REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. P&A CAUSE NO. 1 OF 2015

IN THE MATTER OF THE ESTATE OF SAMUEL KIMALEL TANUI (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION OR ANNULMENT OF GRANT

BETWEEN

PRISCA JEPNG'ETICH TANUI.....APPLICANT

AND

PRISCA JEPKOLUM MALEL.....1ST RESPONDENT

STEPHEN KIPKIRUI MALEL.....2ND RESPONDENT

JACKLINE JEBET MALEL.....3RD RESPONDENT

JUDGMENT

[1] By a Chamber Summons application dated **6 January 2015,** the applicant moved the Court pursuant to the provisions of **Section 47 and 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya;** and **Rules 44(1) and 73** of the **Probate and Administration Rules** for orders that:

[a] spent

[b] That the court file for **Eldoret SRM P&A No. 19 of 1984** be recalled for purposes of annulling and/or revoking the grant issued by the said court in lieu of disclosure of material facts and/or misrepresentation on the part of the then administrator, **Samson Kipsang Malel;**

[c] That the Grant of Letters of Administration intestate issued on **30 August 1984** and confirmed on **20 May 1985** be revoked and/or annulled;

[d] That the title deed issued on the ground of misrepresentation be cancelled forthwith;

[e] That the applicant be made the administratix and beneficiary of the estate of the late **Samuel Kimalel Tanui;**

[f] That an order be issued restraining and/or stopping the respondents and their agents and/or servants from intermeddling, subdividing or dealing in any way with the estate of the deceased person, more particularly **L.R. No. Nandi/Kipkaren/Salient/234**, measuring approximately 20.0 Ha., pending the hearing and determination of the application *inter partes* and thereafter the hearing of the main cause;

[g] That costs of the application be provided for.

[2] The application was predicated on the grounds that the applicant is the biological daughter of the deceased and therefore had an equal

right, not only to a share of the estate of the deceased alongside her brother, **Samson Kipsang Malel**, but also to apply for Grant of Letters of Administration Intestate in respect of the said estate. It was further the assertion of the applicant that her consent to the issuance of the Grant was never sought or obtained by the **Samson Kipsang Malel** (now deceased); and therefore that the said Grant was obtained fraudulently, by concealment of her interest in the estate.

[3] The application was supported by the applicant's own affidavit, sworn on **6 January 2015** in which she averred that the deceased passed away on **4 June 1978**, and was survived by his widow, **Elizabeth Tanui** (who is since deceased); a son, **Samson Kipsang Malel** (now deceased) and the applicant, **Prisca Jepng'etich Tanui**. She stated that it was upon the demise of her mother on **13 March 2012** that she came to learn that her brother had furtively filed **Eldoret Succession Case No. 19 of 1984** and had been issued with a Grant of Letters of Administration Intestate; which Grant had been confirmed and the suit property transferred into his name.

[4] It was further the averment of the applicant that the proceedings leading up to the Grant of Letters of Administration Intestate and the Confirmation of Grant were marred by procedural defects in that, her consent was never sought or obtained by **Samson Kipsang Malel;** and that she was excluded from the proceedings for confirmation of Grant, notwithstanding specific direction by the court that she be notified thereof. Accordingly, the applicant averred in paragraph 21 of the Supporting Affidavit that, unless the Grant is revoked, the respondents will proceed with the distribution of the assets of the estate of the deceased to her detriment.

[5] The respondents opposed the application, relying on the Replying Affidavit sworn by **Prisca Jepkolum Malel**, the 1st respondent herein. She took the stance that **"…it is ridiculous and shocking…"** that the applicant filed an application for annulment and revocation of grant over 30 years after its confirmation. She further averred that the application has been overtaken by time and events, in that the administrator, **Samson Kipsang Malel** has since died and that a Grant of Letters of Administration Intestate in respect of the estate of **Samson Kipsang Malel** is yet to be obtained.

[6] As the widow of **Samson Kipsang Malel**, the 1st respondent averred that the applicant did not ask for a share of the deceased's estate in **Eldoret SRMP&A No. 19 of 1984** because she was married and was earning a good income as a trained teacher; and that it was not open to her to change her mind more than 30 years later to claim a share of the father's estate; which has been transmitted to the dependants of **Samson Kipsang Malel**. She added that her mother-in-law did not, in her lifetime, raise any issue with the Certificate of Confirmation issued on **30 May 1985** on the basis of which the suit property was transmitted to **Samson Kipsang Malel.**

[7] Following directions, given herein on **16 April 2018 by Hon. Achode, PJ,** that the application be disposed of by way of *viva voce* evidence, the applicant, **Prisca Jepng'etich Tanui** testified on **25 February 2019** as **PW1.** She adopted her witness statement dated **22 October 2018** as part of her evidence in chief and confirmed that she is the daughter of the late **Samuel Kimalel Tanui**, to whose estate these proceedings relate. She confirmed that the deceased died on **4 June 1978**; and was survived by his widow, **Elizabeth Tanui**, a son, **Samson Kipsang Malel** and herself; and that he left behind a piece of land, more particularly known as **Nandi/Kipkaren Salient/234**, measuring about 20.0 Ha.

