



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYAHURURU
SUCCESSION CAUSE NO.104 OF 2017
IN THE MATTER OF THE ESTATE OF N K K (DECEASED)
A N D –
SWK.....APPLICANT
- V E R S U S -
EKK.....RESPONDENT
JUDGMENT

NKK, who was a resident of Ngorika area, Nyandarua, died on 17/03/2010 as indicated in the death certificate No. 950***(EKKi).

SWK is the wife of the deceased while there is no dispute that the Respondent **EKK** is a son to the deceased.

The court must first give a brief history of this case before addressing the application under consideration. The Respondent whom I shall refer to as **E**, filed Succession Cause 66/2011 after citing the Applicant; Although **E** had filed this cause, the Respondent went ahead and filed a parallel suit **NKU 103/2012** where a grant of letters of Administration was issued to her on 21/05/2012 and the same was confirmed on 15/02/2013. **E** filed an application dated 17/05/2013, seeking revocation of the said grant. The Applicant did not oppose the said application and by Justice Emukule's ruling of 31/01/2014, the confirmed grant was recalled and revoked. **E** and the Applicant were appointed as joint Administrators of the deceased's estate. The court further ordered that the titles to the assets comprising the estate; namely **Plot *** Ngorika Settlement Scheme and Nakuru/Bahati/Ndunduri/***** were to revert to the names of the deceased, **NKK** and any other registration was cancelled.

In compliance with the court order, the Applicant and **E** were issued with a joint grant of letters of Administration Intestate dated 31/01/2014 and after six months, **E** applied for confirmation vide the summons dated 20/08/2014. The same was fixed for hearing on 05/12/2014. The application was served on the firm of Osero & Co. Advocates who then had conduct of the matter on behalf of the Applicant; the application was duly received by the said Advocate on 25/11/2014 but at the hearing of the application on 05/12/2014 neither the Applicant nor the Advocate attended court and the court proceeded to hear the summons.

In the presence of Mr. Njuguna, Counsel for **E**, the then Applicant, grant was confirmed in terms of paragraph 5 of the affidavit in support of the application.

Upon being issued with the confirmed grant **E** took action by applying for subdivision of the deceased's estate, that is, land into individual portions in terms of the confirmed grant. The exercise was not completed because the Applicant filed the application dated 29/02/2016 through Njiiri Kariu and Njau Advocates and that is the application that is before me for determination. The Applicant sought the following orders;

1. Spent;

2. That the Respondent by himself, his agents or servants be restrained from evicting and or moving any persons, selling, disposing or redistributing LR. Nyandarua/Ngorika/* and Bahati/Ndunduri/2*** which form the deceased's estate;**

3. That the Respondent by himself or his servants be restrained from occupation, use, ingress and egress from the two parcels of land Nyandarua/Ngorika/ * and Bahati/Ndunduri/***;**

4. That the distribution of the confirmed grant be stayed and Respondent be barred from taking any further action of the

grant issued on 05/12/2014;

5. That the grant of letters of Administration be redistributed in accordance with the wishes of the deceased;

6. That the estate and share of SWK be determined before the distribution of the estate;

7. That the court do determine the beneficiaries of the estate;

8. That the deceased's estate as distributed during his lifetime be upheld by this court;

9. That the matter be heard afresh;

10. That the grant issued to both the Applicant and Respondent on 31/01/2014 be revoked.

The application was based on grounds that the deceased was not polygamous; that the beneficiaries were not consulted and did not consent to the distribution; that the estate was distributed to strangers and that the deceased had distributed the estate during his lifetime. The application was supported by the affidavit of the Applicant who deposed inter alia, that she got married to the deceased in 1970 and they were blessed with nine children; that she had engaged the firm of E.N Njue & Co. Advocates to represent her that she has learnt that the said Advocate did not have a practicing certificate, that she was never served, cited or made aware of the application for confirmation of grant filed by E nor did she give her input on distribution; that the distribution was unfair to the beneficiaries of the estate as strangers were included; that she contributed to the repayment of the land in respect to *Nyandarua/Ngorika****; that she is aware that E is the deceased's son as she took care of him after the mother MN was divorced by the deceased in 1967 and that the said M remarried to one Kairu where she sired five other children namely;

1. NWK

2. PMK

3. AK

4. DK

5. MK

She further deposed that the said MN died and was buried in her home in Muguga and is not a beneficiary of the deceased's estate; that the deceased had told her during his lifetime that he had divorced MN and that thereafter, E distributed the estate fraudulently; that the deceased had distributed the estate in his lifetime and that E failed to inform the court that beneficiaries had not given their consent.

