In re Estate of Kigen Opigi Kongoni (Deceased) (Succession Cause 161 of 1998) [2025] KEHC 1830 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 161 OF 1998

JRA WANANDA, J

FEBRUARY 21, 2025

IN THE MATTER OF THE ESTATE OF THE LATE KIGEN OPIGI KONGONI (DECEASED)

BETWEEN

PAULINA CHELAGAT BOOR ..... 1ST APPLICANT

ELIZABETH NAMUSABI WANGILA ..... 2ND APPLICANT

BRENDA CHEPKOECH ARUSEI ..... 3RD APPLICANT

BRIAN KIPLIMO ALIAS BRIAN WANGILA MAKHANU ..... 4TH APPLICANT

AND

BERNICE ARUSEI NASAMBU ..... RESPONDENT

RULING

1. Before this Court for determination is Summons seeking, inter alia, for Revocation of Grant. Of curiosity however is the fact that such prayer for Revocation of Grant is brought 24 years after the impugned Grant was confirmed, and these Succession proceedings long concluded.

2. The background of the matter is that the deceased, Kigen Opigi Kongoni, died on 2/10/1995. On 26/08/1998, one Annah Chepig Opigi, claiming as his widow, petitioned for Grant of Letters of Administration Intestate in respect to the estate. However, the said Annah Chepig Opigi, herself died on 23/05/1999 aged 84 years, apparently before the Petition could be fully processed. In the circumstances, one Bernice Nasambu Arusei, (the Administrator herein) took over the Petition claiming as the wife of the late Cyrus Arusei whom he described as the only son of the deceased. Bernice Nasambu Arusei was then, on 9/08/1999, issued with the Grant of Letters of Administration, and which was subsequently confirmed on 25/08/1999. The only property compromising the estate was the parcel of land described as Kakamega/Chekalini 64 measuring 6.4 Hectares, and which was wholly distributed to the said Bernice Nasambu Arusei (Administrator).

3. As aforesaid, 24 years after confirmation of the Grant as aforesaid, the 4 Applicants have filed before this Court, the Chamber Summons dated 13/1/2023 seeking Orders as follows:

   i. That the Grant of Letters of Administration issued to the Administrator on the 9/08/1999 by the High Court at Eldoret Succession Cause No. 161 of 1998 be revoked and annulled.

   ii. That the transfer of the estate land parcel number Kakamega/Chekalini/64 into the names of the Administrator be cancelled.

   iii. That the land parcel number Kakamega/Chekalini/64 currently subdivided into divisions number 3562-3572/11 in the names of the Administrator and be reverted to the deceased's name and/or as to the true beneficiaries this Honourable Court shall decide are entitled to the same.

   iv. That the grant of letters of administration of the estate of the deceased be issued to the Applicants herein.

   v. That this Honourable Court do restrain the Administrator from taking possession, continual disposing off or otherwise howsoever intermeddling with the estate of the deceased.

   vi. [.....] spent

   vii. That this Honourable Court makes such further or other orders as shall preserve the estate of the deceased and advance the interest of justice in this cause.

   viii. That costs of thus Application be provided for.

4. The Application is filed through Messrs Wangila, Kimaiti & Partners Advocates LLP, and the grounds in support are as set out on the face thereof. The same is then supported by 3 respective Affidavits. The first Affidavit is sworn jointly by the 3rd and 4th Applicants, while the second and third are sworn separately by the 1st and 2nd Applicants, respectively.

