



**In re Estate of SNS (Deceased) (Succession Cause 1769 of 1999)  
[2020] KEHC 2890 (KLR) (Family) (28 September 2020) (Judgment)**

*In re Estate of SNS (Deceased) [2020] eKLR*

Neutral citation: [2020] KEHC 2890 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 1769 OF 1999  
LA ACHODE, J  
SEPTEMBER 28, 2020  
IN THE MATTER OF THE ESTATE OF SNS (DECEASED)**

**BETWEEN**

**SSNS ..... 1<sup>ST</sup> APPLICANT  
MS ..... 2<sup>ND</sup> APPLICANT  
RS ..... 3<sup>RD</sup> APPLICANT**

**AND**

**SKHS ..... RESPONDENT**

**JUDGMENT**

1. SNS, the deceased whose estate is in issue herein died domiciled in Kenya on 23<sup>rd</sup> June, 1999. A copy of a Certificate of Death of serial no. [particulars withheld] is on record. The deceased left a written will dated 5<sup>th</sup> April, 2019. On 27<sup>th</sup> October, 1999 a Grant of Probate of Written Will was granted to SKHS who is the deceased’s son and the sole Executor appointed under the will.
2. On 19<sup>th</sup> February, 2019 SKHS filed an application for confirmation of grant via summons dated 15<sup>th</sup> February, 2019 seeking that the grant of probate be confirmed and the estate of the deceased be distributed in the terms specified in the deceased’s last will. The application is supported by an affidavit sworn by himself on 15<sup>th</sup> February, 2019 in which he states that there is no pending application for provision of dependants and no estate duty is payable in respect of the estate.
3. S deposed that he is the sole beneficiary of the deceased’s estate. He asserted that while the will states that adequate maintenance be provided to the deceased’s second wife Y, the proviso was subject to her



- remaining single. That since Y has since remarried, the proviso has been rendered nugatory and is no longer applicable. Further that the deceased had under clause 5 of his will stated that he had provided for his daughters AS and BS during his lifetime by buying them a piece of property and under clause 4 that his daughter RMS had inherited property from her mother, KBS.
4. On 27<sup>th</sup> February, 2019 the Applicants filed an application under Certificate of Urgency via Chamber Summons dated 25<sup>th</sup> February, 2019 seeking preservation orders and the revocation of the grant. The application is supported by an affidavit sworn by the 1<sup>st</sup> Applicant on 20<sup>th</sup> February, 2019 on her own behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants. The Applicants and the Executor/Respondent are all children of the deceased herein.
  5. In the affidavit, the 1<sup>st</sup> Applicant deposes that she and her co-applicants only became aware of these proceedings through a Third Party in 2004. That while the Respondent stated their names as dependants while petitioning for the Grant of Probate, he never brought the petition to their attention.
  6. It is their case that since obtaining the Grant of Probate in 1999, the Respondent has negligently and in disregard of the provisions of section 83 of the *Law of Succession Act* failed to administer the deceased's estate in accordance with the will. They accuse the Respondent of concealment of material facts, failure to provide a proper account of what he has collected and preserved and how he intends to distribute the deceased's estate. Additionally, that the Respondent has concealed material facts to wit that he collects rental income from the rental units on the property known as L.R. No. xxx/3369 [particulars withheld] Road and that the deceased had monies in several Bank accounts.
  7. The 1<sup>st</sup> Applicant asserted that the Respondent had been sued in HCCC No. 1778 of 2001 and CMCC No. 10436 of 2003 in his capacity as Executor for failing to administer the deceased's estate towards paying out its liabilities. That the preservation orders sought would therefore ensure that the deceased's estate is protected pending the hearing and determination of the application for revocation of Grant and the confirmation of Grant.
  8. Further that since the Applicants are dependants of the deceased, the court ought to ensure that their rights are protected in line with section 26 and section 29 of the *Law of Succession Act*.
  9. In response to the application, the Executor/Respondent filed a replying affidavit sworn by himself on 14<sup>th</sup> March, 2019 in which he asked the court to dismiss the application for being incompetent and defective. He stated that while the 1<sup>st</sup> Applicant SS claimed to represent the 2<sup>nd</sup> and 3<sup>rd</sup> Applicant, there was no proof that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicant had authorized her to act on their behalf.
  10. The Respondent asserted that the grievance herein is whether the Applicants were adequately provided for in the deceased's will but stated that the Applicants had not brought any proof to qualify their demands. He instead accused them of being under a misguided belief that they are entitled to share in the income of the estate.
  11. On 26<sup>th</sup> April, 2019 the 1<sup>st</sup> Applicant filed a further affidavit sworn by herself on 12<sup>th</sup> April, 2019 in which she reiterated the contents of her affidavit sworn in support of the application of revocation of grant and asked the court to allow the application to safeguard the greater interests of justice to both the beneficiaries and the estate.
  12. It was the 1<sup>st</sup> Applicant's statement that the deceased had under clause 3 of his will made a provision for her and her co-applicants which provision they are rightfully entitled to. Further that as children of the deceased, their stake in the deceased's estate is protected by the law. She urged that she and her co-applicants had annexed all relevant documentation and subsequent medical reports to support their claims for a reasonable provision out of the deceased's estate.