JMK, a son to the deceased by the Respondent also swore an affidavit in support of the application where he reiterated what the Applicant had stated. He denied that the deceased had two houses, or that E's siblings by his mother were children of the deceased. The Applicant also filed a further affidavit dated 20/09/2017 denying the averments by the E.

EK filed a replying affidavit dated 13/05/2016 in which he deposed that at all material times, he involved the Applicant in the matters of the deceased's estate but she refused to cooperate and is using delaying tactics and violence as per the exhibited P3 form **EKK7B**; that the Applicant filed the application dated 26/01/2015 which was dismissed; that the Applicant is wasting the estate through quarrying and felling trees; that most of the issues raised in the application are res judicata as they have been adjudicated upon in the earlier application; that the issue of how many houses the deceased had was settled by Justice Emukule in his ruling of 31/01/2014 and Applicant's own affidavit dated 15/02/2011; that the firm of Osero & Co. Advocates represented the Applicant even until 26/01/2015 that firm of E.N. N was engaged and prosecuted the application dated 26/01/2015 and thereafter the Applicant was aware of what transpired before 26/01/2015; that though blind, the deceased engaged in economic activities that enabled him pay the Settlement Fund Trustee (SFT) loan; that at the time his mother separated from the deceased, they were three children in their house and that the deceased regarded them as his, and that when the siblings wanted to be circumcised or marry they sought the deceased's permission/ blessing; That the deceased married the Applicant in 1972 when he was a big boy; that the Ngorika land had been allocated to the father in 1966 when his mother was still with the deceased and that by the time the Applicant got married to deceased the SFT loan had been repaid. He denied trying to disinherit the other beneficiaries but that the Applicant is trying to do that and he urged the court to dismiss the application.

On 23/11/2017, directions were taken that the matter be determined by way of viva voce evidence, and the parties were at liberty to file further statements in addition to the affidavits already on record. The objector filed further statements of the objectors, *JKK, JKM and JMK*. The Objector/Applicant (PW1) reiterated the contents of her statement and affidavits. She admitted that E is her step son who was born to the deceased by another wife before she got married to him; that after the deceased's death, she applied for letters of Administration which were issued to her, as a result of which she was issued with the titles to deceased's property. She admitted that the land has not been distributed because when she attempted to do so, she was informed that the grant had been revoked and that she was supposed to jointly administer the estate with E and which she had no knowledge of. When she was away she was informed that the land was being subdivided by E; that before that E had gone home with the Chief and assaulted her and she obtained a P3 form, P-Exhibit 2 and she wants the court to order that the land belongs to her. She denied knowledge of the order cancelling the titles issued to her or that the green card had an entry of her and E as joint administrators; that the land was proposed to be shared into three parts, one part to be sold to defray costs of distribution and the balance to be shared between the houses while *Bahati/Ndunduri**** was to be sold and proceeds shared equally. In cross examination she denied to have sworn the affidavit dated 15/03/2011 in which she admitted that the deceased had two houses and that E had two other siblings.

PW2 JKK told this court that he was a brother to the deceased, and he knew the objector as the only wife of the deceased; that the deceased had been married to MN but they divorced in accordance with **Kikuyu Customary Law**; that MN had only one child with the deceased; that N got married elsewhere and got other children and that she died and was buried where she had married. PW2 said that the grant issued to E should be revoked because E cannot be entitled to land when the Objector/Applicant is still alive. He did not recall when N left the deceased. Though he said that N remarried, PW2 did not know to whom or where.

PW3 JMK described himself as a brother in – law to the deceased, his brother having married the deceased’s sister. He denied having ever seen the deceased with another wife; that he knew the deceased as a young man, but did not know E’s mother, or when the Objector/Applicant got married to the deceased. He did not know that the deceased had a wife by name MN.

