



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 89 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE ANNELIES ANNA GRAFF

ELN (minor suing through the mother)

JN.....APPLICANT

VERSUS

BERNARD HEINRICH GRAFF.....1ST RESPONDENT

PAB.....2ND RESPONDENT

JUDGEMENT

1. Annelies Anna Graff (hereinafter simply referred to as the deceased) passed away on 15th September, 2010. A grant of representation to her estate was issued to her husband Bernard Heinrich Graff (hereinafter simply referred to as Bernard) who is the 1st Respondent on 29th November, 2010 and confirmed on 10th December, 2010. Bernard later passed away and on 16th June, 2016 and a grant of representation to the estate of the deceased was issued to the 2nd Respondent, PAB (hereinafter simply referred to as P) who is a son of the deceased.

2. The subject of this decision is the summons dated 22nd May, 2012 and amended on 28th October, 2018 in which the Applicant, ELN, a minor suing through her mother JN seek orders as follows:

“1. **THAT** the Honourable Court be pleased to revoke the Grant of Representation to the estate of the late Annelies Anna Graff issued to Bernard Heinrich Graff on 29th day of November, 2010 and confirmed vide a Certificate of Confirmation of Grant dated 10th December 2010;

2. **THAT** without prejudice to the foregoing, the Honourable Court be pleased to revoke the Grant of Representation to the estate of the late Annelies Anna Graff issued to PAB on 16th June 2016;

3. **THAT** pending hearing and determination of this application the Respondents be restrained from using, expending or otherwise investing the assets and moneys bequeathed to them on account of the last Will and testament of Annelies Anna Graff dated 8th March, 2010 and the Grant made on 29th November, 2010;

4. **THAT** this Honourable Court be pleased to make such reasonable provision out of the net estate of the late Annelies Anna Graff for the Applicant, ELN, as a dependant of the Deceased as the Honourable Court thinks fit;

5. **THAT** pending hearing and determination of this application the Honourable Court be pleased to restrain further dealing in the properties contained or set out in the Will of Annelies Graff (Deceased) dated 8th March, 2010 including the properties known as Plot No. 775 and 776 Malindi in the name of Tropicana Hotels Limited and two-acre Residential House Plot No. 826 and 827 Malindi known as Kingstone House.

6. **THAT** the Honourable Court be pleased to quash the transfer of the properties contained or set out in the Will of Annelies Graff (Deceased) dated 8th March, 2010 including the properties known as Plot No. 775 and 776 Malindi in the name of Tropicana Hotels Limited and two-Acre Residential Plot No. 826 and 827 known as Kingstone House.

7. THAT the Honourable Court be pleased to order the Respondents, jointly or severally, to produce to this Honourable Court a full and accurate inventory of the assets and liabilities of the late Annelies Anna Graff (Deceased) and a full and accurate account of all dealings therewith up to the date of the account within a time period the court deems fit;

8. THAT the costs of this application be provided for.”

3. The application which is premised on sections 76 and 26 of the Law of Succession Act, Cap. 160 (L.S.A.) and rules 44, 45 and 73 of the Probate and Administration Rules, 1980 (the Rules) is supported by grounds on its face, a supporting affidavit sworn by the mother of the minor Applicant and annexures to the affidavit.

4. The undisputed facts gleaned from the pleadings and the evidence adduced in this cause disclose that the Applicant EMN is the daughter of P who is now the sole respondent in this case. Patric is the son of the deceased and Bernard who is also now deceased.

5. On 8th March, 2010 the deceased executed a Will in which she appointed her husband, Bernard, the executor and trustee of her Will and Testament. Upon the demise of the deceased, Bernard petitioned for probate and issuance of a confirmed grant and the orders were issued on 10th December, 2010. Through an application dated 22nd June, 2011 made by Bernard, the grant was rectified to include land parcels numbers 781, 1843, 1844 and 1845 Malindi which had allegedly been sold by the deceased to one Marco Luciani and Maema Ltd before her death.

6. On 31st March, 2016 Bernard passed away and P was appointed in his place to manage the estate of the deceased. A grant was issued to Patric on 16th June, 2016.

7. The advocates for the parties filed and exchanged written submissions which they relied on in support of their clients' cases.