13. The 1<sup>st</sup> Applicant asked the court to interrogate the contents of the deceased's last will to determine whether or not the Respondent was the sole beneficiary under the will; direct the Deputy Registrar to schedule a site visit to the Wangapala property to ascertain the status of the rental units and the rental income emanating therefrom and the Respondent to provide true and accurate statements of accounts of his dealings with the estate.
14. Additionally, on the said 26<sup>th</sup> April, 2019 MS and RS, the 2<sup>nd</sup> and 3<sup>rd</sup> Applicant respectively, filed an Affidavit of Protest dated 12<sup>th</sup> April, 2019 jointly sworn by themselves against the confirmation of grant. In it they reiterate the averments made by the 1<sup>st</sup> Applicant regarding the Executor's dealings with the deceased's estate.
15. It was their statement that the deceased made a provision for them under clause 3 of his will but which the Executor had failed to abide by thereby denying them their entitlement under the will. This they said was despite the Executor earning colossal sums from the estate. That instead, the Executor was purporting to rewrite the deceased's will by imposing conditions which the Applicants had to fulfil before they could benefit under the will.
16. The Protestors further accused the Executor of underestimating the deceased's estate to the detriment of the other beneficiaries. They averred that he had failed to provide a breakdown of the value of the deceased's assets and a statement of accounts of his dealings with the estate. They urged that unless the court intervenes and makes such orders as necessary to protect, uphold and safeguard the estate and the rights and entitlements of the beneficiaries, the estate will go to waste.
17. On 26<sup>th</sup> June, 2019 the Executor/Respondent filed an affidavit sworn by himself on 25<sup>th</sup> June, 2019 in response to the Affidavit of Protest. He denied the allegations levelled against him in the protest instead stating that the Protestors were informed about the confirmation of the grant when they were served with the summons to attend the hearing for the confirmation of grant. That as such, the Protestors suffered no prejudice.
18. According to the Executor/Respondent, protests for confirmation of grant are usually about irregularities in the mode of distribution of the assets of the estate. That in the instant case however, the mode of distribution is specified under the will and as Executor, he is merely following the wishes of the deceased in distributing the estate. He urged that contrary to the assertions made, clause 3 of the Will does not create a legal obligation on the estate to render financial assistance to R and M. That the deceased directed him and not the estate to help his sisters. He however expressed his willingness to render assistance stating that the only drawback was that the Protestors were not truthful in their claims particularly that they suffer from fibromyalgia and chronic pain disorder.
19. Sayed reiterated that he is the sole beneficiary under the deceased's will which will has not been challenged or varied. He asserted that while the Protestors are requesting the court to order a monthly maintenance or reasonable provision for them out of the estate, they have not come under section 26 of the *Law of Succession Act*. That without the proper application, the court cannot make any orders under section 26 as sought. Further that the matter is res judicata having been determined in a ruling delivered by Justice Kalpana Rawal on 3<sup>rd</sup> October, 2006.
20. S contended that while the Protestors had alluded to being involved in two separate accidents, they had failed to provide a collision or accident report. That instead, they had presented letters drawn by different doctors on different occasions and whose authenticity was questionable. He urged that it was suspect that the only diagnosis of the Protestors on record was done 18 years ago yet they claimed to suffer from a painful disease for which one would expect that they have continuous appointments with



rheumatologists and other specialists over the years. Further that there is photographic evidence of the Protestors hiking Mount Kenya in 1998 which contradicts their claims.