In support of the E’s (Respondent’s) case three people testified, **JMK, JKK and EKK**

DW1 JMK described himself as a young brother to the deceased. He recalled that the deceased was allotted the land at Ngorika in 1965 when he was married to MN; that DW1 lived with MN on the land for 3 years as the deceased was by then working in Nairobi; that MN got three children **E, Wand PM**; that he (DW1) later went back to Elburgon and that MN left her matrimonial home with 2 children but E was left behind. He did not know why N left nor did he hear of any divorce. He knew that the deceased had two houses first house, made of 3 children and the 2nd house, of the Objector/Applicant and her 9 children; that after the deceased’s death, the Objector was uncooperative.

DW2, JKK is a nephew to the deceased. He stated that the deceased was allocated the Ngorika land in 1966 and that DW went to live on the said land for about 2 ½ years. When DW1 left DW2 went to live on the said land with EK, and his mother MN and his grandmother; He stayed on the land for 2 years 3 months when he went to help another of his uncles at Kinangop in 1970; that by then, MN had 3 children, **E, NW and PM**. DW2 knew the Objector/Applicant as the deceased’s wife with whom they have 9 children. He said that he used to relate well with the Applicant till the deceased died and E was not informed of the death but on learning of it, reported to the Chief who summoned the family and they were told to apply for letters of administration after burial. DW2 said that K is an uncle of MN who lived in Mombasa.

DW3 EK, (the Respondent), testified that he was born in 1963 to MN and the deceased; that the parents married in 1963, and he had two other siblings **NW born in 1966 and PM, born in 1968**; that his mother separated from the father in 1970; that he remained at Ngorika where he lived with his uncle **J DW1 and his wife and later with JK, DW2**. When the mother left he was left, with the grandmother and DW2; that the mother left for Nairobi to give birth; that she never returned to Ngorika; that in 1972 the father married the Applicant who already had one child; that he lived well with the Applicant and her children; that whenever his brother PM came home, the Applicant would welcome him; that in 1975, his mother moved to Mombasa to live with her uncle DK. She was allocated land there and she never remarried; that when she died, she was buried by her father; that when the deceased died, he was not informed of the death till one of his half brothers, M enquired from him; that when he arrived at home, he found PW1, 2 and 3 and on making enquiries, the Applicant became hostile to him; that the matter was referred to the Chief, and they agreed on burial to proceed; and they returned to the Chief after burial where the objector was given a letter of introduction to the court dated 27/09/2010 listing all beneficiaries; that all beneficiaries were present save M, a daughter of the Applicant as per letter dated 27/09/2010. He later learned that the Applicant had filed a succession cause with a letter also dated 27/09/2010 purportedly authored by the Chief of Ngorika Location but which omitted the beneficiaries from the 1st house that the Chief swore an affidavit dated 01/07/2013 denying having written or issued the letter dated 27/09/2010 to the Applicant (page 47). On legal advice, E cited the objector and she was duly served with the citation but she declined to respond. E filed a succession cause 66/2011 in which the objector filed an objection but went ahead to file succession cause 103/2012 where only her house were identified as beneficiaries and obtained grant on 21/05/2012. The said grant was confirmed distributing the whole estate to the Applicant’s house. That is when E applied to have the grant revoked which the court granted in its ruling of 31/01/2014 and both the objector and E were appointed administrators of the deceased’s estate; that he applied for confirmation of grant, and invited the Applicant; E asked the District Officer to invite the Applicant to consent to distribution but she did not appear. The Land Control Board gave the consent on 22/01/2015 and the estate was subdivided into 4 portions. E further stated that the objector and her children have been in use of the land having chased him away and assaulted him and the Assistant Chief on 13/02/2015. It is E’s contention that the objector is not truthful.

Having reviewed the evidence of the witnesses and the rival submissions by Counsel, I think that the issues that require determination are as follows;

- 1. Whether the Respondent E is a beneficiary of the deceased’s estate.**
- 2. Whether the deceased was polygamous.**
- 3. Whether the grant issued to the Respondent (E) on 31/01/2014 and confirmed on 05/12/2014 should be revoked, annulled or amended.**

Whether the Respondent is a beneficiary of the deceased’s estate:

E described himself as the son of the deceased who was sired by the deceased’s first wife, MN. He told the court that he was born in 1963. All the witnesses who testified both for the Applicant and E do agree that E is the son of the deceased. The Applicant admitted that when she got married to the deceased in 1972, she found E living with the father, (the deceased) and the grandmother and that she took care of him as her own son until he grew up. E told the court that he lived in harmony with the Applicant and he has even assisted the Applicant’s children until the demise of the deceased that the Applicant became hostile towards him. The hostility became manifest when the objector sneaked to court and obtained a confirmed grant dated 15/02/2013 in which the Applicant failed to include E as one of the deceased’s children and hence a beneficiary. **Section 29 (a) of the Law of Succession Act sets out who a deceased’s dependants are;**

“Dependant means 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.”