5. In the first Affidavit, the 3rd and 4th Applicants deponed that they are the children of the late Cyrus Kipkoech Arusei, the son of the deceased herein, Kigen Opigi Kongoni (their grandfather), and that the Administrator is their step-mother, the mother of their step-siblings, namely, Linda Chepkemboi, Elyne Chebet, Leah Cheptanui and Kenneth Kiprono. According to the Applicants, by virtue of being children of the late Cyrus Kipkoech Arusei, they are beneficiaries, and interested parties, to his estate. They deponed further that the deceased (their grandfather) had 2 wives, and not one, as purportedly insinuated by the Administrator, as follows:

Wife	**Children**
Anna Chepig Opigi	Paulina Chelagat Boor, Teresa Tuwei, Martha J. Serem and Cyrus Kipkoech Arusei
Mama Tarikoko	Matha, Samoei, Keuroti and Chemeli

6. They deponed further that as shown above, their grandmother (Anna Chepig Opigi) had only one son, their late father, Cyrus Kipkoech Arusei, who, in turn, also had 2 wives, namely, the Administrator herein, Berice Arusei Nasambu, and the 2nd Applicant, Elizabeth Namusabi Wangila (the 3rd and 4th Applicant's mother). They then urged that when applying for Letters of Administration, the Administrator, fraudulently and/or by misrepresentation, or concealment, obtained a purported letter

from the Chief, by not disclosing all the beneficiaries of the estate of the deceased, the children and grandchildren who survived the deceased, and who are entitled to a share thereof, that also, in her Application seeking substitution as a Petitioner, the Administrator did not disclose that their father, whom she purportedly sought to benefit through, had 2 wives and 6 children, and that in in the undated Application for Confirmation of Grant, in blatant disregard of the law, she intentionally omitted all grandchildren of the deceased, and instead listed only their step-brother, Kenneth Kiprono, as the only beneficiary as a grandchild.

7. They deponed that all along, they had been benefitting and depending on their father, both in his lifetime and after his demise through the death gratuity of his estate, that the Administrator, in exclusion of the Applicants and other beneficiaries, secretly filed the undated Application for Confirmation of Grant supported by an unsigned Affidavit, and that the Grant was confirmed and a Certificate thereof issued albeit without a schedule of shares due to the purported beneficiaries. They deponed further that upon obtaining the Certificate of Confirmation of Grant, the Administrator has engaged in an enterprise to disinherit them and other beneficiaries. According to them, the Administrator has failed to proceed diligently with the administration of the estate and has also failed to produce to the Court, within the prescribed time, an inventory of administration as required, that the Administrator, in disregard of the law, took advantage of her position as the Administrator and transferred into her name, the land parcel Kakamega/Chekalini/64, which is the only asset in the estate, to the exclusion of all other beneficiaries, without the knowledge of the Applicants and other beneficiaries and dependants of the deceased.

8. The respective additional Supporting Affidavits sworn by the 1st and 2nd Applicant as aforesaid, basically echoed what has already been deponed in the above Affidavit sworn jointly by the 3rd and 4th Applicants. The only major differences is that in the Affidavit sworn by the 1st Applicant (Paulina Chelagat Boor), she deponed that she is a child of the deceased, Kigen Opigi Kongoni, and thus a step-brother of the late Cyrus Kipkoech Arusei, while in the Affidavit sworn by the 2nd Applicant (Elizabeth Namusabi Wangila), she described herself as being a wife of the late Cyrus Arusei, and thus a co-wife of the Administrator.

Replying Affidavit

9. The Application is opposed by the Administrator vide her Replying Affidavit sworn on 29/02/2024, and filed through Messrs Z.K. Yego Law Offices Advocates. In the Affidavit, she deponed that the Letters of Administration was granted in 1998, to the late Anna Chepig Opigi, as the widow of the deceased, that Anna Chepig Opigi, before her demise, held a meeting on 15/03/1999, for purposes of conveying her last wishes, during which meeting, she declared that all her properties, including those inherited from the deceased (her late husband) would be inherited by and transmitted to the Administrator upon her demise. She deponed further that the family held a meeting on 17/01/2001, for purposes of discussing the inheritance and transmission of the property, which meeting was attended by the daughters of the deceased, and in particular, Pauline Chelagat Bor (1st Applicant), Teresa Tuwei and Martha Serem, that during the meeting, it was agreed that the Administrator inherits all the property of the deceased that had been inherited and transmitted to Anna Chepig Opigi vide the Letters of Administration granted in 1998, and that the decision by the family was in accordance with the prior consensus of the family and the wishes of the late Anna Chepig Opigi that the estate be inherited by the Administrator as the known and legitimate widow of the late Cyrus Kipkoech Arusei.

