



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
MISCELLANEOUS APPLICATION NO. 4 OF 2015
FORMERLY
SUCCESSION CAUSE NO. 38 OF 2008

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KAJIADO
(IN THE MATTER OF ESTATE OF LESINKO SOKORTE KIRAYIO, DECEASED)
NYOKABI LESINKO LESEROGERERE APPLICANT

VERSUS

NAIMUTIE SOKORTE RESPONDENT

RULING

Introduction

1. The deceased herein one Lesinko Sokorete Kiratio died on 10th October 1996. Before his death the deceased was the registered owner of land Title No. Ngong/Ngong/4124 situated in Kajiado.
2. It is not in dispute that in the course of his lifetime the deceased was married to two wives; Nyokabi Lesinko Leserogerere and Naimutie Sokorte.
3. In order to put this matter into context, I will undertake to give a summation of the contentious issues through a chronological history of the proceedings.
4. The genesis of this matter is when the Office of the President issued a letter Ref. MDS.18/2VOL.XX/304 on the 28th of October 2008. In that letter, the following were indicated as the 'legal heirs' of the estate of the deceased:

1. Rhoda Nyokabi	72 years	Female	2 nd Wife
2. Patricia Nanyu	47 years	Female	Daughter (Deceased)
3. Patrick Seur	45 years	Male	Son
4. Joyce Mbama	43 years	Female	Daughter
5. Nancy Sirau	42 years	Female	Daughter

6. Virginia Seleina 40 years Female Daughter (Deceased)

5. A grant of letters of Administration was subsequently issued to the Applicant on 20th January 2009.

6. On 17th November 2009 an application dated 10th November 2009 was filed objecting the making of a grant of representation to the estate of the deceased.

7. A letter from the office of the President Ref. BDM.18/4/VOL.I/221 dated 23rd September 2009 emanated regretting an error in the earlier letter Ref. MDS.18/2VOL.XX/304 and dated the 28th of October 2008.

8. The new letter added the 1st wife of the deceased as well as two sons as beneficiaries, all of whom had been excluded from the initial letter. The legal beneficiaries to the estate of the deceased were listed as being:

a. Naimutie Sokorte	70 years	Female	1 st Wife
b. Issaac Saisa Sukurti	32 years	Male	Son
c. Tubula Sokorte	21 years	Male	Son
d. Rhoda Nyokabi	72 years	Female	2 nd Wife
e. Patricia Nanyu	47 years	Female	Daughter (Deceased)
f. Patrick Seur	45 years	Male	Son
g. Joyce Mbama	43 years	Female	Daughter
h. Nancy Sirau	42 years	Female	Daughter
i. Virginia Seleina	40 years	Female	Daughter (Deceased)

9. Subsequently, the grant of letters of administration of 20th January 2009 was amended on 3rd March 2011 to include the respondent, Naimutie Sokorte as a co administrator to the estate of the deceased.

10. On 11th May 2011, the Respondent filed an application for Summons for Confirmation of grant dated 6th May 2011. The application was accompanied by an affidavit sworn by the Respondent. The affidavit listed the beneficiaries of the estate in terms of the letter dated 23rd September 2009 and proposed an equal mode of distribution of the estate of the deceased between the two households. The estate being solely the Land parcel number Ngong/Ngong/4124.

11. The application and the affidavit was also accompanied by a consent to certificate of confirmation dated 6th may and filed on 11th May 2011. Of note was the fact that of all the beneficiaries already mentioned, only Isaac Saisa Sukurti and Tubula Sokorte had appended their ID Numbers on the document.

12. On 14th July 2011, the Applicant filed an objection to the making of grant that was amended on 3rd march 2011 to include the Respondent as a co administrator. It was the applicant's main contention that the respondent had failed to disclose the existence of a property in Narok that was allegedly part of the estate of the deceased upon which she lived. Therefore, the said property should be included in the estate to cater for both household's interests. This application was withdrawn in an application filed on 8th September 2011.

13. A summons for revocation of grant and an accompanying affidavit by the Applicant were then filed concurrently on the 8th September 2011. The basis for this application was for orders that the Grant of Letters of Administration issued on 3rd March 2011 to include Naimutie Sokorte as an administrator be revoked. Further, it sought to compel Naimutie Sokorte to produce a true account of the deceased's alleged Narok property.