[8] The applicant further told the Court that, it was not until **2012**, after the demise of their mother, that she got to learn that her brother, **Samson Kipsang Malel** had secretly applied for Grant of Letters of Administration Intestate in respect of the estate of their deceased father in **Eldoret CM P&A No. 19 of 1984** and thereafter caused the entire property to be transmitted to himself without her knowledge or consent. And, because of hostility from her brother's family, she was constrained to instruct her Advocates to take appropriate legal action with a view of vindicating her rights as one of the beneficiaries of the deceased.

[9] PW1 also mentioned that her brother, **Samson Kipsang Malel**, was married to two wives; namely, **Prisca Jelagat Malel** and **Elizabeth Jemutai**. She asserted that the Petitioner was under obligation in law to disclose this fact to the court. She consequently prayed that the deceased's estate be shared equally between her and her deceased's brother's estate; and therefore that **Elizabeth Jemutai**, who she called as her witness, ought also to be taken into consideration in the distribution of the half share of the deceased's estate due to **Samson Kipsang Malel.** To buttress her testimony, the applicant produced several documents as exhibits, including the following:

[a] A certificate of Death in respect of the deceased **Samuel Tanui** (marked **the Plaintiff's Exhibit 2);**

[b] A copy of the Green Card for Land Parcel No. **Nandi/Kipkarren Salient/234** (marked **the Plaintiff's Exhibit 4);**

[c] A Certificate of Official Search for **Nandi/Kipkaren Salient/234** (marked the **Plaintiff's Exhibit 5)**

[10] Elizabeth Chemutai (PW2) also adopted her witness statement dated **22 October 2018** wherein she confirmed that she is the widow of the late **Samson Kipsang Malel**; and that the 1st respondent, **Prisca Jepkolum Malel**, is her co-wife. **PW2** also confirmed that the applicant is her sister-in-law and the only surviving offspring of the deceased, **Samuel Kimalel Tanui**. She therefore supported the applicant's proposal that the estate of the deceased, **Samuel Kimalel Tanui**, be shared equally by his children, **Samson Kipsang Malel** and **Prisca Jepng'etich);** and that she be included in the share that is due the estate of **Samson Kipsang Malel. PW2** relied on the Minutes of Kipkaren Salient Land Disputes Tribunal dated **25 November 2008** (marked the **Plaintiff's Exhibit 12** herein) and a Decree issued by the court at Kapsabet in enforcement thereof **(the Plaintiff's Exhibit 13).**

[11] The 1st respondent, **Prisca Jepkolum Malel**, *alias* **Prisca Jelagat Malel**, testified as **DW1** for and on behalf of the three respondents; the 2nd and 3rd respondents being her children. She adopted the averments set out in her Replying Affidavit sworn on **14 May 2015**. She also relied on the List and Bundle of Documents filed on her behalf on **8 October 2019** by her Advocate, **Mr. Yego**. She confirmed that **Samson Kipsang Malel** was her husband; and that he was polygamous. **DW1** also conceded that **PW2** is her co-wife. She however contended that the marriage between **Samson** and **PW2** had broken down and that Samson had moved the court vide **Eldoret SPMCC No. 82 of 1985** seeking return of dowry. She therefore strongly resisted any attempts by **PW2** to claim to a share of the deceased's estate.

[12] It was further the testimony of **DW1** that the deceased, having transferred the estate property into his name, bequeathed it to his three

sons vide a Will dated **28 September 1992**. She, nevertheless, conceded in cross-examination that she had no problem including her daughters in the distribution of the subject property. She also admitted that **Samson** did not take his sister's interest in the suit property into account; and that she has a right to claim a share of her father's estate.

[13] In her written submissions dated **17 September 2020, Mrs. Sawe**, learned counsel for the applicant proposed the following issues for determination:

> **[a]** Whether the applicant has proved dependency and entitlement to the deceased's estate;
>
> **[b]** Whether the late **Samson Kipsang Malel** was guilty of non-disclosure of material facts;
>
> **[c]** Whether the application before the Court is merited.