8. In submissions dated 29th November, 2018 counsel for the Applicant identified four issues for the determination of the court namely:

“i. Was the proper procedure followed in issuing the Grant of Probate dated 10th December, 2010 and 16th June, 2016 to the estate of the deceased;

ii. Was there misrepresentation of material facts in obtaining the Grant of Probate dated 10th December, 2010 and 16th June 2016;

iii. Whether the Respondents could dispose of properties not listed in the Will; and

iv. Whether the Applicant was a dependant of the Deceased.”

9. Submitting on the first issue, counsel for the Applicant urged this court to find that the proper procedure was not followed in issuing the grant of probate to the estate of the deceased. It was pointed out that the application for confirmation of grant was filed on the same day with the petition for grant of probate. Counsel for the Applicant submitted that the petition for grant of probate was not gazetted as required by Section 67 of the L.S.A. The decision in **Re Estate of Stephano M'mugambi M'ndiera (Deceased) [2008] eKLR** was cited in support of the assertion that compliance with Section 67 of the L.S.A. is mandatory.

10. Dismissing the assertion by the P that the grant was procedurally issued as it was confirmed in accordance with Section 71(4)(c) of the L.S.A., counsel for the Applicant submitted that no confirmation of grant can be made without notice of the petition for letters of administration for the estate of the deceased being published in the Kenya Gazette as required by Section 67 of the L.S.A.

11. It is the position of counsel for the Applicant that the court is empowered by Section 76(a) of the L.S.A. to revoke a grant of representation if the proceedings to obtain the grant were defective. Counsel for the Applicant therefore urged this court to revoke the confirmed grant as the filing of the petition for grant of letters of representation was made without notice in the Kenya Gazette.

12. Turning to the Applicant's allegation that the grant was hinged on misrepresentation of material facts, counsel for the Applicant submitted that among the grounds cited in support of the summons for confirmation of grant of probate by Bernard was that he needed to deal with the deceased's shares in Tropicana Hotels Ltd, the company that owns Eden Rock Hotel in Malindi. Bernard had also averred that the deceased was also a director in the company. Counsel for the Applicant submitted that when Patric was cross-examined on 22nd February, 2016 he averred that the deceased had sold Eden Roc Hotel before she passed away and he is the one who actually did the official handing over of the hotel. It was therefore the submission of counsel for the Applicant that if the hotel had been sold before the deceased passed away, then the grant of probate and confirmation thereof was based on a misrepresentation of material facts to the court.

13. On the third issue as to whether Bernard and P could dispose of properties not listed in the Will of the deceased, counsel for the Applicant submitted that in the case of the estate of a person who dies partially testate and partially intestate, the estate should not be consolidated into one cause since distribution of the estate would require application of different rules and procedures. It was submitted for the Applicant that the deceased died partially intestate since land portion numbers 781, 1843, 1844 and 1845 Malindi were not included in the deceased's Will and fall under the ambit of Part V of the L.S.A. which provides for administration of the estates of persons who die intestate.

14. According to counsel for the Applicant, a person who seeks to administer the estate of a person who died intestate requires consent as per

Rule 26 of the Rules which was not the case in this matter as the consent of the Applicant was not sought or obtained. Counsel cites the decision in **Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & another [2013] eKLR** in support of the submission that any petition for issuance of grant of letters of administration intestate must be accompanied by consents of all persons entitled to a share in the estate.

15. Turning to the last issue as to whether the Applicant was a dependant of the deceased, counsel for the Applicant submitted that grandchildren are included in the list of dependants provided in Section 29(6) of the L.S.A. According to counsel, there is no dispute that the Applicant was a grandchild of the deceased and had been welcomed to the family of the deceased and was being maintained by the deceased prior to her death. Paragraph 21 of the affidavit in support of the amended application is referred to as conveying the evidence of the kind of relationship between the deceased and the Applicant. It is further the submission of counsel for the Applicant that Patric was aware and had acquiesced to the deceased maintaining the Applicant herein especially because he was unable to do so.

16. Pointing to Section 28 of the L.S.A., counsel for the Applicant asserted that the said provision sets out the circumstances to be taken into account in considering whether any order should be made under Part III of the Act, key among the factors being the existing and future means and needs of the dependant, whether the deceased had made any advancement or other gift to the dependant during his lifetime and the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making any provision for the dependant. Reference was made to the decision of **In the Matter of the Estate of Joseph Namayi Lukungo (deceased), Kakamega High Court Succession Cause No. 457 of 2005** as reiterating the provision of Section 29(b) of the L.S.A.