14. On 5th July 2012 an application was filed in the court seeking to object the making of a grant. Its content and grounds were similar in substance to the two applications alluded to in the preceding paragraphs.

15. The grant as amended on 3rd March 2011 was consequently confirmed on the 22nd of May 2014 in terms of the mode of distribution proposed in the affidavit filed on 11th May 2011 and sworn by Naimutie Sokorte. From the court records, Naimutie Sokorte was the only beneficiary present.

16. On 30th September 2014, the Respondent filed an application seeking for orders that the Executive Officer at the Principle Magistrates court at Kajiado execute all the instruments necessary to effect sub division and transmission of the applicants portion of the deceased's estate to her name. This was precipitated by the refusal by the Applicant to sign the mutation forms in order to effect subdivision. In her response dated 12th November 2014, the Applicant contended that the Respondent sought to subdivide the land parcel known as Ngong/Ngong/4124 and yet she had another property in Narok that was not shared between the households. On 16th June 2015 the Magistrates court at Kajiado ruled that the application dated 30th September 2014 was out of it jurisdiction and proceeded to dismiss it.

17. On 16th July 2015 the Applicant then filed an application for summons for revocation or annulment of grant that was subsequently transferred to the high court at Kajiado.

18. By summons filed before this Court dated 29th February 2016, the Applicant Nyokabi Lesinko Leserogerere moved the court under **section 27, 29(a), 35, 71, 76, 83(e)(f) (g) of the Law of Succession Act and Rules 7, 40(3) (a)(b), 40 (4), 44 of the Probate and Administration Rules** for revocation or annulment of a grant of probate issued to Naimutie Sokorte and Nyokabi Lesinko Leserogerere on the 22nd May 2014 on the grounds that:

a. The proceedings to obtain the grant were defective in substance;

b. 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. The grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant

19. This court through a decision dated 2nd February 2017 partially allowed the Applicant's application and made orders that the application dated 29th February 2016 be allowed to the extent of amending the list of beneficiaries to include the Respondent's daughters without interfering with the grant issued on 22nd May 2014. Additionally, a fresh consent to distribution of the estate of the deceased was to be filed with this court and the matter be mentioned after 60 days for compliance. There was no order as to costs.

The application:

20. The Applicant has now filed this application pursuant to **Sections 47,67,68 and 69 of the Law of Succession Act and Rules 17(1), 59,63 and 73 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act, Order 45 of the Civil Procedure 2010 and all enabling provisions of the law** seeking orders that:

a. The Notice of Objection dated 10th November 2009 be struck out for being filed grossly out of

time and without leave of court.

b. This Honourable Court be pleased to Review the orders issued by the Honourable Judge R. Nyakundi on the 2nd February 2017.

c. The costs of this application be provided for.

21. The application is premised on the grounds enumerated in it and buttressed by the affidavits of Nyokabi Lesinko Leserogerere, Elizabeth Sigimbei Ngethe and Michael Mwathi all dated 4th April 2017.

22. The application sets out three main grounds upon which the orders are sought, these being:

a. The Notice of Objection under Form 76 Law of Succession Act dated 10th November 2009 was filed grossly out of time and without the leave of the court being sought by counsel for the Objector/Respondent.

b. There has been discovery of new and important matters and evidence which after exercise of due diligence could not have been produced by the Applicant herein at the time when the order was made as the substantive application that was being dealt with at the time was summons for revocation of grant.

c. There are several errors apparent on the face of the record of the Ruling delivered by the Honourable Judge R. Nyakundi on 2nd February 2017.

23. The Respondent, via a replying affidavit dated 27th April 2017 opposed the application. It was her contention that the application is frivolous, mischievous, misconceived in both law and fact, an abuse of the court process and is aimed at defeating the philosophy and principle of substantive justice as enshrined in the Constitution and the Law of Succession Act and ought to be dismissed with costs.