[14] In respect of the first issue, it was the submission of **Mrs. Sawe** that there being no dispute that the applicant is the biological daughter to the deceased, she had proved dependency. She also pointed to the indubitable evidence that the applicant used to reside on the suit property with her mother prior to her mother's demise in **2012** and urged the Court to find that she is indeed entitled to a share of deceased's estate. Counsel also submitted that the applicant had tendered cogent evidence to prove that, in his petition for grant, the late **Samson Kipsang Malel**, did not make a full and frank disclosure of her interest. Counsel drew the attention of the Court to the Chief's letter dated **8 August 1984** (the **Plaintiff's Exhibit 6)** as proof of this fact.

[15] On the merits of the application, counsel relied on **Sections 26, 27 and 29** of the **Law of Succession Act** and urged the Court to make provision for the applicant who was unjustly left out by her brother, by re-distributing the estate equally between the deceased's two children; and by taking into account the interest of Samson's estranged wife, **Elizabeth Jemutai (PW2).**

[16] On behalf of the respondents, **Mr. Yego** relied on his written submissions dated **1 October 2020**. On his part, he proposed the following issues for determination:

> **[a]** Whether the suit in **Eldoret SRMP&A No. 19 of 1984** has abated;
>
> **[b]** Whether the suit is overtaken by time and events; and
>
> **[c]** Whether the Grant of Letters of Administration Intestate issued on **30 August 1984** and confirmed on **20 May 1985** was obtained by misrepresentation and whether the same ought to be cancelled.

[17] Counsel for the respondents set out the brief background of the matter and asserted that, upon the demise of the deceased on **4 June 1978**, his only son, **Samson Kipsang Malel,** applied for and was issued with Grant of Letters of Administration Intestate in respect of the estate of the deceased herein; which Grant was confirmed on **20 May 1985**. Thereupon the subject property was registered in the name of the late **Samson Kipsang Malel** v*ia* transmission; and that **Samson** resided thereon with his mother until his demise on **24 July 2006**. Counsel further pointed out that, after the demise of the deceased's widow in **2012**, the children of **Samson Kipsang Malel** have continued to reside on the property to date with their mother, the 1st respondent.

[18] Thus, it was the submission of **Mr. Yego** that the proper respondent to this suit ought to have been **Samson Kipsang Malel** or his personal representative. He urged the Court to note that no citation was ever issued to the widow or children of **Samson Kipsang Malel** as a first step towards their substitution in **Eldoret SRMP&A 19 of 1984**; and therefore that the respondents lack the requisite *locus standi* to defend the revocation application. Counsel relied on **Julian Adoyo Ongunga & Another vs. Francis Kiberenge Bondeva (suing as the Administrator of the estate of Fanuel Evans Amudavi, Deceased)** [2016] eKLR for the proposition that the issue of *locus standi* is so cardinal in a matter such as this; and that without it the proceedings are null and void.

[19] Counsel further submitted that the lower court proceedings abated on **24 July 2007** by dint of **Order 24 Rule 3(1) and (2)** of the **Civil Procedure Rules;** the applicant therein having died on **24 July 2006**. He urged the Court to find that, since no application for either substitution or revival was ever filed in the cause, the instant application for revocation has no foundation. The case of **Justus Muthoka Nzau vs. Daniel Mwambu Mwamati & Another** [2019] eKLR was cited by **Mr. Yego** to support his argument. In addition, counsel took the posturing that the instant application is untenable in that it has been overtaken by both time and events; and that the applicant did not satisfactorily explain the inordinate delay of over 30 years in seeking revocation. Accordingly, the Court was invited to make the inference that the applicant acquiesced to the transmission of the estate property to her brother, **Samson**, and therefore is estopped from raising any complaint in connection therewith.

[20] In response to the allegations that the Grant was obtained fraudulently by **Samson Kipsang Malel**, it was the submission of **Mr. Yego** that the applicable law at the time of the demise of **Samuel Kimalel Tanui** on **8 August 1984** was Nandi customary law; under which only sons were entitled to inherit from their parents. He therefore took the posturing that the **Law of Succession Act, Chapter 160** of the **Laws of Kenya** and its entire regime for revocation of grants is inapplicable to the deceased's estate; and that the applicable law recognized only one beneficiary, namely, **Samson Kipsang Malel**. Reliance was placed by counsel on **Joseph Rotich & 4 Others vs. John Kimeli Busienei & Another** [2009] eKLR in urging the Court to dismiss the application dated **6 January 2015** with costs.

