REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 897 OF 2010

IN THE MATTER OF THE ESTATE OF PETER NGUMBI MULEI (DECEASED)

BETWEEN

1. JENNIFER MUTHUE NGUMBI.....1ST APPLICANT

2. KATHEKA-KAI CO-OPERATIVE SOCIETY LIMITED....2ND APPLICANT

AND

KEVIN MULEI NGUMBI.....1ST RESPONDENT

STEPHEN KYALO NGUMBI.....2ND RESPONDENT

ERIC NDONYE NGUMBI.....3RD RESPONDENT

RULING

1. By a Petition filed on 15th December, 2010, the Respondents herein in their capacities as the sons of the deceased petitioned for letters of administration intestate of the estate of **Peter Ngumbi Mulei** (deceased). Pursuant thereto Letters of Administration were issued to the said petitioners on 6th March, 2011. Upon a subsequent Summons for Confirmation of Grant the said Grant was confirmed.

2. By Summons for Revocation or Annulment of Grant dated 29th July, 2019, the 1st Applicant seeks the following orders:

> **a) THAT that the grant of letters of administration to Kevin Mulei Ngumbi, Stephen Kyalo Ngumbi and Eric Ndonye Ngumbi made on the 12th day of April 2011 and confirmed on the 30th day of April 2013, be revoked.**
>
> **b) THAT conservatory orders be and are hereby issued prohibiting Kevin Mulei Ngumbi, Stephen Kyalo Ngumbi and Eric Ndonye Ngumbi from interfering with, disposing, transferring, alienating, sequestering, attaching, levying distress, levying execution or dealing in any way prejudicial to the interest of the Applicant herein with any of the assets that are the subject of this Application pending the hearing and determination of this Application.**
>
> **c) THAT conservatory orders be and are hereby issued prohibiting Kevin Mulei Ngumbi, Stephen Kyalo Ngumbi and Eric Ndonye Ngumbi or any person or entity herein from interfering with any of the assets that are the subject of this Application by way of using them as collateral or security to obtain or continue obtaining any financial accommodation from anyone or any financial institution which financial accommodation includes but is not limited to overdrawing accounts, borrowing new loans or topping up existing loans pending the hearing and determination of this Application.**
>
> **d) THAT cost of this application be in the cause.**

The 1st Applicant's Case

3. According to the 1st Applicant, a daughter of the deceased, the Respondents who are her brothers and the administrators of the estate of the

deceased, had the said grant of letters confirmed on 30 April 2013, when the beneficiaries of the deceased's estate were present except for herself and her elder brother **Francis Kamalizah Ngumbi** as they did not and still do not reside in Kenya.

4. According to the 1st applicant, during the pendency of the suit and pending the confirmation of grant of the letters of administration herein she was approached by the said administrators and advised that in order for the company known as Peter Mulei & Sons Limited to continue running smoothly following their father's demise and prior to the Grant of Letters of Administration being confirmed she should sign a consent appointing the three to run the company as everything else got sorted out later. On the basis of that understanding she signed a consent for the confirmation of the grant to the three administrators only to later be made to understand the full implication of the same in as far as it extended beyond the transitioning of the running of Peter Mulei & Sons Limited to vesting the entire estate in the Respondents leaving out four other beneficiaries who are her siblings.

5. When she later inquired as to why the estate was vested in three beneficiaries disinheriting four children she was advised that there was an intention to make the Respondents trustees of the estate holding the same for the benefit of all seven beneficiaries. As a result, she gave the resulting trust a chance since the trustees were a family and the Grant had already been confirmed.

6. The 1st applicant deposed that in the year 2014 after noticing that the estate was neither being administered nor was the property being shared out, at least not to her, she wrote several letters to the trustees requesting for information regarding the estate and the vesting of her share in her. It was her case that her said letters were also motivated by her desire for inclusion in the management of the estate as an heir since there had been several occasions where significant decisions regarding the estate were made without her being informed such as:

a) failing to provide advance knowledge of what properties were being pledged as security for loans,

b) changing of the name of a business owned by the company,

c) refusal to share company strategic information,

d) refusal to provide any financial statements or share results of any audits for 10 years,

e) refusing to formally and legally include her in the ownership of the companies owned by the estate etc.