21. S asserted that M is a pharmacist while R is an accountant and that both professions are not strenuous. That in any event, they had not presented their bank statements to demonstrate their financial situation.
22. S denied wasting and mismanaging the estate and stated that he had rendered all accounts to the court as required by law. He asserted that all the affairs of the estate are settled and the will of the deceased under which he is the sole beneficiary remains unchallenged. He asked the court to confirm the grant as sought in his application.
23. On 5<sup>th</sup> March, 2019 the court directed that the matter proceed by way of viva voce evidence and that the parties file their witness statements and bundle of documents. The hearing commenced on 2<sup>nd</sup> December with the case of the Applicants being heard first.
24. RS, the 3<sup>rd</sup> Applicant gave sworn testimony as PW1 in which she asked the court to adopt her written statement as evidence. She stated that the deceased was her father whereas the Executor SK is her brother. She asked the court to revoke the grant issued to SK stating that he had mismanaged the estate and failed to provide a statement of accounts. Further that while the Executor listed the property known as L.R. No. xxx/3369 [particulars withheld] Road as constituting the estate, he failed to indicate that the property generates rental income.
25. It was R's statement that while S considers himself the sole beneficiary under the will, she too is a beneficiary as long as she is in need. She urged that in 1997 and 1998, she was involved in motor vehicle accidents and has been on medication and physiotherapy to date. She pointed out that though she lives in Canada, she is not on government support because she does not wish to rely on taxpayer's money. She called upon the court to adopt clause 3 of the Will and direct that the Executor provide for her and the 2<sup>nd</sup> Applicant according to the will. She urged that as a result of their accidents, they are unable to engage in gainful employment and would benefit from the financial assistance.
26. On cross-examination, R asserted that the Executor had undervalued the deceased's estate but that she did not have any proof thereof. She admitted to having previously made an application for provision under the will under section 26 of the *Law of Succession Act* but which application was dismissed in a ruling delivered by Justice Kalpana Rawal. On re-examination, she stated that while the application was dismissed, the learned Judge stated that the applicants were at liberty to bring an appropriate application at the appropriate time.
27. R contended that there is nothing in the will to the effect that she has to be sick in order to qualify for financial assistance. That all the deceased stated was that if she is in financial need, she should get a provision. She asserted that she needs financial assistance because she is unwell and does not work and therefore has no money. Further that while the Canadian government has a welfare system she did not wish to be on welfare since her father, the deceased herein, had left her a provision under his will.
28. YIHH testified as PWII in further support of the application for revocation and adopted her written statement filed hereto as her evidence. She stated that she is the widow of the deceased having been married to him as his 2<sup>nd</sup> wife. She has no biological children but that the Applicants and the Respondent are her step-children. She noted that she does not however have a good relationship with the Executor SK.
29. It was Y's statement that the deceased had in his will directed that the Executor provide adequate maintenance for her during her lifetime or until she remarries. She averred that a few months before