17. It was submitted by counsel for the Applicant that the testimony of the mother of the Applicant shows that Patric has not featured in the life of the minor, nor has he fulfilled his parental responsibilities. Further, that Patric is unable to provide for the Applicant's needs and that the Applicant was maintained by the deceased from the moment the Applicant was born until the deceased passed away. Additionally, it was submitted that Patric had not complied with the orders issued in Malindi CMCC No. 23 of 2012 directing him to pay the Applicant's school fees.

18. The closing statement of counsel for Applicant was that no reasonable provision was made for the Applicant in the deceased's Will and this could have been caused by the fact that she made her Will when terminally ill. Counsel therefore urged this court to allow the application.

19. In opposing the application, counsel for the P through submissions dated 6th December, 2018, identified the following issues for determination:

“(i) Whether the objection was filed within time.

(ii) Whether the deceased left a valid Will.

(iii) Whether the procedure of the application of the confirmed Grant was lawful and if not, what would be the effect of the nullity of such a grant on property already disposed off on the basis of the annulled grant?

(iv) Whether the applicant was a dependant of the deceased.

(i) Whether there is any property capable of being shared under the intestacy provisions of the Act.”

20. On the first issue regarding the time in which the application was filed, counsel for P submitted that this court has no jurisdiction to handle this matter the same having been filed after the grant of probate was confirmed. The submission is supported by reference to Section 30 of the L.S.A. which provides that **“no application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71.”** According to counsel, the grant having been confirmed in accordance with Section 71 of the L.S.A., this court has no jurisdiction to entertain an application made under sections 26 and 29 of the L.S.A.

21. As to whether the deceased left a valid Will, P's counsel submitted that the Will made by the deceased was valid and there is no direct challenge to the validity of the Will by the mother of the minor save for the averment at paragraph 23 of her affidavit in support of the amended application that **“the deceased made her Will when she was terminally ill and this might have played a part in the omission.”** According to counsel, the said averment is speculative and does not meet the threshold for declaring the Will of the deceased invalid.

22. On the claim by the Applicant that the established procedure was not followed in the confirmation of the grant of probate, counsel for P submitted that Section 71(4) allowed the confirmation of a grant at the time of its issuance in certain circumstances. In his view, the confirmation of the grant of probate was therefore regular. This assertion was supported by reference to the decision in the case of the **Estate of George Mituga Omari (Deceased) [2016] eKLR.**

23. According to counsel, Section 67 of the L.S.A. is deemed to have been amended by the latter provision that came into operation as an amendment in 1984 and it cannot be construed that Parliament intended that there be publication of the application in the gazette while the whole purpose of the enactment was to inject speed into the application where the conditions are met. Counsel therefore urged the court to find that the grant of probate to Bernard was validly issued and the same was only terminated by his death.

24. Counsel for Patric further submitted that no application was made to substitute Bernard within one year as required by Order 24 Rule 4 of the Civil Procedure Rules, 2010 and any claim against Bernard had therefore abated.

25. Further, that actions undertaken by Bernard were protected by Section 93 of the L.S.A. According to counsel for Patric, the mother of the Applicant had confirmed that the only property belonging to the estate of the deceased were two shares in Tropicana Hotels Limited which belonged to P's grandmother Elsbeth Van Menyhart and plots number 826 and 827 where the deceased and Bernard used to live. It was submitted by counsel for P that Bernard had averred in an affidavit sworn on 20th June, 2011 that plot numbers 781, 1843, 1844 and 1845 had been sold to Marco Luciani and Maema Limited by the deceased before she passed away. Counsel therefore submitted that there was nothing left in the estate of the deceased.

26. On the question as to whether the Applicant was a dependant of the deceased, Patric's counsel submitted that for provision to be made to a dependant in pursuance of an application under Section 26 of the L.S.A., the applicant should first establish that he/she was a dependant as defined by Section 29 of the L.S.A. Counsel stated that in the case at hand we are dealing with the estate of a deceased married woman and the only dependant was her husband, Bernard. It was counsel's position that Patric was not a dependant of the deceased and consequently the Applicant who is the daughter of P could not, under any circumstances, characterize herself as a dependant of the deceased. Counsel asserted that the Applicant would not be able to directly inherit from her grandmother so long as the father is alive. The decisions in the cases of **In Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR** and **Cleopa Amutala Namayi v Judith Were [2015] eKLR** were cited in support of this proposition.