7. The 1st applicant further averred that it also became increasingly difficult to distinguish between the assets and expenses of the estate and those of the Trustees and that since the grant of letters of administration were confirmed in this matter almost nine years ago there has been no plan to vest the property in its rightful owners and the trustees have resorted to doling out handouts to her whenever she challenges them to act in a fiduciary manner by disclosing information regarding the estate and also vesting her share of the same in her. It was her case that since the trustees took over the management of the estate, they have done so in the opaquest manner possible only choosing to share information regarding the estate amongst themselves to her exclusion. Owing to that conduct, it was her position that it has become impossible for beneficiaries like herself to ascertain its condition, extent or health as it has been run devoid of any form of legally recognized accountability mechanisms.

8. It was deposed that in the year 2018, at a meeting of the heirs to the estate, she expressed her desire to obtain her share of the estate from the Trustees but once again though her request was acknowledged it has since been met with the usual reluctance, sluggishness and lack of co-operation that she has now become all too accustomed to when it comes to implementation.

9. It was therefore her case that the Trustees have failed to proceed diligently with the administration of the estate and as such there are still properties registered to her deceased father almost ten years since he passed away. The 1st applicant lamented that it has been more than six months from the date of confirmation of the grant and the Trustees have failed neglected and or defaulted in completing the administration of the estate in respect of all matters other than continuing trusts and neither have they produced to the court a full and accurate account of the completed administration as required by law. Despite it being more than eight years since the grant of letters of administration an agreed long-term or any other solution on how the property would be dealt with for the benefit of all seven (7) siblings has not been found or agreed upon leading to frustration of some of the beneficiaries of the estate especially herself.

10. She added that despite the Trustees assertions that they do not lay claim to the assets of the estate and that they hold them at the behest of all the beneficiaries they have not taken any steps to demonstrate such assertion.

11. By a supplementary affidavit, the 1st Applicant averred that the heirs believed that the three administrators were to act as trustees and not to have the estate granted them absolutely and unconditionally contrary to the confirmed grant which vested their late father's estate to the three administrators. It averred that the administrators were under duty to disclose to the court the basis upon which the consents to the grants of the siblings was obtained and based on which disclosure this court would have created a trust and conveyed the property to the administrators on the said terms.

12. It was therefore her case that the letters of administration as confirmed by this court are erroneous and misleading as they do not represent the agreement of the heirs or their intention as none of them agreed that the entire estate vest in the administrators but charged the administrators with the responsibility of assisting the court to grant the property to the three administrators to hold in trust for all the beneficiaries. As such the administrators, for whatever reasons, which reasons are immaterial, misguided the court as to the intention of the heirs.

13. It was her position that the Respondents have revealed laxity/negligence by which the estate is handled as they don't even know the size of the estate seeing as they allege that it owns forty percent (40%) of the shares in Peter Mulei & Sons Limited while from her removed abode in the United States America she knows that the estates shareholding is fifty percent (50%). This begs the question whether the

administrators appreciate their role of collecting the assets of the estate when they can lose ten percent (10%) of a multi-million/billion-shilling company or otherwise have it unaccounted for.

14. She denied that the Respondents had invited her for the meeting and averred that she found out that they were planning on having a meeting in Kenya, to her exclusion and to discuss her and her demands with her elder brother who was due in Kenya from the U.S at the time. She hurriedly took some time off work boarded a plane to Kenya within days of learning of the meeting and arrived in Kenya much to the shock of the administrators.

15. While admitting that she received the amounts of money claimed she asserted that more than Kenya shillings thirty two million (Kshs. 32,000,000=) arose from the sale of one real estate property out of the seventy six (76) properties owned by their late father. Despite that, the deponent of the replying affidavit swears that their late father was worth only Kenya Shillings twenty million (Kshs. 20,000,000/=) when he died despite the loans taken by the administrators secured by a small fraction of the estate's real estate and with outstanding balances in the hundreds of millions. Since the Respondents have conveniently failed to file the accounts in this court, it was averred this court cannot know how the estate has been managed and who its beneficiaries have been and to what extent.