10. She deponed further that the family held another meeting on 12/02/2002 during which the family agreed that the parcel of land Kakamega/Chekalini/64 be transmitted to the Administrator to the exclusion of the 2nd Applicant who had failed to prove her marriage to the late Cyrus Kipkoech Arusei.

She deponed further that in 2023, she was summoned to appear before the Assistant Chief to discuss the inheritance and that pursuant thereto, the family held a meeting on 26/6/2023 during which they objected to the Summons on the grounds that the inheritance and transmission of the property had already been discussed and settled.

11. She maintained that she did not obtain the Grant of Letters of Administration through misrepresentation or concealment or non-disclosure of material facts, and contended that on the contrary, she petitioned the Court with the consent of the family, including the 1st Applicant herein, who had knowledge of the Petition, and consented to the transmission of the property to the Administrator. According to her therefore, the instant Application is an abuse of the Court process, filed with the malicious intent to frustrate her. She then deponed that the 1st and 2nd Applicants were aware of the Petition 24 years ago and did not raise any objection.

12. She then referred to her exhibits of what she stated to be copies of the minutes of the various meetings referred to in her Affidavit her. I also note that she exhibited respective 3 respective Statements from the following people who described themselves as follows:

Teresa Tuwei	Sister to the 1st Applicant and thus, also sister to the late Cyrus Kipkoech Arusei (husband to the Administrator).
Vincent Lagat Kon'gonyei	Chairman of the Kapchan'gkechir family which the deceased belonged to, and a cousin to Cyrus Kipkoech Arusei.
Samuel Kimaiyo Sitienei	Son of the deceased with his 1st wife, the late Mama Tarakoko, and thus, a step-brother to Cyrus Kipkoech Arusei, and also to the 1st Applicant.

13. In her statement, Teresa Tuwei stated that being the only son in their family, the late Cyrus Kipkoech Arusei was bequeathed the whole estate by the deceased (their father), that upon their father's demise, their mother, Ann Chepig Opigi, applied for Letters of Administration for the estate, that the wish of their mother, Ann Chepig Opigi, the initial Petitioner, was therefore that the estate devolves to her said brother, Cyrus Kipkoech Arusei, but that unfortunately, Cyrus Kipkoech Arusei, pre-deceased their mother as he died on 23/04/1998 and their mother died later on 23/05/1999. He stated that during the lifetime of the said Cyrus Kipkoech Arusei, he only had one wife, the Administrator herein, and that she never knew the 2nd Applicant as his brother's wife as his brother never introduced her nor acknowledged her as his wife. In conclusion, she supported the Administrator's contention that it is the Administrator who is entitled to inherit the estate by virtue of being the only legitimate widow of the late Cyrus Kipkoech Arusei. In his statement, Vincent Lagat Kon'gonyei stated that being the Chairman of the Kapchang'kechir, he knew the late Cyrus Kipkoech Arusei very well and that as such, he knew him to be married to only one wife, the Administrator herein, and that he never introduced to him the 2nd Applicant as his wife. According to him therefore, the 2nd Applicant is a total stranger to him, and her claims are false and malicious.

14. In his statement, Samuel Kimaiyo Sitienei, too, stated during his lifetime, Cyrus Kipkoech Arusei was married to only one wife, the Administrator herein, and that the 2nd Applicant is a total stranger to him as Cyrus Kipkoech Arusei never introduced her to him as his wife or acknowledged her as such.

According to him therefore, the Administrator is entitled to inherit the estate of the deceased as the only legitimate wife of his step-brother, and the only daughter-in-law of the deceased.