By the letter dated 27/09/2010, the Chief of Ngorika Location, where parties hail from, identified E as one of the deceased's beneficiaries. The Applicant in her replying affidavit dated 15/03/2011 and filed in court on the same date, at paragraph 6 thereof, also identified E as one of the beneficiaries of the deceased's estate. The above affidavit forms part of the record and it is trite law that each party is bound by its own pleadings. The said affidavit has never been struck off. It is therefore dishonest for the Applicant to depone at paragraph 10 of the application dated 29/02/2016 that ***"the grant was issued to SW and E on 31/01/2014 be revoked on the ground that it was obtained based on untrue allegations, false information statement and facts by fraudulently affirming that the said administrator was the son to the deceased and that the deceased had two wives."***

Further at paragraph 11 of her affidavit in support of the application, the objector was dishonest when she deponed;

"That I am aware that EKK was a child whom the deceased agreed to take care of in the past."

In the above paragraph, the Applicant was denying that E is a son to the deceased but just a stranger that the deceased took care of. Later in her testimony she changed and admitted that E is a son of the deceased. Maybe she had realized that even her witnesses confirmed that E is indeed the deceased's son. The Applicant has not been truthful and forthright at all hence the inconsistencies in her evidence. E is the deceased's son by his first wife MN and therefore a beneficiary of the deceased's estate.

E gave a detailed explanation as to how the Applicant became hostile towards him upon the deceased's death and that is how they ended up before the Chief who advised them to file the succession proceedings; that the Applicant became unresponsive ending up with E filing a citation which though served, the Applicant ignored and filed another cause Succession Cause 103/2011, in which she did not include E as one of the beneficiaries. The original grant issued in that cause was revoked by Justice Emukule on 31/01/2014 in Nakuru High Court Succession No. 66/2011 and appointed both E and the Applicant as administrators of the estate. The Judge in doing so, considered ***Section 66 (b) of the Law Succession Act*** which states as follows;

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

- a. Surviving spouse or spouses, with or without association of other beneficiaries;***
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;***
- c. The Public Trustee; and***
- d. Creditors***

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."

In the exercise of his discretion, Justice Emukule further stated as follows; ***"(paragraph 19) the Respondent being the surviving spouse ranks higher in priority to the Applicant. However, that section vests in the court the discretion to grant letters of Administration to any person(s) it deems fit in the interest of the estate of the deceased. From the evidence before me it is clear that the Respondent has been fraudulent and has acted in bad faith. It is also evident that there is bad blood between the two houses. Consequently, it is in the interest of the estate of the deceased and all the beneficiaries that an administrator is appointed for each house."***

Justice Emukule observed that the objector was fraudulent and acted in bad faith and that there was bad blood between the two houses and can not allow the Applicant to be the only administrator. It would be detrimental to E and any other beneficiary that the Applicant does not recognize. E is the son of the deceased and properly appointed by the court to represent his interests and those that he represents.

Whether the deceased was polygamous:

It is E's contention that his mother MN the first wife of the deceased and that whether or not MN was separated from the deceased at the time of her death, she was still a wife and her children with the deceased are therefore entitled to inherit from the deceased's estate. The Applicant on the other hand argues that when she got married to the deceased, he had no wife and had divorced from MN.