16. The 1st applicant's position was that the intention of the heirs as was to be captured by the court at the confirmation hearing has been overtaken by events and as such the court cannot rectify the grant to bring it into compliance. Besides, the Respondents, however well-meaning, cannot now be appointed as trustees seeing as the ingredients required for the formation of such a relationship are now clearly absent from a reading of the affidavits by the heirs herein and the effects and realizations brought about by the effluxion of time. She denied that the business of the estate will suffer without administrators as there is a board of directors who ran the company prior to the letters of administration and the revocation of this grant will not change their status.

17. In light of the foregoing, it was her case that there is no alternative but to revoke the grant herein as its birth and existence are not supported by any legal or accurate factual positions.

18. It was submitted on behalf of the 1st applicant that during the confirmation hearing for the grant which was held on 30/4/2013 the Respondents knowingly/unknowingly inadvertently or deliberately misled this court into recognising them as the sole beneficiaries thereby confirming the grant in a manner that conveyed the deceased's' estate to the Respondents as opposed to conveying the property to the Respondents (the three administrators) to hold in trust for the seven (7) beneficiaries and that this is the position the 1st Applicant consented to when she signed the consent to the grant which is on the court record from which it is clear that the grant was to be confirmed to the Respondents to hold the property in trust and not to the Respondents absolutely. However, the grant as confirmed disinherited four (4) of the beneficiaries leaving them at the mercy of the Respondents.

19. It was submitted that all the beneficiaries admit that the Respondents were to hold the property in trust and this court had the power to create such a trust while confirming the grant. However, the Respondents misguided the court as to the intention of the parties by failing or neglecting to make full disclosure to the court with regard to the agreement/intention of the seven (7) beneficiaries resulting in the 1st Applicant being disinherited.

20. Accordingly, the grant as was confirmed and currently stands recognises the Respondents as the sole beneficiaries of the estate of the deceased which is a position that all beneficiaries including the Respondents admit to be incorrect and far from the intention of the beneficiaries. As such the grant cannot be allowed to exist as is as it was obtained by the Respondents concealing a fundamental material fact such as an intention to create a trust, from this court thus violating Section 76 (a),(b) and (c). In the alternative, if there was any such disclosure made to the court and it was not captured in the confirmation of the grant then the grant is still defective being a misrepresentation of the clear understanding of the beneficiaries more so the 1st Applicant. However, in all likelihood, had the court been given the information regarding the intention of the parties it would have either declined to confirm the grant; insisted on the presence of the 1st Applicant at the hearing to confirm the position; or confirmed the grant by creating the trust as intended and agreed.

21. In support of the submissions the 1st Applicant relied on the case of re **Estate of Wahome Mwenje Ngonoro Deceased [2016] eKLR** where **Mativo J.** and submitted that in the present case though the Respondents disclosed to the court that there were other beneficiaries, they failed to disclose to the court that those other beneficiaries and more particularly the 1st Applicant had an interest in the estate of the deceased. Instead they led the court to believe that the 1st Applicant had no interest in her late fathers' estate and that she had denounced her interest in the same.

22. It was disclosed that though on 18th June 2014 the Respondents filed an affidavit in affirmation of trust before this court in response to a push by the 1st Applicant for accountability by them, the existence of the constructive trust has only been on paper as there has been no action by the Respondent to recognise or implement such a trust which is evident from their failure to observe the responsibilities of trustees which include but are not limited to the duty to account. In the absence of such a trust the Respondents are continuing to manage and use the estate of the deceased as the ultimate and sole beneficiaries as recognised by the grant and only supporting their siblings as they so please or have mercy as opposed to on the basis of a legally recognised obligation.

23. According to the 1st Applicant, the Respondents violated the above provisions by not availing to the court the substance it needed in accurate information to make a just confirmation of the grant. Secondly, the Respondents concealed a material agreement between the beneficiaries regarding the estate leading to the Respondents being legally recognised as the ultimate and sole beneficiaries of the estate of the deceased and that the 1st Applicant had no interest in her late fathers' estate. It was contended that the Respondents were under a duty to disclose to this court the correct agreement between the parties as the 1st Applicant, who at the date and time of confirmation of the grant was a resident of the United States of America and not present in court but had trusted them to speak on her behalf and convey to the court the correct position on this matter being that she was interested in her share of the estate and that the Respondents were to be appointed as trustees for all beneficiaries and not the sole and ultimate heirs of the deceased as they now stand.