Applicants' Further Affidavit

15. The 1st Applicant, Pauline Bor, then filed the Further Affidavit sworn on 30/04/2024. She basically repeated the same matters she had already deponed, but also added that the exhibited purported expression of last wishes of Anna Chepig Opogi has no nexus to this instant case since this case is about the estate of the deceased herein, Kigen Opigi Kongoni, and not the estate of Anna Chepig Opogi. She added that at the time of the demise of Anna Chepig Opigi, the Succession proceedings of the estate of the deceased was still underway and none of his property had been transferred nor shared amongst the beneficiaries, and that therefore, such property could not be construed as being held by Anna Chepig Opigi. According to her therefore, the said expression of last wishes could only have related to properties owned by Anna Chepig Opigi. Regarding the family meeting of 17/01/2001, she deponed that by that date, the Administrator was already in possession of the estate since the Confirmation of the Grant had already been concluded in 1999 and that the meeting was a clandestine move to ratify her illegalities. She also denied ever attending any of the meetings, but nonetheless pointed out that the minutes of the meeting of 12/02/2002, indicate that she was indeed recognized as a "wife" and thus eligible to share in the estate.

Hearing of the Application

16. It was then agreed, and directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Applicants filed their Submissions dated 3/05/2024, while the Administrator filed hers dated 29/04/2024.

Applicants' Submissions

17. In his Submissions, Counsel for the Applicant submitted that when applying for the Letters of Administration, the late Anna Chepig Opigi did not obtain the compulsory introductory letter from the Chief as required by law. He also pointed out that after Anna Chepig Opigi died, the Administrator did not seek to revoke the Grant as by law required before applying to be so appointed in her place.

18. He submitted further that the Administrator did not also seek consents from the other beneficiaries, she also did not disclose their existence to the Court, that no notice by the Administrator was gazetted and she also reiterated that the Summons for Confirmation of Grant was undated and the Affidavit unsworn, and that the same was rushed. He therefore prayed that the Grant be revoked under the provisions of Section 76 of the *Law of Succession Act* and cited the case of Matter of the Estate of L A K-(Deceased) [2014] eKLR. He submitted further that there was no compliance with Rule 40(8) of the Probate & Administration Rules as there were no consents signed by the survivors of the deceased in Form 37. He cited the case of Beatrice Mbeere Njiru v Alexander Nyapa Njiru [2022] eKLR and also Succession Cause No. 172 of 2008, Estate of Ibrahim Likabo Miheso (Deceased) [2020] eKLR.

19. In respect to the principle that a dead sole Administrator cannot be substituted as a Grant is an instrument issued in personam and therefore not transferrable, he cited the case of Re Estate of George Ragui Karanja (Deceased) [2016] eKLR and several other cases. Regarding the failure to disclose the existence of other beneficiaries, he cited the case of re Estate of Wahome Mwenje Ngonoro Deceased [2016] eKLR and also Rule 26 of the Probate and Administration Rules. In respect to how the hearing of Summons for Confirmation of Grant should be conducted, he cited Rule 41 of the Probate and Administration Rules. Regarding the alleged family meeting of 17/01/2001, he reiterated that the same was after the Succession proceedings had already been concluded. He cited the case of Margaret

Wairimu Murigi Gitau & another v Ethan Mbau Gitau [2017] eKLR. The rest of the matters contained in the Submissions are basically mere repetitions of arguments already made. In the end, Counsel urged that the Application be allowed with costs and on the issue of costs, he cited Section 27(1) of the *Civil Procedure Act*, and also the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR

Administrator's Submissions

20. On his part, regarding the contention that the Administrator obtained the Grant of Letters of Administration by failing to fully disclose the beneficiaries of the deceased, Counsel for the Administrator termed the same as misleading since, in accordance with the exhibited minutes of the family meeting held on 17/01/2001, and attended by the daughters of the deceased, including, Paulina Boor (1st Applicant), Teresa Tuwei and Martha Serem, the family agreed that the Administrator had authority to inherit the property as the widow of the late Cyrus Kipkoech Arusei, and daughter-in-law of the deceased.