[21] I have carefully considered the evidence presented herein by the parties as well as the written submissions filed at the conclusion thereof. There is no dispute that the deceased herein, **Samuel Kimalel Tanui**, died on **4 June 1978** while domiciled in Kenya. The Certificate of Death as well as an extract from the Register of Death were produced by the applicant as **Exhibits 1 and 2**. The deceased was survived by his widow **Elizabeth Tanui** with whom he had two children; namely, **Samson Kipsang Malel** and the applicant, **Prisca Jepng'etich Tanui**. The parties are in agreement that **Elizabeth Tanui** and **Samson Kipsang Malel** are since deceased; the two having died on **24 July 2006** and **13 March 2012,** respectively.

[22] It is also common ground that the only free disposable asset left behind by the deceased was a piece of land known as **Nandi/Kipkarren Salient/234**, measuring 20.0 Ha.; and that before his demise, **Samson Kipsang Malel** filed an application before Eldoret SRM's Court, being **Eldoret SRMP&A Cause No. 19 of 1984** for Grant of Letters of Administration Intestate, in respect of the estate of the deceased. The matter was duly processed and a Grant issued to **Samson Kipsang Malel** on **30 August 1984 (the Plaintiff's Exhibit 10).** Upon the Grant being confirmed on **20 May 1985 (the Plantiff's Exhibt 11),** the estate asset was transferred, by way of transmission and vested in **Samson Kipsang Malel** as the absolute and sole proprietor thereof. (see a copy of the green card marked the **Plaintiff's Exhibit 4** and the Land Certificate produced by the 1st respondent as Document No. 8 in the List and Bundle of Documents dated **8 October 2019)**.

[23] The applicant now contends that she was all along unaware of the succession proceedings; and that she only got to know thereof when the family of her deceased brother chased her away from the suit property after the death of her mother in **2012**; and it is therefore within that backdrop that the applicant filed the instant application dated **6 January 2015**. As the succession cause was handled before the subordinate court, an order was made herein on **16 April 2018** directing the Deputy Registrar of this Court to **"…call for and expedite the transfer of the lower court file to this Court…"** That order was duly complied with; and although **Mr. Yego** had asked for directions on whether to proceed with the revocation application in the High Court File or the lower court file, the parties were in agreement that the matter proceeds to substantive hearing in the High Court Miscellanous File. This position was endorsed by the Court in the light of the provisions of **Section 47** of the **Law of Succession Act**; which stipulates that:

> **""The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient…"**

[24] Thus, for the avoidance of doubt, I need to emphasize that all necessary applications brought for purposes of the **Law of Succession Act** not specifically provided can only be brought by summons; for **Rule 49** of the Probate and Administration Rules states that:

> **A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.**

[25] I am therefore in total agreement with the position taken by **Hon. Makau, J.** in Re **Estate of Erastus Muriungi Nyaruthi (Deceased)** [2015] eKLR, as it was the applicable procedure as at the time the subject application was filed, that:

> **"…the proper procedure to seek revocation or annulment of Resident Magistrate decision against confirmation of a grant is by filing a miscellaneous application by way of summons as provided by the law of Succession Act to the nearest High Court registry applying the provisions of the Law of Succession Act but not to file a Notice of Motion applying the Civil Procedure Act as the provisions of the Civil Procedure Act do not apply to Succession matters save those specifically stated under Rule 63 of the Probate and Administration Rules…"**

[26] That said, there is need to tackle several technical issues raised by **Mr. Yego**, learned counsel for the respondents, before engaging in a merit-based consideration of the application. From the written submissions of **Mr. Yego**, the following preliminary issues emerge for determination:

> **[a]** Whether the **Eldoret SRMP&A No. 19 of 1984** had long abated; and whether the instant application has been overtaken by both time and events;
>
> **[b]** Whether the respondents have the requisite *locus standi* to be enjoined herein as respondents in respect of the deceased's estate;
>
> **[c]** Whether the **Law of Succession Act** is applicable to the estate of the deceased, who died long before the Act came into effect.

[27] On abatement of the lower court matter, it was the submission of **Mr. Yego** that, since **Samson Kipsang Malel**, the petitioner in **Eldoret SRMP&A No. 19 of 1984** died on **24 July 2006**, it was imperative that he be substituted by a personal representative within the timelines set by **Order 24 Rules 3(1) and (2)** of the **Civil Procedure Rules**, which provide thus:

> **(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.**
>
> **(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.**

[28] Whereas it is a fact that no application for substitution was filed in **Eldoret SRMP&A No. 19 of 1984**, it is instructive that **Order 24** of the **Civil Procedure Rules** is not one of the provisions imported into the **Law of Succession Act** for purposes of **Rule 63** of the **Probate and Administration Rules**. That Rule is explicit in **Subrule (1)** thereof that:

> **Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), …shall apply so far as relevant to proceedings under these Rules.**