27. As for the evidence adduced in support of dependency, Patric's counsel dismissed the same as being inadequate. He submitted that the hotel was sold and there was no evidence of the Applicant having continued to receive any support from the deceased after the hotel was sold. Further, that Patric worked at the hotel when they still owned it and it was natural that the Applicant would get the services referred to by the Applicant on account of her father's position at the hotel. According to counsel, no evidence was adduced to show that the deceased was indeed paying school fees for the child.

28. On the last issue as to whether there is property capable of being shared under the intestacy provisions of the L.S.A., it was submitted that according to P's averment, there is nothing left of his mother's estate capable of being collected and shared out. Further, that Patric had averred that until he was appointed he did not know the position of the estate and he would not have bothered to apply for grant of probate had he known that nothing remained in his mother's name.

29. Finally, it was submitted on behalf of Patric that by paragraph 2 (B) of the Will, the deceased bequeathed all the residue of her estate to her trustee meaning that no part of the estate would have fallen to be shared under the intestacy rules. Further, that Patric had explained that he was paying the Applicant's insurance but only stopped doing so after his property was destroyed by fire forcing him to go to Germany and re-start his life. Patric therefore asked the court to dismiss the Applicant's summons.

30. In my view, the issues in this matter are:

- (a) Whether there is a valid application before this court;
- (b) Whether the grant of probate should be revoked; and
- (c) Whether the Applicant was a dependant of the estate of the deceased.

All the other issues identified by the advocates for the parties will revolve around these issues.

31. P's counsel raised an objection to the application premised on Section 30 of the L.S.A. The section bars the making of applications under Part III of the L.S.A., which sections 26 and 29 fall into, after a grant has been confirmed in accordance with by Section 71 of the L.S.A. Indeed Rule 45(1) of the Rules is clear that an application under Section 26 of the L.S.A. can only be made **“where a grant has been applied for or made but not confirmed.”**

32. On the face of it therefore, this court has no jurisdiction to entertain the instant application since it was brought after the grant had been confirmed.

33. There is, however, an application for revocation of the grant. If the application succeeds, a door is opened for the Applicant to make her application. The question therefore is whether the confirmed grant of probate should be revoked. Section 76 of the L.S.A. provides the grounds for revoking or annulling a grant as follows:

“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;
- d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

ii) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court

order or allow; or

iii) to proceed diligently with the administration of the estate; or

iv) 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 any material particular; or

e) that the grant has become useless and inoperative through subsequent circumstances.”

34. The Applicant relies on two of those grounds namely deficiency in the procedure of obtaining the grant and concealment of something material from the court.

35. On the claim that there was misrepresentation of material facts the Applicant stated that the grant was obtained and confirmed on the strength of an averment by Bernard that there was need for the grant to be confirmed in order to enable him deal with the deceased's shares in the company that owned Eden Roc Hotel. According to the Applicant this averment was contradicted by Patric when he stated that the hotel had been sold during the lifetime of the deceased. In the contradictions in the averments of the late Bernard and Patric the Applicant spots a misrepresentation of material facts.

36. I am not persuaded by the Applicant's claim that the grant of probate was obtained by misrepresentation of material facts to the court. There is no evidence on record that the late Bernard changed his averment prior to his demise. The fact that Patric averred otherwise did not in any way render the averment of Bernard untrue. Bernard cannot be accused of having misrepresented facts to the court on the strength of the averment of P. There is nothing apart from the averment of P to show that the deceased, at the time of her death, did not hold shares in the company that owned Eden Roc Hotel. I therefore do not agree with the Applicant that the grant of probate is poisoned for having been obtained based on misrepresentation or concealment of facts.

37. The other ground upon which the Applicant seeks to revoke the grant is the deficiency in the proceedings leading to the grant of probate. Counsel for the Applicant submitted that the grant was confirmed in breach of Section 67 of the L.S.A. The Section states:

“67. Notice of application for grant

1. No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.

2. A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.”

38. I was urged by P's counsel to find that the said Section was amended by Section 71 of the L.S.A. which provides for immediate issuance of a confirmed grant in certain circumstances. Counsel submitted that this should be so since Section 71(4) was introduced through an amendment in 1984 and should therefore be deemed to have revoked Section 67 of the L.S.A.

39. With utmost respect to P's counsel I must state that his submission is untenable. If Parliament had intended to amend Section 67 through Section 71(4) then it should have said so.