21. He added that it is therefore clear that the 1st Applicant, in her capacity as a "dependent" of the deceased, gave her consent and was aware that the Administrator had petitioned the Court for the Grant. He cited Section 29 of the *Law of Succession Act* on the definition of "dependents" and submitted that the 1st Applicant should have invoked the provisions of Section 26 which provides that the Court may make reasonable provision for a "dependent" out of the deceased's net estate upon an application by such "dependent", and submitted that if at all the 1st Applicant was genuinely aggrieved and disadvantaged by the proceedings, she had the right to request the Court to make a provision for her, but she chose not to.

22. He also urged that the 1st Applicant had the right to file an application for objection to the Grant in line with Section 68 of the *Law of Succession Act* but she did not do so despite knowing that the Administrator had petitioned for the Grant. According to Counsel, the 1st Applicant, by failing to raise discontentment during the family meetings and also before this Court, it is safe to infer that this instant application is an afterthought. He urged further that under the doctrine of laches, the 1st Applicant is not entitled to the reliefs sought as she was aware that the Grant had been issued to the Administrator 24 years ago but took no steps to act. He cited the case of Tabitha Wanjiru v Jotham Kihiko Hika & 2 others [2017] eKLR. In respect to the allegation that the Administrator fraudulently misrepresented herself by alleging that she was the only daughter-in-law of the deceased, Counsel maintained that the Administrator is indeed the only legitimate widow of the late Cyrus Kipkoech Arusei, and by the exhibited expression of last words of the late Anna Chepig Opigi, it is evident that the 2nd Applicant only became known to the family of the late Cyrus Kipkoech Arusei during his funeral where she introduced herself as his wife and widow.

23. Counsel further pointed out that from the said expression last words of the late Anna Chepig Opigi, it is indicated that the 2nd Applicant did not produce any evidence to demonstrate that she was married to the late Cyrus Kipkoech Arusei. He further submitted that from the minutes of the family meeting held on 17/01/2001, it is clear that the 2nd Applicant was never recognized as a "wife". He cited the case of Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976 and also Section 43 of the *Marriage Act*. He submitted that the 2nd Applicant's claim to be a wife of the late Cyrus Kipkoech Arusei merely on the basis of being included in the death gratuity of the late Cyrus Kipkoech Arusei is not sufficient evidence to connote the existence of marriage. He also cited the case of re estate of Harrison Makau Julius Manthi (Deceased) [2018] eKLR. According to Counsel therefore, the 2nd Applicant has not satisfied the requirements under Section 76 of the *Law of Succession Act* to warrant revocation of the Grant.

24. He further observed that the 2nd Applicant was aware that the Administrator had commenced Succession proceedings vide the exhibited letter dated 18/09/2000, whereof she was made aware of the of the proceedings, and was invited to object thereto if at all she was married to the late Cyrus Kipkoech Arusei, and which she did not do, only to file the instant Application 24 years later, without any explanation for the delay. Counsel submitted that "equity aids the vigilant, and not the indolent", and that therefore the Application should be dismissed on the ground of laches. Regarding the claims by the 3rd and 4th Applicants as grandchildren of the deceased, Counsel cited the case of Cleopa Amutala Namayi vs Judith Were (2015) eKLR to argue that to make the claim, they needed to have first held representation on behalf of their parents. He submitted further that no evidence in terms of birth certificates and/or notification of births have been produced to demonstrate that they are the children of the late Cyrus Kipkoech Arusei. He cited the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR.

Determination

25. The issue that arises for determination herein is basically "whether the Applicants have met the threshold for revocation of the Grant issued in this Cause in the year 1999".

26. In respect to revocation of Grants, Section 76 of the *Law of Succession Act* provides as follows:

> Revocation or annulment of grant
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> 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;
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> (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;
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> (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;
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> (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
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> (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
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> (ii) to proceed diligently with the administration of the estate; or
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> (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."