- the deceased's demise, the Executor kicked her out of the [particulars withheld] property which was her matrimonial home, prompting her to seek refuge at the homes of relatives where she remained until 2007 when she subsequently remarried and moved to her current residence. She urged that at no point between 1999 and 2006 did the Executor provide her with any maintenance as directed by the deceased. That all she got was harassment and ridicule.
30. Y asserted that the [particulars withheld] property had five (5) flats which were rented out during the deceased's lifetime. The flats consist of three-bedroom and two-bedroom units which generate rental income. During the deceased's lifetime, it was she who collected the rent therefrom. She presented receipts from 1999 in support of this assertion.
  31. According to Y, though there existed a divorce cause in the Kadhi's Court in which her marriage to the deceased was nullified, it was filed by the deceased's daughter AS and not the deceased.
  32. It was Y's contention that during his lifetime, the deceased often spoke of his love for all his children and the desire to have all of them share in his estate. This she says was reflected in the provisions he made for each one of them under his will. She urged the court to intervene in order to safeguard the rights and entitlements of the beneficiaries and the estate at large. Further that the court make provision for her for the eight (8) years before she remarried as had been directed by the deceased in his will.
  33. On 10<sup>th</sup> February, 2020 the Executor, SK testified in opposition to the application for revocation and in support of the application for confirmation of grant.
  34. Sayed testified that while the Applicants were seeking a reasonable provision out of the deceased's estate, they had failed to bring an application under section 26 of the *Law of Succession Act*. Instead, they had come to court under sections 47, 66, 68 and 69 of the *Law of Succession Act*. He asserted that while M and R had previously approached the court under section 26, their application was dismissed by the court which held that the medical documents they presented before it did not support their case on a balance of probability and asked them to produce a certificate from a Canadian Government Authority of their status.
  35. He urged that to date, the ruling had not been appealed nor have the Applicants presented the requisite documents. That instead, the Applicants have presented the same documents presented before the court in 2006 to support their current application. He urged the court to dismiss the application on the ground of res judicata.
  36. S took issue with the documents produced by M and R in support of their claims of having been involved in motor vehicle accidents, particularly the Motor Vehicle Report, the subpoena made to M, the medical records and letters from different medical practitioners.
  37. It was S's contention that nothing in the medical reports shows that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicant are unable to work for gain. Further that the subpoena presented did not indicate in what matter M was required to testify. He drew attention to one of the reports which is prepared by [particulars withheld] Clinic in which R is said to suffer from a condition called sleep apnea and recommended that she reduce her weight. He averred that sleep apnea was a medical term for snoring which is not a serious medical condition.
  38. S denied concealing the rental income from the estate and stated that he had in pleadings described the [particulars withheld] property as landed property. That he had also filed Valuation Reports prepared by Crystal Valuers. He denied wasting the estate and stated that since the deceased's demise, he has renovated the flats on the property, drilled a borehole and installed a generator. He attributed his delay in filing for confirmation for grant to applications that were previously hereto and suits that had been filed against the estate.