40. As was explained by the Court of Appeal in **Sally Njambi Mahihu & another v Mwanguzi Kai Deche & another [2017] eKLR; Civil Appeal No. 42 of 2016 (Malindi)** Section 67 of the L.S.A. is meant to **“avail any objector the time and opportunity to participate in the probate proceedings.”**

41. In my view, Section 71(4) could not have therefore been introduced to upset such a very important provision. In matters of succession of the estates of deceased persons, a notice of the filing of an application for grant is meant to protect the beneficiaries of the estate and other persons like creditors who have an interest in the affairs of the estate of a deceased person. Compliance with Section 67 of the L.S.A. is necessary before a grant, other than a limited grant for collection and preservation of assets, is made. Indeed the provision does not contemplate a confirmation of a grant of representation where published notice of the application of such a grant has not been made. Section 71(4) was only meant to ameliorate the requirement by Section 71(1) that a grant can only be confirmed after expiration of a period of six months from the date of its issuance.

42. The grant of probate herein therefore suffered a procedural defect. It is a grant that may be revoked on ground (a) of Section 76 of the L.S.A. I say it may be revoked as the power granted to the court is discretionary for the language used is that the court **“may at any time”** revoke or annul a grant of representation whether confirmed or not.

43. The door is thus open for the court to consider the ultimate question as to whether the Applicant was a dependant of the deceased. P's counsel frowned on the existence of such dependency stating that the Applicant being the grandchild of the deceased could not access the goodies of the estate of the deceased during the lifetime of her father, P.

44. The submission that a grandchild can only access the estate of his/her grandparent after the demise of the child's parents was backed by the decision of this Court (W. Musyoka, J) in the matter of **In Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR** where it was stated that:

“ 36. The available literature appears to place her under Mary Musambayi. I suspect that she is a daughter of the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependent of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased. There are two reasons for this. She is not an heir of the deceased, for grandchildren are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependent of her grandparent, but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependent on the grandparent immediately before his death.”

45. Also cited is the decision of A.C. Mrima, J in **Cleopa Amutala Namayi v Judith Were [2015] eKLR** wherein the learned Judge held that:

“17. Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents who died intestate after 01/07/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren’s own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say such grandchildren must hold appropriate representation on behalf of their parents.”

46. It is noted that W. Musyoka, J did clarify that a grandchild is not entitled to inherit from a grandparent unless there is an application for provision under Section 26 of the L.S.A. In the case before me there is an application by the Applicant for provision under Section 26 of the L.S.A. and the cited cases do not therefore speak to the situation herein.

47. Section 29 of the L.S.A. provides who the dependants of the estate of a deceased person are by stating that:

“29. Meaning of dependant

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

48. Section 29(a) creates a special category of dependants who are dependants due to their relationship to a deceased. Here the wife, wives, former wife or wives and the children of the deceased are automatic dependants and it is immaterial whether or not they were being maintained by the deceased immediately prior to his death. The next category found in Section 29(b) can only be dependants if they were being maintained by the deceased immediately prior to his death. Not all the parents, step-parents, grand-parents, grand-children, step-children, children whom the deceased had taken into his family as his own, brothers, sisters, half-brothers and half-sisters of a deceased are dependants of the deceased person. Maintenance by the deceased prior to his death has to be established before a member of this group becomes a dependant. Section 29(c) provides that a husband of a deceased is a dependant if he was being maintained by the wife immediately prior to the date of her death.

49. The question therefore is whether the Applicant was a dependant of the deceased immediately prior to the demise of the deceased. The mother of the Applicant testified and called witnesses who established that the Applicant was provided for by the deceased. P lived separately from the Applicant and her mother. The house in which the Applicant and her mother lived in belonged to the hotel. The particulars of dependency as particularized in paragraph 21 of the affidavit sworn by the mother of the child in support of the amended application were not disputed.

50. On the other hand Patric did not produce any evidence to show that he catered for the needs of the child. Indeed there is evidence that in 2012 he was sued by the Applicant’s mother for maintenance of the child.

51. On the evidence adduced I am satisfied that the Applicant was indeed a dependant of the deceased.

52. Before making my final orders there was an issue as to whether the deceased died partially intestate. Counsel for the Applicant submitted that the properties that were not included in the Will ought to have been dealt with under the law applicable to the estates of persons who die intestate.

53. P’s counsel stated that by virtue of paragraph 2(B) of the deceased’s Will the deceased had dealt with her residual estate and it cannot be said that the law applicable to persons who die intestate was applicable to the estate of the deceased.