27. Section 76 was expounded upon by W. Musyoka J. in the case of Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR where he stated as follows:

> " Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required.The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust."

28. It is also settled that the grounds set out in Section 76 above need to be proved with sufficient evidence as the mandate to revoke a Grant is a discretionary power that must be exercised judiciously and only on sound grounds, not whimsically or capriciously.

29. In this case, in respect to the allegation that the Administrator, or even the initial Petitioner, Ann Chepig Opigi, did not, while petitioning the Court for the Grant of Letters of Administration, seek or obtain consents from all the beneficiaries, indeed, my perusal of the file did not reveal the existence of any such consents. This being a very old file, I cannot vouch whether all pleadings are still intact in the file. Be that as it may, although it is stated that the deceased, Kigen Opigi Kongoni, left behind 2 widows, the other widow, Mama Tarikoko, having never come forward at any time to challenge the Grant, there would be no basis to dwell on the failure, if any, of obtaining her consent since it is the co-widow who possessed the right to raise such questions. The 1st Applicant claims to be the daughter of this other widow (Mama Tarikoko), but however, she has not disclosed whether this other widow (her said mother) was alive at the time that the Succession proceedings were commenced by Ann Chepig Opigi, or even when it was taken over by the Administrator herein. Assuming that she (her mother) was alive at that time, there being no evidence that she (her mother) at any time during her lifetime, raised any objection to the issuance of the Grant to either the late Anna Chepig Opigi, or the Administrator herein, the 1st Applicant would have no basis or locus to purport to step in, on her mother's behalf, and start raising questions on whether her mother's consent was sought or obtained, there being no evidence that her mother was in any way legally incapacitated from challenging the Grant by herself.

30. For the said reasons, I am unable to agree with the Applicants' contention that the Grant was obtained by fraudulent means or by the making false statements or concealment from the Court of facts material to the case. In any case, and as already stated, Section 76 of the *Law of Succession Act* is discretionary

in that it gives the Court discretion whether to revoke or annul a grant. It is not therefore the position that any breach or violation must always or automatically lead to revocation of a Grant.

31. Regarding her (1st Applicant's) claim that she is entitled to share in the inheritance, being a daughter of the deceased, Kigen Opigi Kongoni, it would be undeniable that indeed the 1st Applicant would be entitled to a share of the estate. However, I find it odd that she would wait for a whole 24 years to claim such share since there is ample evidence on record that she has always been aware that the Succession was concluded in the year 1999 "Equity aids the vigilant, not the indolent". It is also not lost on me that one Samuel Kimaiyo Sitienei, and also one Teresa Tuwei, whom it has not been denied, are a brother and a sister, respectively, to the 1st Applicant, have in fact come forward and made statements filed herein opposing the Applicant's claim. My feeling is that the instant Application is all an afterthought and most probably only filed "to settle some old scores". I am certain that if indeed the 1st Applicant was genuinely interested in pursuing her share of inheritance, she would have moved long time ago. However, at no time during the proceedings did she protest or object. She clearly chose to sleep on her rights, if any, for 24 years and has not even bothered to give any explanation whatsoever for such inexcusable delay. While the instant Application is not prohibited by law or barred by limitation, the adage that "litigation must come an end" must also be recognized. The inaction by the 1st Applicant for all these years must have convinced the Administrator, and given her the belief that the 1st Applicant was satisfied with the mode of distribution adopted. This, in essence, is one clear instance where the principles of "estoppel", "waiver" and/or "acquiescence" must apply against the Applicants.

32. In respect to "estoppel", "waiver" and "acquiescence", the Court of Appeal, in the case of Serah Njeri Mwobi vs. John Kimani Njoroge [2013] eKLR, held as follows:

> " In our understanding, the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See Seascapes Limited v Development Finance Company of Kenya Limited, Nai Civil Appeal No. 247 of 2002.
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> The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows:-
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> > " Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right ... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him."