There is no doubt that the deceased was first married to MN. E said that he was born in 1963 when MN was married to the deceased. DW1 and 2 confirmed that they lived with MN on Plot *** Ngorika. DW1 lived at Ngorika with his wife and MN between 1966 and 1968 after which DW2 took over. The two did not state the circumstances under which MN left. However they were categorical that the deceased never divorced MN. It is only E who learnt that MN left due to pregnancy complications, gave birth in Nairobi but the child died and she did not return to Ngorika. PW1 and 2 could not avail any evidence to prove that the deceased divorced MN. They admitted as much. Although they alleged that MN was later remarried to one Kairu, they could not say when and where. E and DW2 explained that Kairu was an uncle to MN whom she went to live with after she left the deceased's home. PW1, 2, DW1, 2 and 3 were all aware that MN was buried by her father. If she had been married to one Kairu then one wonders why he could not bury her. In law, the burden of proof lies on the party that alleges. The Applicant has alleged that MN and deceased were divorced and the onus was upon her to prove that allegation.

Section 109 of the Evidence Act provides; "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The Applicant made an allegation but she totally failed to avail any evidence in support thereof.

Section 3 of the law of Succession Act defines a wife as; “Wife includes a wife who is separated from her husband and the terms ‘husband’ and ‘spouse’ and ‘widower’ should have a corresponding meaning.” Even though MN may have separated from the deceased, she is still deemed to be a wife of the deceased for purposes of succession.

Section 29 (a) of the Law of Succession Act which I have quoted earlier defines a dependant as a wife, wives, or former wife or wives. It follows that even if MN had separated from the deceased she was still a dependant for purposes of succession.

The letter of introduction written by the Chief of Ngorika Location on 27/09/2010 also recognized the fact that the deceased had two houses with E representing the first house, that belongs to his mother MN and the Applicant representing her house. This was further buttressed by the Applicant’s own averments in her replying affidavit filed in Succession Cause 66/2011 sworn on 15/03/2011 in which she categorically stated that the deceased was survived by beneficiaries that she named at paragraph 6 – 1st house, her and her children and 2nd house which included EK, MW and PMK, children of MN. In his ruling dated 31/01/2014 Justice Emukule found as a fact that the deceased was polygamous having married MN with whom he had 3 children and the Applicant with whom he had 8 children. The Judge observed that the objector had not disputed that fact and had acknowledged in her application dated 04/11/2011 in Succession Cause 66/2011 (see paragraph 12 and 13 of the ruling). In her testimony in court, the Applicant denied that she ever swore the affidavit dated 15/03/2011 and that she had just seen it in court. These documents were however considered earlier in the ruling of 31/01/2014. As submitted by E’s Counsel, the issue of whether or not the deceased was polygamous was settled in the ruling by Justice Emukule on 31/01/2014. There has been no appeal on the said ruling and the issue is actually Res Judicata.

Related to the above issue is whether MWK and PMK are children of the deceased and hence beneficiaries to the deceased’s estate. DW1 and 2 who actually lived with MN Ngorika testified that she had three children with the deceased and left with two but E was left with DW2 and his grandmother. The testimony of DW1 and 2 corroborates that of E. According to E, the objector was aware of the two children and they used to visit the deceased and even Peter supported the Applicant’s children. Though the Applicant denies knowing the two other children now, in her own affidavit of 15/03/2011 she deponed that the 2nd house comprised EK, NWK and PMK. She is bound by her own pleadings and Justice Emukule in his ruling of 31/01/2010 found as a fact that the three were named as beneficiaries by the Applicant although they were left out during distribution. (See paragraph 12 of the ruling). The ruling has not been challenged on appeal and it is the decision of this court that MN’s house comprises of her three children EK, NW and PM who are beneficiaries of the deceased’s estate.

Whether the grant issued on 31/01/2014 should be revoked:

Section 76 of the law of Succession Act provides the grounds upon which a grant may be revoked or annulled. **Section 76 reads 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:-
 - i. 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
 - 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 any material particular; or
- e. That the grant has become useless and inoperative through subsequent circumstances.

He who alleges that grounds exist for revoking/annulling a grant has to demonstrate to the court their existence thereof. In **Mundia Njoroge & 9 Others vs Cecilia Muthoni Njoroge & Another** Succession Cause 127/1999 the *estate of late Richard Njoroge Njogu*, Justice Mativo observed, “the grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all the above grounds.”

Justice Mwita in **Albert Imbaya Kisigwe vs Recho Kawai Kisigwe** Succession Cause 158/2000 also observed “power to revoke a grant is discretionary power which must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke Section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

I am guided by the above decisions. The bottom line is that the court’s discretion must be exercised judiciously within the confines of

Section 76 of the Law of Succession Act.