24. According to the 1st Applicant, her consent to the making of the grant did not amount to renunciation of her right of inheritance since the disclaimer of interest must be express. Renunciation of the right to executorship under section 59 of the ***Law of Succession Act*** does not suffice as a disclaimer of right of inheritance since Rule 18(2) of ***Probate and Administration Rules*** provides that a renunciation of probate by an executor, whether by oral declaration or in writing, shall not operate as a renunciation of any right which he may have to a grant of letters of administration in some other capacity unless he expressly renounces such right. Section 59 of LSA and rule 18 of P & A Rules is significant in showing what amounts to disclaimer of inheritance right which must be done expressly. It was therefore submitted that the consent to making of the grant did not amount to waiving of the inheritance endowed to the applicant as a beneficiary.

25. The 1st Applicant's position was that her consent to making of the grant and failure to protest was based on her belief that her benefits as a beneficiary of the estate would arise from formation of a trust as agreed.

26. The 1st Applicant was categorical that she is not asking this court to declare the existence of a trust (as matter of fact it may not have jurisdiction to do so) but contended that the promise of formation of a trust is so material that basing on it and believing it to be true the Applicant consented to making of grant and under Section 76 the grant was obtained by the concealment from the court of material fact that the intention of the 1st Applicant was not to disclaim her right of inheritance but to derive such a benefit from a trust which beneficiaries agreed to form. Therefore, the grant should be revoked.

27. It was further submitted that there is no evidence on record to show that the Respondents proceeded to administer the estate of the deceased. Despite the fact that the 1st Applicant through correspondences notified the Respondents to vest her share of the estate in her, they have failed to do so as can be seen from among others the fact that the shares of the deceased in a company controlled solely by the Respondents have not been transferred to their respective beneficiaries and are still in the name of the estate of the deceased. The record of this honourable court bears the 1st Applicant witness that the Respondents have never complied with the mandatory provisions of Section 83 (e) and (g). According to the 1s Applicant, the Respondents have not only failed in all the fiduciary duties that would be owed a beneficiary in a trust and in this case the 1st Applicant and more so by failing/refusing to account, they have also proceeded to fail to perform their statutory duty to account to this court of their exercise of the powers granted to them by the grant of representation. The effects of their failure are so grave that the court would be unable to grant them power to continue to do anything as it is not aware of how the grant has been used so far or is being used presently. The court is in the dark and hence would be unable to sanction any continuation of the confirmed grant as it is being carried out outside the law and outside the jurisdiction and legally sanctioned oversight of this court by the opaque and covert manner that the Respondents operate in to the point of hiding from this honourable court.

28. It was submitted that this honourable court has no basis to sanction the continued administration of the estate of the deceased as in the absence of the accounting and inventory being filed before this court the court would be endorsing a process it knows nothing about likely even giving its blessing to a continued injustice. The lack of information gives the court no choice but to revoke the grant herein thereby causing the Respondents to come out of the shadows of the deep darkness of where they presently operate and return to the well illuminated judicial process where they would first explain their whereabouts by accounting then seek a fresh mandate in new letters and walk a different path in the event that they are granted the letters again, of course with modifications advanced by the 1st Applicant at the appropriate time and forum.

29. In support of her submissions, the 1st Applicant relied on re **Estate of Wahome Mwenje Ngonoro Deceased** (supra) and contended that she has been able to demonstrate that the grant as confirmed was never the intention of any of the beneficiaries and as such should not be allowed to stand but be revoked as all beneficiaries confirm they never intended to convey their inheritance to the Respondents unconditionally as evidenced by the grant as confirmed. Despite the fact that the Respondents allege that they recognize the existence of a trust their conduct has demonstrated that no such vehicle exists in their minds whether it be a registered trust or a constructive trust. Secondly, though the 1st Applicant resides in the United States of America does not mean that she cannot appoint an administrator of her choosing to represent her in the administration of the estate of the deceased should she be unable to do so in person. Thirdly, a lot has happened since the estate of the deceased was vested in the Respondents such that though there was an intention to create a trust the circumstances of the case no longer permit the rectification of the grant to reflect that position on account of the water that has passed under the bridge. The Respondents lack the interest, capacity and or will to act in such capacity and it is definitely doubtful that they would command the trust of all beneficiaries to play such a sensitive role.