> It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced. .....
>
> In our understanding, the term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time. Halsbury's Laws of England, 4th Edition, Volume 16 at page 994 states the following about the term 'acquiescence':-
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> > " The term is, however, properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act."

33. Applying the above principles, the only property of the estate, Kakamega/Chekalini 64, having been transmitted to the Administrator long time ago, and being in her quiet possession for the last 24 years, and having long sub-divided the same into sub-plots, it will be an injustice, in my view, to dispossess her of the same after all these years, particularly where the parties seeking such dispossession have not bothered at all to give any explanation whatsoever for their inordinate delay to seek redress.

34. Regarding the claim by the 2nd Applicant, she claims to be 2nd wife of the late Cyrus Kipkoech Arusei and that the Administrator herein is her co-wife. To prove her claim, she has alleged that they both, to date, receive death gratuity of their late husband, being his next of kin.

35. Simply put, the 2nd Applicant alleges that she, too, is a wife to the late Cyrus Kipkoech Arusei, and thus entitled to share of the estate herein, the deceased being her father-in-law. I have perused the exhibited copy of the letter from the Ministry of Finance, Pensions Department in respect to that issue of death gratuity but I find nothing therein which may be deemed to prove that it recognized the 2nd Applicant as a "wife". Further, there is evidence that her alleged mother-in-law (Ann Chepig Opigi), before her demise, made a written declaration disowning her as being her "daughter-in-law. The Administrator has similarly, denied that the 2nd Applicant was her co-wife. Further, as aforesaid, there are also written statements made and filed herein by one Teresa Tuwei and Samuel Kimaiyo Sitienei, a sister and brother, respectively, to the late Cyrus Kipkoech Arusei, also disowning the 2nd Applicant as being their brother's second wife. Another statement denying the 2nd Applicant's claim of being a "wife" was also filed by one Vincent Lagat Kon'gonyei who stated that he is the Chairman of the family of the deceased. All the 3 statements are emphatic that at no time did the late Cyrus Kipkoech Arusei acknowledge the 2nd Applicant as being his wife, and never introduced her to any of them as such. I also note that although the 2nd Applicant claims that she got 2 children (the 3rd and 4th Applicant herein) with Cyrus Kipkoech Arusei, she has not produced any proof such as a Certificate of Birth to prove this fact.

36. Indeed, it is trite law that "he who alleges must prove". This is the principle of the "burden of proof" and which is codified in Section 107 of the *Evidence Act* as follows:

> "107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

37. In the case of Gituanja vs Gituanja (1983) KLR 575, the Court of Appeal held that the existence of a marriage is a matter of fact which must be proved with evidence. The Court of Appeal case of Hortensia Wanjiku Yawe vs The Public Trustees, Civil Appeal 13 of August 6, 1976 is also to the same effect. It was therefore incumbent upon the 2nd Applicant to prove, on a balance of probabilities, that she was married to the said Cyrus Kipkoech Arusei. However, in light of what I have stated above, I am not satisfied that the 2nd Applicant has demonstrated that she was a "wife" to the late Cyrus Kipkoech Arusei as she alleges.

38. In any case, she, too, is guilty of laches having come to Court 24 years after the Grant was confirmed, and the Succession proceedings concluded. Having sat on her rights, if any, for such a long period of time, she, too, is now "estopped" from conducting herself in a different matter.

39. In fact, by exhibiting a copy of the demand letter dated 18/09/2000, written to her by Messrs Kibichy & Co. Advocates, then representing the Administrator, the 2nd Applicant "scored a classic own goal into her own net". I say so because the letter threatened legal action against her if she continued interfering with the Administrator's possession of the property that had been transmitted to the Administrator by virtue of these Succession proceedings. The letter having been written in the year 2000, 13 years before she filed the instant Application, it is ample proof that the 2nd Applicant had always been aware of the conclusion of the Succession proceedings but never thought it necessary to challenge the same. The letter also having denied her claim of being a widow of Cyrus Kipkoech Arusei, it is also sufficient proof that the 2nd Applicant was always aware that were she to move to Court, then she would be required to prove that claim of marriage. It is however clear that despite such notice, the 2nd Applicant, to date, has not been able to prove her alleged marriage to the late Cyrus Kipkoech Arusei.