[29] Indeed, authorities abound to demonstrate that the **Law of Succession Act** was is a stand-alone piece of legislation with its own

procedural rules; and therefore that the **Civil Procedure Act,** unless specifically provided for in the Act or the rules thereunder, and in particular **Rule 63** aforementioned, is inapplicable. The Court of Appeal made this explicit in in **Josephine Wambui vs. Margaret Wanjiru Kamau & Another** [2013] eKLR thus:

> **"We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and Rules of procedure. In the few instances where the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1)."**

[30] In the premises, the argument that the lower court matter abated pursuant to **Order 24 Rule 3** is clearly untenable. As to whether the application is overtaken by events; including the fact of the death of the administrator; the transfer of the property into the name of the administrator as the sole beneficial owner; and the fact that the administrator bequeathed the same to his progeny by a Will, it is noteworthy that in **Section 76** of the **Law of Succession Act,** it is recognized that:

> **"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 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;**
>
> **(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either-**
>
> **(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or**
>
> **(ii). To proceed diligently with the administration of the estate; or**
>
> **(iii). To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in material particular; or**
>
> **(e) That the grant has become useless and inoperative through subsequent circumstances."**

[31] Hence, the fact only that the administrator is deceased, or that the property has since changed hands in terms of ownership is no bar to the Court's intervention, should the same be warranted, even after confirmation of grant. This is because laches, acquiescence and estoppel are inapplicable within the context of proceedings for revocation of grant. In **Patrick Mwangemi Wanjala & 3 others vs. Jackson Ngoda Jumwa,** [2016] eKLR, for instance, the court held as follows-

> **"Although the Summons herein was filed on 12.8.14, six years after the Grant was issued on 28.3.08, and ten years after the demise of the deceased on 24.12.04, the law is clear that a "grant of representation, whether or not confirmed, may AT ANY TIME be revoked or annulled ..." There is therefore no limitation as to the time for filing summons for revocation of Grant. The law does not even provide that a party must explain any delay in seeking revocation of a grant. Consequently, this Court makes nothing of the fact that the Summons herein was filed 8 years after the grant was issued."**

[32] Similarly in **Jane Wambui Wahuga & 4 others vs. Ruth Njoki Mwangi [2016] eKLR,** it was stated-

> **"*The* said section states that a grant of representation, whether confirmed or not, may at any time be revoked by the court if it was obtained by fraud, or concealment. It may also be revoked if the proceedings were defective in substance and/or it was obtained by means of untrue allegation of facts essential in point of law to justify the grant. An application for revocation of grant cannot therefore be claimed to be time barred. Thus, the Applicants' grounds for revocation of grant as set out in the summons for the revocation or annulment of the grant cannot be dismissed based only on the ground of limitation. The court has an obligation to determine the application on the basis of the provisions of the law."**

[33] Hon. Musyoka, J. went further and held thus in Re Estate of Charles Ngotho Gachunga (Deceased) [2015] eKLR:

> **"It is argued that the application has come in too late. In other words the same was filed after an inordinate delay which has had the effect of rendering it time-barred due to effluxion of time. The answer to this submission is that the office of administrator is for life. He can be called to account at any time so long as he is still alive. Needless to say that section 76 of the Act does not impose any time limitations within which an application for revocation of grant ought to be filed."**

[34] The second technical point raised by **Mr. Yego** is the question whether the respondents have the requisite *locus standi* to be enjoined herein as respondents in respect of the deceased's estate. He made the argument, and validly so, that the administrator's personal

representative is yet to be enjoined to the lower court matter either by way of citation or substitution. I am in agreement that the fact only that the 1st respondent is the widow of **Samson Kipsang Malel** is no basis for her to be called to account in respect of the deeds and omissions of her deceased husband in his capacity as an administrator. That notwithstanding, it is also noteworthy that, the **Law of Succession Act** does not expressly provide for substitution of deceased administrators. What is envisaged by the Act is that, in the event of the death of one or more of joint administrators, where there are more than one administrator, the surviving administrator or administrators would then have the mandate, by dint of **Section 81** of the **Law of Succession Act,** to continue with their duties to completion without the need to replace the deceased ones. That Section states thus:

> **"Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them…"**

[35] In this respect the position taken **Re Estate of Mwangi Mugwe *alias* Elieza Ngware (deceased) [2003] eKLR,** by **Hon. Khamoni, J.** which I subscribe to, is that:

> **"…the operative word is "substitution". The Law of Succession Act has no provisions talking about substitution of a deceased single administrator…In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76(e) of the Law of Succession Act and Rule 44 of the Probate and Administration Rules whereby the Applicant would apply for revocation or annulment of a grant on the ground "that the grant has become useless and inoperative through subsequent circumstances." The Applicant would proceed to put a prayer in the same application that a new grant be made to him and could as well add a further prayer, if need be, for confirmation of the new grant. The application, should, of course, be supported by consent from adult beneficiaries in the estate of the first deceased person, the second deceased person being the deceased administrator."**

[36] In the same line of thought, **Hon. Musyoka J.** held as follows in **Re Estate of George Ragui Karanja (Deceased)** [2016] eKLR:

> **The Law of Succession Act does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative… It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the Law of Succession Act, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act."**

[37] And in the case of **Florence Okutu Nandwa & Another vs. John Atemba Kojwa, Kisumu Civil Appeal No. 306 of 1998,** the Court of Appeal made it clear that:

> **"A grant of representation is made in *personam*. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the Law of Succession Act. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the Law of Succession Act and the Probate and Administration (Rules)…"**

[38] In the light of the foregoing, it is manifest that the Grant of Letters of Administration Intestate issued to the late **Samson Kipsang Malel** became inoperative upon his demise, in accordance with **Section 76(e)** of the **Law of Succession Act**. The applicant having applied for revocation, it is only fair and just that the respondents, being persons who would undoubtedly be affected by the proposed revocation, be given a hearing before such orders are made. This is unlike the situation obtaining in the persuasive authority of **Julian Adoyo Ongunga & Another vs. Francis Kiberenge Bondeva** (supra) that counsel for the respondents relied on, wherein the appellant had taken it upon himself to file the suit for compensation on behalf of a deceased person without first obtaining a Grant of Letters of Administration *Ad Litem* or a full Grant of Letters of Administration Intestate. I therefore take the view that the joinder of the respondents to this suit is proper and accords well with **Articles 50** and **159(2)(d)** of the **Constitution,** which underscore the right to be heard and dictate that justice be done without undue regard to procedural technicalities.

[39] The last technical issue raised by **Mr. Yego** is whether the **Law of Succession Act** is applicable to the estate of the deceased, who died long before the Act came into effect. He submitted that since the deceased, a Nandi by tribe, died on **4 June 1978** before the commencement of the **Law of Succession Act**, his estate is governed by the Nandi customary law; according to which his only son, **Samson Kipsang Malel**, was the sole beneficiary of his estate. Thus, **Mr. Yego** defended the chief's letter dated **8 August 1984** by which **Samson** was named the sole beneficiary of the estate of the deceased, **Samuel Kimalel Tanui**. He relied on **Joseph Rotich & 4 Others vs. John Kimeli Busienei & Another** [2009] eKLR wherein, **Hon. Ibrahim, J.** (as he then was) held that:

> **"…The deceased died on 1st March, 1979. The Law of Succession Act came into operation on 1st July, 1981. Section 2(2) of the Act provides as follows:**
>
> > **"The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of the death, but nevertheless the administration of their estates shall commence or proceed so far as possible within this Act."**
>
> **The Will under challenge here was signed on 4th May, 1979. It was prepared by Mr. Paul Birech Advocate who testified and produced the same in court. It was signed by himself and another Advocate K.K. Arap Sego as witnesses. The**

applicable law at the material time, to Africans was the Africans' Wills Ordinance 1961, No. 35 of 1961…"

[40] It is common ground that the deceased, **Samuel Kimalel Tanui**, died on **4 June 1978** before the enactment and commencement of the **Law of Succession Act**; which Act came into effect on **1 July 1981**. Since the proceedings for grant were not initiated until **1984**, well after the **Law of Succession Act** came into operation, the respondents cannot be heard to argue for the exclusion of the **Law of Succession Act**. Indeed, the lower court matter was filed pursuant to the procedural rules set out in the **Law of Succession Act** and on the basis of statutory forms designed for purposes of such proceedings. Having taken that conscious step, it would follow that the procedural law applicable to the subject estate is the **Law of Succession Act,** as opposed to Nandi customary law.

[41] I would accordingly endorse the position taken by **Hon. Musyoka, J.** in **Re Estate of Seth Namiba Ashuma** (Deceased) [2020] eKLR that:

> **"35. It is correct to argue that for a person who died intestate in 1965, as is the case of the deceased herein, his estate fell for distribution in accordance with customary law, and administration of the estate was also to be done under customary law. The applicant says that he took over administration on that basis. That also appears to be the purport of section 2(2) of the Law of Succession Act, which provides as follows:**
>
> > **"2. Application of Act (1) … (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death."**
>
> **36. However, under section 2(2), an administration of the estate of a person, dying before the Law of Succession Act commenced would only be fully subject to African customary law, where the administration was sought before the Law of Succession Act came into force on 1st July 1981. For after 1st July 1981, the latter part of section 2(2) of the Law of Succession Act would become applicable, and the administration of an estate of a deceased person sought after that date then had to come under that portion of the section 2(2) which says:**
>
> > **"…but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."**