24. The respondent further deponed that the application elicits nothing new and is but a futile attempt by the Applicants to delay the expedient determination of the matter and a ploy to disinherit her and her children

25. It was the Respondents contention that challenging the Notice of Objection dated 10th November, 2009, Seven (7) years down the line on the basis that it was purportedly filed out of time was but a mere afterthought. Additionally, the same has no legal footing and as Section 68 of the Law of Succession Act does not prescribe the timelines for lodging such an objection to the application for grant and if any application that is out of time is the one at hand.

26. The respondent submitted that this is not the first instance the Applicant has sought to challenge the subject Notice of Objection dated 10th November 2009. She stated that on three different occasions the Applicant had sought to challenge the Notice and it was instructive that each time the challenge was unsuccessful.

27. The Respondent submitted that a perusal of the Applicants pleadings had failed to reveal any new evidence that could not have been tendered during the conduct of the summons for revocation of grant.

28. In a rejoinder to the Respondent's affidavit, the applicant filed a further affidavit dated 8th May 2017. She contended that an order can be reviewed under the three instances envisioned in Order 45 of the civil Procedure Rules which were an error on the face of the record, discovery of new and important evidence that was not available at the time the order was made and any other sufficient reason. She went on to say that her application dated 4th April 2017 had elicited all three grounds and general denials by the respondent/objector do not negate that fact.

29. The Applicant insisted that what was in contention were the orders issued pursuant to a ruling

delivered by the Honourable Judge R. Nyakundi on 2nd February 2017 and nothing more.

30. It was the Applicants position that a Notice of objection cannot legally and regularly be filed after a grant of probate has been issued as was the case in this suit as it will defeat the very purpose of the objection proceedings as envisaged under the provisions of **Sections 67, 68 and 69 of the Law of Succession Act and Rule 17 (1) of the Probate and Administration Rules.**

31. The Applicant deponed that there is an error apparent on the face of the record in that order 2 of the Ruling dated 2nd February 2017 is to the effect that a fresh consent to distribution of the estate of the deceased be filed in court; when pursuant to the notice of objection dated 10th November 2009; the property was distributed under the certificate of confirmation of grant dated 22nd May 2014.

32. The Applicant posited that there is an error apparent on the face of the record in that the court sought to redistribute the estate of the deceased when already there is a grant of letters of administration that had distributed the estate of the deceased on 22nd May 2014 pursuant to a non-existent Notice of Objection dated 10th November 2009 and without complying with several provisions of the law.

33. According to the Applicant, there is an error apparent on the face of the record in that the court seeks to import the children of the respondent/objector and the respondent/objector into the estate of the deceased without proof from the respondent/objector on how it is that she was a wife to the deceased as at the time of his death under the Law of succession Act or proof that the children of the respondent/objector are biological children of the deceased or dependants of his estate within the meaning of the Law of Succession Act.

34. The Applicant went on to add that there is an error apparent on the face of the record in that the court failed to determine the issue of whether the beneficiaries to the estate of the deceased were required to appear in court for verification purposes when the same had clearly been pleaded as a ground of Revocation of the grant.

35. The Applicants took the position that there is an error apparent on the face of the record in that the court failed to consider the issue that there were beneficiaries to the estate of the deceased who had since passed on yet the certificate of confirmation of grant dated 22nd May 2014 illegally and irregularly split the estate of the deceased into two contrary to the express provisions of the law.

Analysis and Determination:

36. Having carefully considered the pleadings of both the Applicant and the Respondent, it is my view that the following two substantive issues are up for determination:

- a. Whether the application meets the threshold for granting Review orders.
- b. If the application meets the threshold, what orders should the Court issue

37. The remedy of review is set out under Order 45 of the Civil Procedure Rules 2010 which provides:

1. (1) Any person considering himself aggrieved—

by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

This order derives from **section 80** of the Civil Procedure Act which gives court power to review its own orders or decrees it had previously passed.

38. In order for an application for Review to succeed, the Applicant must convince the court of the existence of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. The applicant is obliged to clearly and specifically state the new evidence or matter and strictly prove the same. In the case of **James M. Kingaru & 17 others v J. M. Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR Visram (as he then was)** held as follows: -

“Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.