40. In respect to the 3rd and 4th Applicants' claims, although they allege that they are the children of the late Cyrus Arusei, with the 2nd Applicant as their mother, and thus entitled to benefit from their father's share of the estate of their grandfather (the deceased herein), I observe that, apart from mere statements, they, too, have not tendered any evidence whatsoever to support that assertion. No evidence such as Certificates of Birth or any other similar documentary evidence has been produced.

41. In any case, even assuming that they are indeed the children of Cyrus Kipkoech Arusei, by failing to demonstrate that they hold any representation over his estate, they may still be knocked out from claiming a share of their grandfather's estate. In respect thereto, A. Mrima J, in the case of Cleopa Amutala Namayi vs. Judith Were Succession Cause 457 of 2005 [2015] eKLR observed as follows:

> "Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents (sic) 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 (sic) 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." (emphasis mine)

42. Again, they, too, are guilty of laches having come to Court 24 years after the Certificate of Confirmation was issued and the Succession proceedings concluded. Having not alleged that they were in any way incapacitated by any law from acting, and having not offered any explanation for the delay to act, they, too, having sat on her rights, if any, for such a long period of time, they, too, are now "estopped" from advancing a contrary narrative.

43. Having found that the Applicants were aware of the Succession proceedings and are just simply feigning ignorance, I find that there has been an inordinate delay to challenge the Grant. The present Application was filed 24 years after the Grant was confirmed and the Applicants have not bothered to even explain this obvious inordinate delay. I refuse to accept the argument that simply because the *Law of Succession Act* does not stipulate a time limit for applying for revocation of a Grant, an Applicant who approaches the Court after an inordinate delay has no obligation to explain the delay. On this view, I refer to the Court of Appeal case of Ali Omar Ali Abdulrahman v Mohamed Ali Abdulrahman [2020] eKLR, in which the Applicant sought extension of time to file an Appeal to challenge the High Court's refusal to revoke a Grant. Sitting as a single Judge, and in declining the Application, Murgor JA, held as follows:

> " With respect to whether any prejudice would be occasioned to the respondent, it is apparent that the application for revocation relates to a grant that was confirmed way back in 1992. This is clearly a very old succession matter. The question would arise as to whether the revocation sought would serve any useful purpose this late in the day.
>
> All factors considered, I am not persuaded to exercise my unfettered discretion to allow the application, which I accordingly dismiss. .....".

44. Similarly, Achode J (as she then was), in the case of Monica Wangui Kimani & Another v Josphat Mburu Wainaina [2015] eKLR, stated as follows:

> " 16. Indeed Section 76 of the *law of succession Act* states that a grant may at any time be revoked, or annulled by the court if it finds that it was obtained fraudulently by making of false statements, or concealing material facts. This may appear to place no time limit within which an application for revocation may be brought. The Probate Court is a court of Equity and has very wide discretion to aid the interest of justice. However, Equity aides the vigilant and not the indolent ....."

45. Like the said Judges, I, too, find in this case, that revocation of the Grant, if allowed at this late stage, will severely prejudice the estate as it will unnecessarily send all concerned parties back to square one, without any just cause. Indeed, "equity aides the vigilant and not the indolent".

Final orders

46. In the end, I find the Applicants' Chamber Summons dated 23/08/2023 lacking in merit and an abuse of the judicial process. The same is accordingly dismissed with costs to the Administrator-Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF FEBRUARY 2025.

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Mr. Wangila for the Applicants

Ms. Nasongo h/b for Mr. Yego for the Administrator/Respondent

Court Assistant: Brian Kimathi