[42] The same viewpoint was taken by the Court of Appeal in **Erastus Gichingiri Muhoro vs. Gerishon Gichingiri Muhoro & 2 Others [2014] eKLR, thus:**

> **"The deceased died in 1974 and the Kikuyu Customary Law is what was applicable under *Section 2(2)* of the Law of Succession Act. However, the grant of Letters of Administration of the deceased estate was sought in 1996 under the current Act thus; the administration of the deceased's estate was to be in accordance with the Act as far as possible."**

[43] Moreover, Nandi County does not fall within the exemption provided for in **Section 32** of the **Law of Succession Act.** I therefore find no merit in **Mr. Yego's** argument that, because the deceased died before **1 July 1981**, the **Law of Succession Act** is inapplicable to his estate. I therefore take the view that, to the extent that the succession cause was filed after **1 July 1981** and pursuant to the Probate and Administration Rules, the administration of the estate is governed by the Law of Succession Act and the rules thereunder; and not Nandi customary law.

[44] Turning now to the merits of the application, the main grounds set out on the face of the Summons dated **6 January 2015**, for purposes of **Section 76** of the **Law of Succession Act**, are:

> **[a]** That the Grant of Letters of Administration Intestate was obtained fraudulently by concealment from the court the true existence of the true beneficiaries and dependants of the deceased's estate and more particularly the applicant who is the biological daughter and beneficiary of the deceased's estate;
>
> **[b]** That consent to the making of a Grant of Letters of Administration Intestate to a person of equal or lesser priority was not obtained from all the bona fide beneficiaries to the estate;

[45] While it is true that **Samson Kipsang Malei**, made no mention of his sister, the applicant, in his petition and the affidavit in support thereof; there is credible evidence to show that his mindset and intention was not inclined towards defrauding his sister. He apparently genuinely believed, albeit wrongly, that being the only son to the deceased, he was the sole heir and beneficiary of his estate, by virtue of the Nandi customary laws. (see **Eugene Cotran's Restatement of African law, Kenya Volume 2: The Law of Succession1969 (London, Sweet & Maxwell).**

[46] This mindset was further evinced in **Samson Kipsang Malel's** Will dated **28 September 1992** by which he bequeathed the suit property to his three sons, to the exclusion of his wife and daughters, such as the 3rd respondent herein. Accordingly, I am not convinced that the applicant proved fraud or any intention on the part of **Samson Kipsang Malel** to overreach her. As to whether **Samson** was right in his approach is an entirely different matter; as shall be soon manifest here below.

[47] Turning now to the merits of the application and whether the applicant has demonstrated that she was unjustly denied a share of the estate of her deceased father and whether sufficient cause has been made for revoking the grant pursuant to **Section 76(e)** of the **Law of Succession Act,** on the ground that it has become inoperative after the death of the administrator; with a view of making provision for the applicant, having given due consideration to the evidence, the submissions made by counsel and the authorities relied on by them, I take the following view of the matter.

[48] Whereas under Nandi customary law (that **Samson Kipsang Malel** purportedly acted upon in justifying the exclusion of his sister, the applicant), female offspring were not entitled to a share of the estate of deceased father, authorities abound in which, even before the advent of the **Constitution of Kenya, 2010**, such customs were questioned for being repugnant to justice and morality under **Section 3(2)** of the **Judicature Act, Chapter 8** of the **Laws of Kenya**. It provides that:

> **"The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."**

[49] *Thus,* **Madan, J.** (as he then was) had the following to say in ***Re Kibiego*** [1972] EA 179, an exposition that has gained sway hence:

> **"Whatever Cotran's source of Nandi Law may be, I am of the opinion that in today's Kenya, in the absence of a valid reason such as grave unsuitability, a widow of whatever race living in the country is entitled to apply to the Court for the grant of Letters of Administration, more so when the children, as in the instant case, are minors. A widow is the most suitable person to obtain representation to her deceased husband's estate. In the normal course of events she is the person who would rightfully, properly and honestly safeguard the assets of the estate for herself and her children. It would be going back to a medieval conception to cling to a tribal custom by refusing her a grant which is obviously unsuited to the progressive society of Kenya in this year of grace. A legal system ought to be able to march with the changing conditions fitting itself into the aspirations** of **the people which it supposed to safeguard and serve".**