39. In **Rose Kaiza v Angelo Mpanju Kaiza Civil Appeal 225 of 2008[2009] eKLR** the court of Appeal stated:

‘An application for review under Order 44 Rule 1 must be clear and specific on the basis upon which it is made. The motion before the Superior Court was based on discovery of new facts. However, it is not every new fact that will qualify for interference with the judgement or decree sought to be reviewed’

40. One cannot use a Review application as a basis for supplementing evidence or introducing new evidence. I have religiously gone through the Applicants pleadings and there is no doubt in my mind that they have failed to demonstrate any new matter or evidence that could not have been made available at the time of conducting proceedings for the application to revoke the grant.

41. The second limb of Order 45 Rule 1 refers to an error apparent on the face of the record. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it morphs into an appeal. Under the guise of review, parties cannot purport to re hear the same issues that had already been sufficiently dealt with.

42. In **National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported))** the Court of Appeal held:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”
“... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”

43. The Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited Civil Appeal No.275 of 2010 [2014] eKLR** opined thus:

“...It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of

decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction..."

44. Upon a reanalysis of the impugned decision, this court is satisfied that some of the issues raised by the Applicant as errors apparent on the face of the record are justifiably so. Author **Steve Ouma** in his book, **A commentary on the Civil Procedure Act Cap. 21 [2nd Edition]** at page 482 states that:

"Where an error on a substantial point of law stares one in the face, and there could be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may be conceivably two opinions can hardly be said to be an error apparent on the face of the record. Again if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible."

45. In its original decision, the court omitted to address and conclusively determine the issue of whether the beneficiaries to the estate of the deceased were required to appear in court for verification purposes when the same had clearly been pleaded as a ground for the Revocation of the grant. This error is clear to be seen and is adjudged as an error apparent on the face of the record.

46. Be that as it may, Order 45 Rule 1 has the third limb for granting an application for review as '*for any sufficient reason*'. It is the finding of the court that a wholesome assessment of the matter has revealed inconsistencies that in the interests of justice ought to be tackled substantively.

47. My view on this matter resonates with the decision in **Pancras T. Swai v Kenya Breweries Limited supra**:

"The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or "for any sufficient reason." The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order."

48. The court in the **Pancras** case went on to invoke and apply its own decision in **Wangechi Kimata & Another v Charan Singh (C.A. No. 80 Of 1985)** (unreported) where it was held that:

"any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

49. In light of the foregoing, it is clear to this court that the Applicant has indeed met the threshold envisioned in **Order 45 Rule 1** for the granting of review orders. Accordingly, I find the application for review meritorious.

50. With the preceding in mind, this court will now embark upon addressing the second issue of what orders the court ought to grant in the circumstances.

51. To this end, the court directs itself to the Application for Summons for revocation of the Grant made by the Applicant and filed on 1st March 2016 and the antecedent contentious proceedings described in the introductory summation.

52. The applicant sought to have the grant revoked on the grounds that:

- a. *The proceedings to obtain the grant were defective in substance;*
- b. *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. *The grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant*

53. A reading of **Section 76(1) of the Law of Succession Act** confirms that a grant can be revoked in the circumstances contemplated by the Applicant:

“76 (1) 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 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 any material particular; or Continuing trust arising.*
- (e) That the grant has become useless and inoperative through subsequent circumstances.”*

54. In light of the above provision I will now proceed to put the contentious facts of this matter into perspective. To begin with, when the Applicant originally begun this matter, the letter that issued from the Office of the President did not indicate three other beneficiaries that were later included in a subsequent letter. Now whether or not this omission was deliberate is moot. What is instructive is that after the Respondent found this out and applied for an objection, the Applicant opposed said application on the basis that it was filed out of time.

55. According to **Section 67 of the Law of Succession Act**:

67. (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 the 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.

56. **Section 68** further provides that:

68. (1) *Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow.*

57. Looking at the timelines, the gazette notice no. 10561 was issued on 24th October 2008 to expire within 30 days yet the objection was filed on 10th November 2009, nearly a year later. This period is indeed out of time. The question that comes to mind for me is whether, indeed, by restricting the notice to the Kenya Gazette which has a limited circulation, the Applicant acted in good faith. Would it not have been a simple matter to give a verbal notice or written communication to the Respondent? More so because a perusal of the court records shows that the Applicant at all times knew of the location of the Respondent. In my view the respondent cause of action is not statute barred by virtue of closure of the 30 day window provided for in the Kenya gazette for any objections to be filed in respect of the estate of the deceased.

