any other special reason.”

53. It is therefore clear that unless the Court thinks otherwise, the Citor must be a person who is himself entitled to a grant, in the event that

a person with a superior right fails to take up the grant or for any other special reason. Where two or more persons have equal rights to grant of representation, there is no necessity for a citation to be made unless when for some special reason the court sees fit to make such an order. In those circumstances, one of them is at liberty to apply for grant and the Court may in its discretion join the other persons if it deems fit. This is my understanding of section 66 of the **Law of Succession Act**, Cap 160, Laws of Kenya which provides that:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

54. Under Part V of the Act, the children of a deceased person rank equally. In this case the Applicant and the Respondent are brothers. Accordingly, there is no superior right to a grant as between the two. Accordingly, there was no need to issue a Citation.

55. Apart from bare averments, there is however no evidence that the Applicant was notified as required in Part VI Rule 26(1) of the **Probate and Administration Rules** despite the fact that the 1st Applicant and the Respondent were entitled in the same degree being children of the deceased. The Respondent however contends that the 1st Applicant was difficult, arrogant and violent and threatened the 1st Administrator. To my mind the Respondent could have notified the 1st Applicant of the intention to take out letters of administration in any other manner or he could have sought an order from the court dispensing with such notice.

56. Apart from that the 2nd and 3rd Applicants being grand children of the deceased herein whose parents were deceased, their parents were entitled to a share in the estate of the deceased and could not be excluded therefrom. I therefore agree with the decision in the case of **Ibrahim vs. Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR** all the beneficiaries to the Estate of the deceased, including his grandchildren, where their parents were deceased, ought to have been disclosed.

57. I agree with the holding in the case of **Monica Adhiambo vs. Maurice Odero Koko [2016] eKLR** in which the court stated as follows:

“In the instant case it is undisputed that the petitioner only transferred the suit property to the interested party after the grant of letters of administration were confirmed which is legally in order. However, a closer look at the process she took in applying for the said grant of letters of administration reveal that the said grant was obtained through fraudulent non-disclosure of material facts. The petitioner in form P & A 5 stated that she was the only beneficiary/survivor of the deceased estate while in reality the deceased had 3 children in total. It turns out that the deceased actually had 2 other children who were Margaret Ouko and Maurice Odero Koko. None of these two beneficiaries had given the petitioner consent in terms of Rule 7(7) (a) (b) and (c) of the Probate and Administration Rules...The petitioner in the instant case cause did not rank higher than the objector in priority in seeking a grant of administration intestate and was required before making of the grant to furnish this court with information and satisfy the court that the objectors having prior preferences to a grant being all children of the deceased, had renounced their right generally to apply for the grant or had consented with making of the grant to the petitioner or that they had been issued with a citation calling upon them either to renounce such right or to apply for a grant. The petitioner therefore acted in contrary to the mandatory provisions of Rule 7(7) of the Probate and Administration Rules and it's no wonder my sister Sitati J had to revoke the petitioner's grant for non-disclosure of material facts...With that said, the fact that the petitioners title over the original suit land was revoked will automatically affect the interested parties ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the Law of Succession Act. The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property.”

58. In the premises, I am satisfied that the grant herein was obtained and confirmed by the making of a false statement or by the concealment from the court of something material to the case and that further the same was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

59. Accordingly, the Grant of Letters of Administration issued to **Annastacia Mbula Kilungu** and **Aternas Kitati Kilungu** herein on 19th May, 2011 and confirmed vide the Certificate of Confirmation of Grant issued on 16th November, 2012 is hereby annulled and/or revoked. I further direct that all title deeds and transfers effected by use of the said instruments be recalled and cancelled.

60. Since **Annastacia Mbula Kilungu** is the only widow of the deceased, I hereby appoint her as the administrator of the estate of the deceased herein, **Angelo Titita Kilungu**.

61. I further direct that this dispute be referred to mediation for the purposes of proper distribution of the estate of the deceased.

62. As this dispute pits members of the same family, there will be no order as to costs.

63. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 18th day of June, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Musya for the Objectors/Applicants

Mr Mukula for 2nd Petitioner/Administrator/Respondent

CA Geoffrey