30. The Court was urged to revoke this grant and pave way for the much needed accounting process to begin a road to recovery.

Respondents' Case

31. In response to these applications, the Respondents averred that the whole process of application for and confirmation of the grant were inclusive and the decisions were made upon consultation amongst all the beneficiaries. It was contended that the applicant being a resident of the United States of America cannot be involved in the day to day running of the activities of the Estate and the aforementioned company in which the Estate owns 40%. The Respondent refuted the allegation that the 1st applicant did not give her consent with full knowledge stating that the 1st applicant is immensely knowledgeable and was fully involved in the steps to be taken with their full implications and executed her consent before a Notary Public.

32. According to the Respondents, the facilitation to the confirmation was meant to ensure a smooth running of the business owned by the Estate without a hitch and that it never conferred any right to the administrators superior to the rest of the beneficiaries hence the issue of disinheriting the beneficiaries is farfetched as it was simply meant to preserve the estate. They contended that they have given explanations to all the beneficiaries and that it is only the 1st applicant who if of a different view. They disclosed that they have gone out of the way to call beneficiaries to meetings and have appraised them of the affairs regarding the estate and the said company as much as they can.

33. The Respondents insisted that the Estate owns only forty per cent in Peter Mulei & Sons Limited hence that is the only share claimable by all the beneficiaries. They disclosed that there was an intention to liquidate some of the properties in order to meet the immediate needs of the beneficiaries but unfortunately these efforts were hindered by the pending court applications by third parties.

34. It was averred that on several occasions upon agreement by all the beneficiaries, the applicant has received money from the estate in excess of 40 million when the value of the estate at the time of the deceased's death was only about Twenty Million.

35. It was averred that the administration of the estate has faced several challenges including volatile business environment, incessant claims of part of the estate by other parties and forcible detainer of some of the properties by the estate squatters which have hampered the finalization of the administration since some matters are pending in court, difficulties which the applicant is fully aware of. It was further averred that as late as July, 2019 upon the insistence of the applicant, while the beneficiaries embarked on the process of valuation of the free estate to enable the determination of the applicant's share, these proceedings were instituted by the 1st applicant hence demonstrating bad faith on her part.

36. The Respondents disclosed that it has always been their desires to see equitable and fair administration of the deceased's estate and they expressed their willingness to table any information they have regarding the affairs of the estate. Accordingly, in their view, revocation of the grant herein is not justified and that the 1st applicant's discontentment expressed herein against the six other beneficiaries is capable of redress without the revocation as no alternative is in place to address the pressing daily concerns of the estate.

37. There was also an affidavit sworn by **Deborah Itumbi Guturo**, one of the beneficiaries on her behalf and on behalf of two other beneficiaries in which she deposed that all the decisions in respect of the deceased's estate including the application for and confirmation of the grant were all inclusive and all decisions were made upon consultations amongst all the beneficiaries including the applicant. Before the administration process commenced all beneficiaries agreed on the administrators and that they are satisfied with the process of administration of the estate.

38. It was disclosed that the 1st applicant attended several meetings in which decisions were mutually agreed including financial assistance to the 1st applicant. It was therefore her view that the issues raised can be resolved without resorting to the decision sought herein.

Determination

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

40. 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;***

41. The Summons by the 1st Applicant is based on two grounds. The first ground is that in applying for confirmation of the Grant the Respondents misled the Court into believing that the Estate was to be confirmed to the Respondents absolutely when the agreement between the beneficiaries was that the same was to be held by the Respondents in trust for all the beneficiaries. The second ground is that the Respondents have not complied with the legal requirements that they render account and expeditiously complete the administration of the estate.

42. It is true that in the Summons for Confirmation of Grant, the Administrators indicated that all the assets of the deceased's estate were to be given to **Kevin Mulei Ngumbi**, **Stephen Kyalo Ngumbi** and **Eric Ndonye Ngumbi** to hold in equal shares. In support of the said Summons were consents executed by inter alia the 1st Applicant and **Francis Kamalizah Ngumbi** in which it was stated that they consented to the confirmation of the Grant of Letters of Administration made to the said administrators. Those consents did not mention that the confirmation was meant to have the said persons hold the assets of the Estate in trust for the beneficiaries. However, in an affidavit sworn by the administrators on 11th June 2014, they stated that the grant was confirmed in their names so as to enable them hold the deceased's Estate in trust for the seven beneficiaries.