58. The applicant failed to challenge the correctness of the procedure at the commencement of the proceedings. The failure by the respondent not to seek leave of the court after the expiry of 30 days is a procedural irregularity which cannot vitiate the proceedings unless a miscarriage of justice is thereby alleged and proved.

59. In the present case the applicant has not pleaded miscarriage of justice on her part that absence of leave to bring an action has prejudiced or compromised her substantive rights. The failure by the respondent to prosecute leave before filing an objection to the succession cause or comply with the rule in anyway did not extinguish the substantive right of inheritance unless otherwise stated. In the notice set in the Kenya gazette, the lapse of the stipulated period is without prejudice to the adjudication of the cause on the merits.

60. I would worry more if the applicant cause of action was on statute of limitations grounds as governed by the Law of Succession or Limitations of Actions Act. I hold that a party's technical non-compliance with the administrative procedure service of process statute does not deprive the court of jurisdiction, and this cannot be raised for the first time on review. Failure to comply with procedural rules may divest a person's right to relief, but it does not oust the jurisdiction of the court under the inherent powers to grant relief sought.

61. To turn around and claim that the Respondent filed their application out of time to me is disingenuous and is clearly against the interests of justice. The Applicant is guilty of material non-disclosure. Furthermore, I am of the view that dependants entitled to an estate cannot be disinherited for want of form.

62. To clear the air on the dependants in this matter, I shall stick to the definition in **Section 29** of the Act as follows:

“29. 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;”

63. Therefore, the dependants in this matter remain the ones indicated in the letter dated 23rd September 2009 in addition to any other dependant that falls under the auspices of **Section 29** of the **Law of Succession Act**.

64. **Apart from section 29 of the law of succession I have in mind Article 27(i) which states that every person is equal before the law and has a right to equal protection and equal benefit of the law.** It would be worthwhile to mention that in all these contestation by the applicant over the estate of the deceased no cogent evidence or material to persuade any court in the land that the respondent was not a spouse to the deceased. The law of succession more specifically section 40 provides as follows: **“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 shall, in the first instance, distribute among the houses according to any wife surviving him as an additional unit to the number of children. The distribution of the personal and household effects and the residue of the net intestate estate which earn more shall then be in accordance with rules set out under section 35 and 38.”

65. In this case there is no dispute that the deceased was survived by widows **Namutie Sokorte and Nyokabi Lesinko Lesorogerere**. Its quite obvious therefore that both spouses and all the children who survived the deceased are entitled as of right the land referenced as **LR.Ngong/Ngong/4124**. The sweeping statements in the form of affidavits by the applicant to the effect that the deceased owned property in Narok where he settled the respondent before his demise remains and shall remain an allegation until probative evidence in the form of search and title in the name of the deceased is availed before this court. There is no reason or justification that I have found in the entire succession cause why the respondent or her two children are to be excluded from inheriting a share of the only property left by the deceased.

66. Having dispensed with that, I will now proceed to examine the `proceedings leading up to the issuing of the Grant dated 22nd May 2014.

67. Regarding the issue of the alleged land in Narok it is trite law that *‘He who alleges must prove under section 107 (1) of the evidence Act it provides that whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts must prove those facts exist.* To date, despite this allegation appearing severally in the pleadings, no evidence has been adduced before the court in support. Therefore, in my view, the court shall not deal any further with this matter

68. In this case the rights of the widows and children are protected under the constitution Art 27 on equality and freedom from discrimination and the law of succession as stipulated under section 35 ,38 and 40 of the Act. The argument being advanced by the applicant that some of the children being fronted by the respondent to inherit the property may not belong to the deceased is neither here or there Based on the evidence adduced by the respondent witnesses its clear she was married to the deceased. The children taken into the family of the deceased upon his death is supported by the chiefs letter dated 23.9.2009. Under section 3(2) of **the Act it defines the** child or children as follows; Reference in this Act to child or children shall include a child conceived but not yet born as long as that child is subsequently born alive and in relation to a female a child born to her out of wedlock an in relation to a male a child whom he has expressly recognised or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility..