[50] And, in **Rono vs. Rono & Another, [2008] 1 KLR 803**, the remarks by **Hon. Waki, JA**, are particularly apt. Here is what the learned Judge had to say well before the 2010 Constitution was promulgated:

> **"Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribers to the International Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two International Human Rights Covenants: the covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in 1966). In 1984, it also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women in short "CEDAW". Article 1 thereof defines discrimination against women as:**
>
> **"Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.**

[51] The Court of Appeal then went ahead to hold that:

> **"…in the circumstances of this case there is considerable force in the argument by Mr. Gicheru that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions."**

[52] Later on, in Mwongera Mugambi Rinturi & another v Josphine Kaarika & 2 others [2015] eKLR the Court of Appeal reiterated its interpretation of the law in this sphere thus;

> **"It would appear from the totality of the submissions made before us and the stance adopted by the appellants all through this protracted litigation that the kernel of their disenchantment lies in the fact that their sister Florence, a married daughter of the deceased, became not only a beneficiary but also an administratix of the estate. That much was clear from Mr. Kioga's resort to Meru Customary Law which stipulated, as captured by Dr E. Cotran in his Restatement of African Law: Vol 2 Laws of Succession at p30;**
>
> > **"Daughters receive no share of the estate. In the absence of Sons, the heirs are the nearest paternal relatives of the deceased, namely father, full brothers, half-brothers and paternal uncles".**
>
> **With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was the norm for a vast majority of Kenya's communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What RONO –VS- RONO (Supra) decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya, 2010. See also GRACE WACHUKA –VS- JACKSON NJUGUNA GATHUNGU [2014] eKLR. We have already noted that Mr. Kioga did concede, as he had to, that one cannot exclude daughters. We have also adverted to the irony of his then asserting in the same breath, that Florence should nevertheless have been excluded."**

[53] Thus, having been called upon to rectify an injustice, this Court cannot fall back on customs that clearly perpetuated discrimination and patriarchy. **Hon. Makhandia, J.** (as he then was) **in Re Estate of Solomon Ngatia Kariuki (Deceased) [2008] eKLR**, while speaking about the applicability of provisions of the **Law of Succession Act**, in the pre-2010 constitutional era aptly observed that;

> **"The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family."**

[54] *In the same vein, in* ***the Matter of Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased)*** **[2017] eKLR,** the point was made that:

> **"…There were bad times in the heavily patriarchal African Society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the Constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when Rono vs. Rono [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases – and the number is rising by the day as courts implement the Constitution – which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution."**

[55] Clearly, therefore, **Samson Kipsang Malel** wrongfully excluded his mother and sister, not only from administrative matters pertaining to the estate of **Samuel Kimalel Tanui**, but also from their rightful share in the estate of the deceased. In the premises, it is my finding that the applicant is entitled to half-share of the suit property.

[56] Although the Court was invited to also make orders in respect of the estate of Samson, and in particular to make provision for **PW2**, that invitation is untenable for the reason that this particular matter concerns, not the estate of **Samson Kipsang Malel** but **Samuel Kimalel Tanui.** The personal representative of **Samson Kipsang Malel** must take the responsibility by, likewise, seeking the intervention of the court vide a succession cause as is by law required; noting that **PW2** has the liberty to move as a citor if need be.

[57] In the result the orders that commend themselves to me, and which I hereby grant, are as hereunder:

[a] It is hereby declared that the applicant, **Prisca Jepng'etich Tanui,** as the daughter of the deceased, **Samuel Kimalel Tanui,** is entitled to half-share of the suit property, being **Land Parcel No. Nandi/Kipkarren Salient/234.**

[b] That the Grant of Letters of Administration intestate issued herein on **30 August 1984** and confirmed on **20 May 1985** be and is hereby revoked pursuant to **Section 76(e)** of the **Law of Succession Act;**

[c] That any and all registrations, transfers, sales and dispositions of the deceased's property known as **Land Parcel No. Nandi/Kipkarren Salient/234,** and any sub-divisions arising therefrom and other subsequent dealings with the said properties and sub-divisions be and are hereby declared unlawful null and void, are accordingly revoked, and all titles issuing therefrom shall be cancelled forthwith, including the title issued to **Samson Kipsang Malel** on **5 September 1985** in respect thereof.

[d] That the applicant, **Prisca Jepng'etich Tanui**, be and is hereby made the administratix of the estate of the late **Samuel Kimalel Tanui;** and that a fresh Grant of Letters of Administration Intestate and a Certificate of Confirmation be issued to her forthwith for the purpose of enforcing the fair distribution of the deceased's estate in accordance with the orders made herein.

[e] That each party shall bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF NOVEMBER, 2020

OLGA SEWE

JUDGE