39. According to S, the averment by his step mother Y that the deceased had property at [particulars withheld] Road Area and Pangani Nairobi is incorrect. He contended that he inherited the properties from his late mother's estate and they therefore belong to him. He urged that his late mother had three (3) properties. He inherited two (2) of the properties while his younger sister A inherited one (1).
40. It was S's contention that after the deceased's demise, he used to give Y a maintenance sum of Kshs. 7,000/= monthly as had been agreed between his lawyer and the FIDA lawyer who was representing Y. He would deposit the money in Y's bank account held at EAB Society. He presented copies of the deposit slips. He stated that he only stopped paying the maintenance sum when Y's marriage to the deceased was nullified by the Kadhi's Court.
41. S stated that he was not the sole beneficiary of the estate and that he had set out the names of the other beneficiaries at paragraph 7 of the petition for confirmation of grant. He asserted that he had served the other beneficiaries while petitioning for the Grant of Probate but did not have proof thereof. Further that while he has benefitted from the estate for 21 years now, he was yet to file a statement of accounts.
42. It was S's testimony that he was aware that as the Executor of the estate, he was required to confirm the grant within a year even though 21 years have since lapsed. He contended that while he did not disclose that he earned income from the [particulars withheld] property, he had described the property as landed to mean that it generated income. That the flats were empty at the time of the deceased's death and it was not until 2012 that he started collecting rent therefrom.
43. S contended that while the will made a provision for his sisters M and R, he had not provided for them because they had not produced proof of their being in financial need. He however admitted that the will did not specify that the two must give particulars of what they earned from the Canadian Government before he could provide for them. He urged that while he had produced documents from the official website of the Canadian Website, he had not called any witness to authenticate the documents.
44. It was his contention that M and R were lying about their medical conditions but stated that he was not a medical doctor and could not interrogate medical documents.
45. On 2<sup>nd</sup> March, 2020 learned Counsel Mr. Farah filed written submissions dated 26<sup>th</sup> February, 2020 on behalf of the Applicants in which he stated that the Applicants had proved on a balance of probabilities that there was gross maladministration of the deceased's estate to warrant the grant of the revocation orders sought. Counsel stated that in granting the orders, the court should also call for the proper accountability of the estate by directing the Executor to file statements of account. He urged that section 83(e) of the [Law of Succession Act](#) requires that an administrator produce a full and accurate inventory of the assets and an account of all dealings with the estate which the Executor has not done.
46. It was Mr. Farah's submission that while the Applicants are alive to the provisions of section 26 of the [Law of Succession Act](#) which empowers the court to make reasonable provision for dependants not provided for under a will, this is inapplicable in the instant case since the provision for the Applicants was made under the will. He urged that though the will does not specify the provision due to the Applicants, they ought to have been adequately provided for from the rental income generated by the estate.
47. Mr. Farah contended that while the Kadhi's Court nullified the marriage between the deceased and Y, the suit was lodged by the deceased's daughter two (2) years after the deceased's death. He asserted that the nullification was orchestrated by the Respondent in a bid to disinherit Y. Counsel submitted that the nullification of the marriage after the deceased's demise should not however affect her status as a spouse under the [Law of Succession Act](#) in line with section 3(5) of the [Law of Succession Act](#). That in any event, the deceased had in his will referred to Y as his wife.



48. It was Mr. Farah's submission that the averments by the Executor/Respondent that the application is res judicata is misguided. To this end, he asked the court to examine the decision delivered in these proceedings in 2006 upon which the Executor based his argument.
49. Mr. Farah submitted that in the event the court finds the revocation of grant unreasonable, that the court direct the Executor to distribute the estate within forty-five (45) days from the date of the order and produce a proper account of the estate within fourteen (14) days.
50. Additionally, Mr. Farah asked the court to protect the identity of the parties herein even while appreciating the need for the court to furnish the editor of the Kenya Law Reports with a copy of its judgments and rulings in line with section 19 of the *National Council for Law Reporting Act*.
51. In opposition, the Executor/Respondent in person filed written submissions dated 23<sup>rd</sup> March, 2020 in which he reiterated the contents of his pleadings and asked the court to dismiss both the application for revocation of grant and the Affidavits of Protest filed against the confirmation of grant and confirm the grant to him.
52. It was the Executor's submission that he is the sole beneficiary of the will and that neither the Applicants nor his step-mother Y have a stake in the deceased's estate. He asserted that the proviso in clause 2 of the will was rendered nugatory by the ruling of the Kadhi's court which nullified the deceased's marriage to Y and that the Applicants had not met the conditions specified under clause of the will. He urged that in Islam, cohabitation is not accepted and Y is therefore not a wife for purposes of succession.
53. The Executor contended that contrary to the assertions made by the Applicants, inheritance is not an entitlement for a deceased person's family members. That testamentary freedom is protected by section 5 of the *Law of Succession Act*. According to him, the deceased did not leave any gift to the Applicants in his will nor did he make a maintenance clause and their status before this court is therefore that of dependants.
54. The Executor contended that a beneficiary under a will is not of the same standing as a dependant under section 26 and 29 of the *Law of Succession Act*. That dependants only become beneficiaries upon being declared as such by the court following an application brought under section 26 of the Act. This he says the Applicants have failed to do. He noted that while the Applicants had previously lodged an application under section 26 before this court it was dismissed, and an attempt to reintroduce the issue is therefore res judicata. He urged that the inherent powers of the court cannot be used to confer jurisdiction where there is no application under section 26.
55. It was the Executor's statement that while the Applicants sought to have their names deducted in these proceedings, he did not wish to have his name deducted or initialized. He averred that the Applicants only sought the order to become invisible to the Government of Canada and other relevant authorities with respect to their allegations regarding their involvement in car accidents and the resultant disability.
56. I note that while the Executor insists that the Applicants ought to have brought an application under section 26 and 29 of the *Law of Succession Act*, an examination of the proceedings and the pleadings filed hereto reveals that what is in issue is the interpretation of the will to give effect to the bequests made to the Applicants and not an application for provision of dependants. As such, I will not belabour the argument on res judicata. In any event, Justice Kalpana Rawal had in dismissing the application filed by the Applicants under section 29 stated that her decision did not bar the Applicants from filing an appropriate application at an appropriate time.