69. I have appraised the supporting affidavits and the applicants own testimony to the effect that the deceased treated the respondent as wife by providing and making visit to Narok from time to time. This remained to be the position until his death. It seemed to me that the applicant accepted the arrangement of polygamous marriage and went along with it without any dispute during the lifetime of the deceased. In my conceded view she is estopped in challenging the validity of the marriage of the respondent to the deceased.

70. It must follow therefore that the deceased estate be distributed equally between the two houses of each wife by each being entitled to an equal share of the property LR. Ngong/Ngong/4124 irrespective of the number of children.

71. Next I turn to the manner in which the grant issued on 22nd May 2014 was confirmed. A scrutiny of the pleadings reveals that consent was not obtained from all the beneficiaries. In addition, on the day the certificate of confirmation was issued, only the Respondent was in court.

72. I am guided by **Section 26 of the Probate and administration rules** that states:

26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant

73. In **the matter of the Estate of Isaac Kireru Njuguna (deceased) Nairobi HC Succession Cause 1064 of 1994** the court found that a grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the estate are not taken into account or distributed.

74. A grant is liable for revocation if obtained through concealment of material information from the court. In the matter of the **Estate of Ezekiel Mulanda Masai Eldoret P&A 4 of 1992** Etyang J in his ruling opined thus:

“It has been conceded by Ambrose Nambosio Namulanda (the Petitioner/Respondent) that Jesicah Mukhwana Namulanda is his step mother (the widow of the deceased) and Wilson Mukiti Mulanda is the eldest son of the applicant. Yet they have been left out from the list of the deceased’s dependants. The petitioner/respondent purported to identify the deceased’s estate in an affidavit filed on 21 May 1996. He applied for and granted letters of administration to administer that whole estate singly. In fact, the estate of the deceased has not been distributed to all his surviving widow and children of the deceased. For the above reasons the grant issued to the petitioner/respondent confirmed on 1st July 1993 is hereby revoked as prayed”

75. I am further persuaded by Kamau Ag J who in **the matter of the Estate of Muriranja Mboro Njiri Nairobi HC Succession Cause Number 890 of 2003** had this to say with regard to defective and irregular proceedings leading up to the issuance of a grant:

“... I am satisfied that the Grant obtained in Nakuru court was not made in accordance with the laid down statutory requirement. The consent of Milka Njeru Muriranja widow of the deceased was not obtained. She never participated in the proceedings in that she never executed any of the mandatory forms to support the application.”

The learned judge went on to say:

“under Rule 26 of the Probate and Administration Rules, consent of heir in equal degree is mandatory. The consent was never obtained from Milka. Citations were never obtained and Milka never signed any of the application forms although her name was disclosed... in the circumstances mentioned above and upon its own motion, this court hereby revokes the grant issued under the Nakuru High Court Succession Cause Number 108 of 2001 to Mary Nyambura Muriranja and Milka Njeri Muriranja on the grounds that the proceedings to obtain the grant were defective in substance.”

76. There is no doubt in my mind now that the proceedings leading up to the issuance of the grant on the 22nd May 2014 were defective in substance. It is for that reason that I invoke the inherent powers of this court granted under **Article 159 of the Constitution, Section 76 of the Law of Succession Act and Section 73 of the Probate and Administration Rules** which mandates that:

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

77. The circumstances elucidated in the preceding analysis can only lead to one conclusion, that the grant dated 22nd May 2014 ought to be revoked.

78. In the upshot the court makes the following orders:

Orders:

1. That the Application dated 4th April 2017 is allowed in terms of Prayer 2.

2. That the Grant of Letters of Administration issued on 22nd May 2014 stands revoked in its entirety.

3. That a limited Grant of Letters of Administration hereby issues forthwith to Nyokabi Lesinko Leserogerere and Naimutie Sokorte as co-administrators in the Estate of Lesinko Sokorte Kirayio, Deceased.

4. That the co-administrators apply for confirmation of the grant within 30 days.

5. That this being a family matter there shall be no order as to costs.

It is so ordered.

Dated, delivered and signed at Kajiado this 20th Day of November, 2017.

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R NYAKUNDI

JUDGE

In the presence of:

Applicant

Respondent

Mr. Sankale for respondent

Ms. Bandia for the applicant

Mr. Mateli Court Assistant