The Applicant's argument is that E misrepresented to the court that there was a first house when in actual fact there was none. The issue of whether or not there were two houses was resolved in the ruling of Justice Emukule of 31/01/2014. There was no such misrepresentation but a finding of the court.

As regards High Court Succession Cause 66/3011 which was filed by E, it is evident that the Applicant had been cited and duly served, filed an objection in 66/2011 but went ahead to file another Succession Cause 103/2011. That was an abuse of the court process and as observed by Justice Emukule in his ruling, the Applicant acted fraudulently in that she used a forged Chief's letter to disinherit the other beneficiaries. She failed to inform the beneficiary of the 1st house about the distribution and consent to distribution. On the other hand, when E filed High Court Succession Cause 66/2011, he named all the deceased's beneficiaries including the Applicant and all her children. E cited the objector before filing Succession Cause 66/2011 showing the transparency in the process. The Applicant's evidence and pleadings have serious contradictions – for example, the affidavit dated 15/03/2011 admitting that E and his 2 siblings were beneficiaries, then denying them any inheritance in the Succession Cause 103/2013. The application and affidavit suggested that E is not the deceased's son. However, in her testimony she readily accepted that E is her husband's son. Generally, E's pleadings testimony and witnesses are more credible and believable than the Applicant's pleadings and evidence which are fraught with contradictions. The Applicant even purported to deny her own affidavit yet it was prepared by her own lawyer Osero, not E. Njue whom she claims to have had no practicing certificate. So far, the Applicant has not demonstrated that the grant issued on 31/01/2014 was obtained fraudulently or by concealment of material facts.

As the Applicant stated, she is in occupation of the 14 acres of the Ngorika land and is not willing to share with anybody else. She will therefore do anything to ensure that she is the sole beneficiary of the said land and that is why she is not willing to have the estate distributed. It is a fact that the Ngorika land was acquired when MN was married to the deceased. She worked on the land to produce capital to pay for the land to the Settlement Fund Trustee. The Applicant did not demonstrate that she solely paid for this plot or even contributed to its purchase. MN contributed to it and her children are rightfully beneficiaries.

The grant was confirmed in the absence of the Applicant and the other beneficiaries. E told the court that though notified, the Applicant failed to attend court. However, even if the Applicant did not attend, E should have ensured that all the other beneficiaries were notified of the date for confirmation of grant. It seems they were not. To my mind, that seems to be the only omission on the part of E. All the beneficiaries did not take part in the distribution and for that reason alone, the confirmed grant issued on 31/01/2014 is defective and must be revoked.

This will give a chance to all beneficiaries to meet and agree on the mode of distribution failing which the court directs that distribution will be in terms of **Section 40 of the Law of Succession Act** which provides as follows; **“Where an intestate was polygamous:-**

- 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**
- 2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.**

Section 40 means that all the deceased's children and spouse will be taken as individual units and will share the deceased's estate equally. The deceased's estate comprises two properties Plot *** Ngorika measuring 5.5 Hectares (13 acres) and Nakuru Bahati/Ndunduri/*** and cattle be shared equally among the 13 units (1st house 3 units, 2nd house 10 units).

In the end the court makes the following orders;

- 1. The grant issued to EK and SW on 31/01/2014 be and is hereby revoked.**
- 2. The beneficiaries to the deceased's estate are the three children of the first house of MN and nine children of the second house of SW and herself, total 13 units.**
- 3. The parties will have 2 months within which to try and agree on distribution of the deceased's estate failing which distribution will be in accordance with Section 40 of the Law of Succession Act.**
- 4. The distribution must take into account where some of the beneficiaries are settled.**
- 5. This is a family dispute and the court orders that each party bears their own costs.**

Dated, Signed and Delivered at NYAHURURU this 26th day of September, 2019.

.....

R.P.V. Wendoh

JUDGE

AMENDED by **R.P.V. Wendoh** this **5th** day of **October, 2019** **Signed**

PRESENT:

Ms. Wanjiru holding brief for Mr. Kariuki Mwangi for the Respondent

Ms. Chelule holding brief for Mr. Mwangi for the Applicant

Soi – Court Assistant