43. The Certificate of Confirmation of Grant however indicated that the assets of the deceased's Estate were given to the three administrators to hold in equal shares. There was no mention of the trust.

44. Having considered the material placed before me I have no hesitation in finding that the intention of the beneficiaries was that the Estate was to be confirmed in the names of the said administrators for the benefit of and in trust for all the other beneficiaries. I associate myself with the views of **Mativo, J** in re **Estate of Wahome Mwenje Ngonoro Deceased [2016] eKLR** where **Mativo J.** stated that:

> **"My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant…The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the judge to know in dealing with the issues before the court. The duty of disclosure therefore applied not only to material facts known to him but also to any additional facts which he would have known if he had made inquiries. The question that inevitably follows is whether the**

non-disclosure was innocent, in the sense that the fact was not known to the Respondent or that its relevance was not perceived."

45. I am however not satisfied that the Grant was obtained fraudulently. I agree with the holding **In the Matter of the Estate of P. W. M – Deceased [2013] eKLR** that:

> **"It should be noted that allegations of fraud border on an accusation of commission of a criminal offence. In civil matters, allegations of fraud are treated as more serious than other allegations. Pleadings on fraud are stricter. The allegations should be supported by sufficient particulars. It is said here that the grant was obtained fraudulently; consequently the pleadings on the point ought to be to a higher standard. I note that the particulars of fraud are bare, totally insufficient to support an allegation of fraud."**

46. Based on the material on record I find 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. That may constitute a ground for revocation of a Grant.

47. The second ground relied upon by the 1st Applicant was that the Respondents have never complied with the mandatory provisions of Section 83(e) and (g). The said provisions set out some of the duties of personal representatives states as being to:

> ***(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.***
>
> ***(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;***

48. It is clear that the Respondents have not complied with these provisions.

49. However, it is not in every situation where transgressions are alleged that the grant must be revoked.

50. I therefore agree with the position adopted by **Muigai, J** in **Mary Wangari Kihika vs. John Gichuhi Kinuthia & 2 Others [2015] eKLR,** that in exercising its discretion the Court ought to take into account the effect of either revoking the grant or relieving all the administrators of their duties and where more injustice would be caused by such action to instead opt for an alternative that would ensure that the estate is properly administered.

51. Similarly, in **Re The Estate of the Late Suleman Kusundwa [1965] EA 247**, it was held that:

> **"The court is…not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance**."

52. This position was clearly appreciated by **Khamoni, J** in **Re Estate of Gitau (Deceased) [2002] 2 KLR 430** where he expressed himself as hereunder:

> **"Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong…While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them."**

53. In my view where there is an alternative to revocation or annulment of a Grant, the Court ought not to resort to the revocation or annulment. In this case, it is clear that some beneficiaries are happy with the manner in which the Estate is being administrated. In annul or revoke the grant would have the effect of throwing the estate into disarray which would be detrimental to the interests of the beneficiaries. In the premises, the process of distribution of the estate ought to be moved forward rather than backwards. Just like **Mutende, J in Eric John Mutemi & Another vs. Agnes Mumbanu Kinako [2016] eKLR it is my view that parties ought to be given a time frame within which to comply with section 83(e) of the *Law of Succession Act* and to show commitment towards diligently administering the estate of the deceased for the benefit of all the beneficiaries, failure to do which this Court would be left with no alternative but to replace the administrators.**

54. In the premises while I disallow the instant application, I hereby direct the Co-administrators of the estate of the deceased herein to put their act together and comply with section **83(e) of the *Law of Succession Act*** within sixty days. During that period the said administrator must take concerted efforts directed at progressively and lawfully administering the estate of the deceased.

55. There will be no order as to costs.

56. It is so ordered.

Read, signed and delivered online at Machakos this 24th day of September, 2020.

G V ODUNGA

JUDGE

Delivered online to the email of the advocates for the parties with their consent.

CA Geoffrey