57. I have analysed the pleadings filed hereto and the submissions by the parties in support of their cases. Both parties have submitted extensively on a myriad of issues, however in my view there are two issues for determination:
- a. The effect of the deceased's will and in particular clause 2 and 3.
  - b. Whether the Applicants have made out a case to warrant the revocation of the grant as sought.
58. I note that while the parties also submitted on the estate of KBNS (deceased) who died testate and whose estate was the subject of Succession Cause No. 1074 of 1989, these proceedings relate only to the estate of SNS (deceased) and the court will therefore limit itself as such.
59. The relevant sections of the deceased's will are Clause 2 and 3 of the will which provide as follows:
- (2) I hereby give, devise and bequeath all my property of whatever kind and nature wheresoever situate to my said son KHS for his absolute use and benefit subject to the proviso that he will provide adequate maintenance for my second wife, YS, now living with me for her life or until she remarries.
  - (3) I direct my son to look after the welfare of my daughters (1) R (2) M and (3) S, now living in Canada whenever they are in financial need and to provide reasonable expenses for them whenever they get married.

Therefore whereas the Executor/Respondent averred that he is the sole beneficiary under the deceased's will, a wholesome reading of the will reveals otherwise.

60. A reading of clause 2 of the will reveals that the bequest to the Executor/Respondent is subject to a proviso. The Black's Law Dictionary, Tenth Edition defines proviso to mean a limitation, condition or stipulation upon whose compliance a legal or formal document's validity or application may depend. As such, it is evident that the Executor/Respondent can only inherit the deceased's estate upon providing adequate maintenance for YS. While the provision to Y was to be made during her lifetime, it was only to last for while she remained single.
61. In his testimony, the Executor/Respondent told the court that for the period from June to December 1999 he paid Y a total sum of Kshs. 42,000/= towards her maintenance. Whereas Y remarried in 2006, he did not provide for her from 2000 to 2006 even though she was single at the time and entitled to a maintenance sum out of the estate.
62. While submitting on this, Mr. Farah stated that even though Y has since remarried, she ought to receive the maintenance that was due to her for the period from 2000 to 2007 and which was agreed at a monthly scale of Kshs. 7,000/= which translated to Kshs. 588,000/= for the period. He urged the court to take judicial notice that the value of the shilling has since decreased and thereby tabulate interest on the sum to a cumulative amount of Kshs. 1,176,000/=.
63. It is evident that the deceased intended that his widow YS be provided for during her lifetime for as long as she remained single. It was therefore upon the Executor/Respondent to maintain her. As such, Y is entitled to payment out of the estate for the period from the year 2000 until 2006 at a monthly sum of Kshs. 7,000/= as had been agreed upon in 1999. Yasmin is therefore entitled to a total sum of Kshs. 588,000/= subject to interest at the court rate.
64. While the Executor argued that Y is not a wife of the deceased, I note that the deceased had under his will which remains undisputed referred to her as such. To dispute her status would have the effect of



disputing the deceased's will. In any event, she finds refuge under section 3(5) of the [Law of Succession Act](#) which provides thus:

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

65. Additionally, during cross-examination the Respondent told the court that at the time of his death, the deceased resided with Y as his wife. That they had lived together as husband and wife from 1994 until the deceased's death in 1999. He also acknowledged that the deceased had in his will described Y as his second wife and provided her with “adequate maintenance” until she dies or remarries. He was aware that his sister A had filed for nullification of Y's marriage but stated that at no time during his lifetime did the deceased state that his marriage to Y was fraudulent.
66. With respect to the Applicants, the relevant part of the will is clause 3 which directed the Executor/ Respondent to look after their welfare whenever they are in financial need. The key word herein is “whenever”.
67. The Concise Oxford English Dictionary, Twelfth Edition defines “whenever” to mean whatever time; on whatever occasion; every time that. From the definition of whenever, it is evident that the term “whenever they are in financial need” is vague. While there is no doubt that the Applicants are entitled to financial need, the will does not state how much money they are entitled to nor what constitutes financial need.
68. The 2<sup>nd</sup> and 3<sup>rd</sup> Applicant are not in gainful employment and live of their sister SS, the 1<sup>st</sup> Applicant herein. They filed the joint Affidavit of Protest hereto seeking to have a provision out of the estate in accordance with the deceased's will. In the court's view, the evidence adduced is enough to suffice financial need. The Applicants would not have filed the protests herein and travelled to Kenya during the course of these proceedings had they not been in financial need to warrant financial assistance from the deceased's estate. In any case, the will did not specify what constitutes financial need, nor did it state that the Applicants would be required to provide medical proof or an employment history in order to demonstrate financial need.
69. From the will, it is evident that while the deceased bequeathed the Executor/Respondent all his property, the deceased also charged him with providing for his wife Y and daughters R, M and S. The Respondent did admit that he is not a sole beneficiary in the will and that that is why he listed the names of the Applicants in his petition.
70. In her testimony, R sought a maintenance sum of USD 1500/= monthly. She did not however give a breakdown of how she came up with the sum sought. As such, whereas the court is of the view that they are each entitled to a maintenance sum out of the estate, the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants should produce a breakdown of the amount sought before the court can order payment of the sums out of the deceased's estate.
71. The second issue is whether the grant of probate issued to the Executor ought to be revoked. The circumstances that can lead to the revocation of grant are set out in section 76 of the [Law of Succession Act](#) which provides thus:

“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;....”

72. Whereas it is now twenty years since the grant of Probate was issued to the Executor/Respondent, I note that the estate has been subject to numerous applications in these proceedings and various applications in other proceedings. It is also noteworthy that the rights of an Executor exist as from the death of the testator and flow from the will and not the grant of probate. (See - Kothari vs. Qureshi & Another [1967] E.A at page 566). In any event, the provision made to the Applicants under the will was vague and was only subject to their being in need. As such, only upon their indicating that they were in need and providing a breakdown of the sums of monies requested towards their maintenance, could the Executor make payments to them out of the estate.

73. Where a party files an application seeking the revocation of grant, the court has the discretion to make orders as it considers fit in the circumstances and is not bound to issue orders for the revocation of the grant as sought. (See - Angelas Maina vs. Rebecca Waiyego Mwangi and Another Succession cause 692 of 2012, [2016] eKLR) In the instant case, a revocation is not necessary for the ends of justice to be met. In any event, it will only serve to drag this cause further and delay the distribution of the deceased’s estate.

74. In the end, I allow the Protests against the confirmation of grant and direct as follows:

- a. YIHH, SS, RS and MS are beneficiaries under the deceased’s will and entitled to share in the deceased’s estate as specified under the will.
- b. The Respondent is ordered to make a provision for YIHH at a total sum of Kshs. 588,000/= out of the estate for the period from 2000 to 2006 as maintenance in accordance with the will. The amount shall be subject to interest at the court rate.
- c. MS and RS are entitled to a financial provision out of the deceased’s estate. The parties shall within forty-five (45) days of this ruling file and serve a tabulation of the amount due to them, to be included in the certificate for confirmation of grant.
- d. The Respondent shall within thirty (30) days file audited accounts of the income in the estate from the time he took over as Executor to date.
- e. The matter shall be mentioned in forty-five (45) days to confirm compliance and for confirmation of the grant to the Executor.
- f. Each party shall bear their own costs.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2020.**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the Applicants.**



**In the presence of.....Executor/Respondent in Person.**