54. Paragraph 2(B) of the last Will and Testament of the deceased stated that:

“I devise and bequeath all the residue of my estate situate in Kenya (residuary estate) unto my trustee and I direct my trustee to sell, call-in and convert into money at such time and in such manner as he shall think fit with full power to postpone the sale, calling-in and conversion of the whole or any part or parts of my residuary estate during such period as he in his uncontrolled discretion shall think proper without being liable for loss.”

55. A residuary clause in a Will disposes of property not expressly dealt with by the other provisions of the Will. Through that clause the deceased brought on board any property that she did not specifically mention in the Will. Had she not included this clause, then the parcels of land which later came into light would have passed through the intestate succession rules. Therefore, the assertion by the Applicant’s counsel that the deceased’s estate was partially intestate is without merit.

56. My statement is backed by the First Schedule of the L.S.A. which provides rules for construction of wills. First, Rule 17 provides that a testator shall be presumed to calculate against intestacy so that a construction avoiding intestacy shall be preferred.

57. Secondly, Rule 28 states:

“28. Effect of general residuary bequest

A general residuary bequest shall comprise all free property of the testator as at the date of his death, whether or not acquired after the date of the will, of which he has not otherwise disposed, and shall include all free property of which he may have attempted but failed to dispose, even though expressly excepted from the gift.”

58. The deceased therefore took care of her residuary estate through the residuary clause. Rules of intestacy were therefore not applicable to her estate.

59. On the other hand, the assertion by P’s counsel that since all the properties were covered by the Will there is nothing to collect and distribute to the Applicant has no legal backing. Section 26 of the L.S.A. empowers the court to make provision for a dependant out of a deceased’s net estate. The residuary estate, if available, can come in handy in making provision for a dependant who has successfully made an application under Section 26 of the L.S.A.

60. Finally, the question is whether there is anything left in the estate of the deceased from which the court can make provision for the Applicant. P says there is nothing but the Applicant’s mother says there is something.

61. It was incumbent upon the Applicant to pinpoint to the court the properties forming part of the estate of the deceased. In her testimony before this court she talked of the mother of the deceased owning shares in Tropicana Hotels Ltd which owns Eden Roc Hotel. She however stated that she did not know the extent of the shares owned by the deceased in Eden Roc Hotel. She also testified that Eden Roc Hotel had been sold and plots numbers 826 and 827 were owned by the person who bought the shares in the hotel. She also stated that she did not carry out any search. On further cross-examination she stated that **“I do not know what constituted the estate of the deceased.”**

62. Still answering questions put to her in cross-examination she testified that she did not know the number of shares the deceased held in Elaco SA. Her evidence was that her including land portion number 781 in the list of the properties of the estate of the deceased was erroneous. She also testified that she did not know if land portion numbers 1843, 1844 and 1845 were sold by the deceased before she died. Referred to an affidavit sworn by Bernard on 22nd June, 2011 she told the court that Bernard had averred that the deceased had sold plot numbers 781, 1843, 1844 and 1845 to third parties as per the agreements annexed to the affidavit. She also stated that she had not cross-checked to verify the averment by Bernard.

63. The evidence of the mother of the Applicant painted a picture of a person who did not know what constituted the estate of the deceased. When P testified in February, 2016 he told the court that the deceased’s shares in Tropicana Hotels Ltd had been sold. His evidence, which was not rebutted, was that there was nothing left in the estate of the deceased by the time he was appointed an executor of the deceased’s Will.

64. The totality of the evidence adduced therefore shows that the estate of the deceased was fully distributed and there is no property or income from which this court can make any provision for the maintenance of the Applicant.

65. Going back to the beginning, I find that although the grant of probate did not comply with the procedure, a revocation of the same would be an exercise in futility. The estate was fully distributed and the properties sold to third parties who are not party to these proceedings and who may not have been aware of the defect in the grant of probate. A revocation of the grant will therefore not add value to the Applicant’s case.

66. Although the Applicant did establish that she was indeed a dependant of the deceased, there is nothing to give her from the estate of the deceased. Fortunately, her father P is alive and should continue providing for her. Anything that would have been given to her would have taken this fact into consideration.

67. The conclusion is that the application fails and the same is dismissed. Owing to the relationship of the parties involved and the issues raised in this matter I make no order as to costs. Each party will therefore bear he/his own costs.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT