



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Francis Kinuthia Nderu (Deceased) (Succession Cause
383 of 1996) [2025] KEHC 5654 (KLR) (2 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 383 OF 1996**

SM MOHOCHI, J

MAY 2, 2025

IN THE MATTER OF THE ESTATE OF FRANCIS KINUTHIA NDERU (DECEASED)

BETWEEN

HELLEN NJERI NDERU PETITIONER

AND

PATRICK ODHIAMBO KINUTHIA OBJECTOR

RULING

1. Before this Court is a Summons for Revocation of Grant is dated the 19th day of June 2018 whereof the Objector/Applicant sought an order of this Court revoking the said Grant, premised on the ground that the Petitioner herein acted in contravention of Section 76 of the *Law of Succession Act* by excluding the Objector herein as among the persons entitled to inherit from the estate of the Deceased by virtue of being a son of the Deceased.
2. That, the Objector/Applicant herein was born on the 4th day of January 1982 to one Jenipher Aluoch Olilo and the Deceased and the Objector/Applicant's mother met sometimes in the 1970s and married one another, and were blessed by two issues, the Objector/Applicant herein and one Stephen Kagombe Nderu. Further, the Objector/Applicant's mother had an employer-employee relationship with the Deceased when the said Jenipher Olilo was employed and worked for the Deceased for the period between 1978 and 1995.
3. That at the time of his death, the Deceased had two wives (houses) and had ensured that his wives and children lived a sustainable life, the Deceased had a home in Kisumu where he had lived with his wife, the Petitioner herein and his sons. The Deceased had also bought another parcel at Carwash for the Objector/Applicant's mother.



4. That when the Deceased died intestate on the 30th day of July 1996 the Petitioner moved this Court for Letters of Administration and Grant which was issued to her by this Court on the 12th day of September 2012.
5. That, the Petitioner herein listed herself and sons Davies Kinyanjui and Erick Ngethe (Deceased) as the only survivors of the Estate and excluded the Objector and his brother as well as their mother (widow of the Deceased)
6. That, at the time of the death of the Deceased, the Objector was a minor who had all along enjoyed the support of his father. Not so long afterwards, the Objector was supported financially by Davies Kinyanjui, the son of the Deceased and the Petitioner.

Objector's Submissions

7. The objector submits that, the law governing the issuance of Grant is settled. Further, in any instance the said issued Grant is found to have been issued pursuant to the provisions of Section 76 of the *Law of Succession Act*, then this Honourable Court has no further duty other than to revoke the said Grant.
8. That, the matter proceeded to hearing inter-partes whereof each party was accorded the chance and forum to shed light into their respective cases and the Objector/Applicant herein presented before this Court his witnesses to corroborate the evidence presented by himself. The witnesses included his mother, one Jenipher Olilo and his uncle Geoffrey Olilo. One of the witnesses however did not testify as she died before giving her testimony.
9. That, the most undisputable evident fact as adduced in the testimony of Jenipher was that she was the mother of the Objector/Applicant and that the Deceased herein was the father of the Objector/Applicant. The Deceased had married the Objector/Applicant's mother and the Objector's mother had also ended up being an employee of the Deceased.
10. That, the evidence on record shows various correspondences between the Jenipher Olilo and the Deceased's companies. It is therefore more than unmerited for the Petitioner/Respondent to allege that he had never known or met the Objector or his mother, when at the same time the Petitioner/Respondent claims to have also worked in the same companies.
11. That, the Deceased was undoubtedly a family man who cherished and ensured none of his family members, either sons or wives suffered, not at least when he was alive and being a hardworking man ensured that the family led a successful, peaceful and sustainable life. This is evidenced both from the pleadings and various affidavits sworn from both the Petitioner and the Respondent. The Deceased had two wives (houses) and each house was accorded a peaceful dwelling place. The Objector's mother was bought a parcel of land where she resided with the Objector and the Objector's brother until the time the Deceased died. It was after the death of the Deceased that the Petitioner herein evicted the Objector's mother from what had been her matrimonial home. Further, the said parcel was later transferred to the Petitioner's Hekimwe Investments Limited. It was irrelevant of the Petitioner thus to claim in her pleadings that she lacked any knowledge of the said parcel or of the said Company. Clearly, the Petitioner is one who was fully determined to disinherit the Objector of that which they are entitled to.
12. That, the evidence on record, included the birth certificate obtained by the Objector at birth was uncontroverted. Further, the Objector adduced evidence to corroborate his testimony that the Deceased's son, one Davies Kinyanjui, continued to support them after the death of the Deceased. The Deceased's son paid the Objector's school fee in his capacity as the Objector's step-brother and from the proceeds of the late father's businesses.



13. Further, as a minor, the law has for the longest period remained clear that all dealings and actions in respect to a child, must always be taken in the best interest of the said child. While such extends to parental responsibility, the Deceased endeavored to ensure that the Objector got the best life that he could offer as a parent. Upon his death, the son, Mr. Kinyanjui, undertook to support the Objector and his mother from the proceeds of the estate. He however stopped, thus necessitating the Objector's mother to undertake legal actions against them. Such extended to the issuance of warrants of arrest, indulgence of both FIDA and Children's Department, which all bore no fruits to the Objector's mother.
14. That, the Petitioner/Respondent enlisted as witnesses, her son and daughter-in-law who testified in respect to the Objector's Application. They both provided a chronological history of the Deceased and all which related to the said estate, including the beneficiaries. The Petitioner/Respondent's daughter-in-law was however not privy to the relationship between the Objector's family and that of the Deceased. She thus testified much touching on the estate only.
15. That, one thing that is evident from the proceedings was the fact that the Petitioner/Respondent herein was fully determined to disinherit the Objector and his family when the said family belongs to the other house of the Deceased and which is thereto entitled to inherit from the estate of the Deceased.
16. Further, it is clear from the proceedings that, the Petitioner/Respondent was so determined to mislead the Court into believing that the Deceased in the proceedings herein, had contribution in his family, business and all that which was registered and/ or acquired in his name and in the same tune, the Petitioner/Respondent has taken this Court into a fool's errand by urging this Honourable Court to believe that the Deceased did not have another family. Lastly, the Petitioner/Respondent in her knowledge or lack of it proceeds to provide no evidence to prove the alleged negligible contribution of the Deceased to his estate.
17. That, in the foregoing, it is evident that the Petitioner/Respondent herein through the years since the demise of the Deceased, has endeavored not only to mismanage the estate but also to ensure that the Objector is excluded and completely disinherited. It is for this reason that the Objector has approached this Honourable Court for an order revoking the said Grant issued to the Petitioner.
18. That, Section 76(a), (b) and (c) of the [Law of Succession Act](#) provides as hereunder:
 - “ 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;
19. That, that section provides that a grant of representation may at any time be revoked or annulled as long as the Court is satisfied that the facts contemplated under the said section are proved. It is therefore clear that there is no limitation in so far as matters revocation or annulment of grant are concerned.
20. That, the issues that emanate from the proceedings herein and which thereto have to be determined by this Honourable Court, may thus be framed as follows:



- i. Whether or not the Objector is entitled to a share in the estate of the Deceased.
 - ii. Whether or not the Application for revocation of Grant is merited and if yes, whether the Objector is entitled to the orders sought therein.
 - iii. Whether or not the Objector is entitled to a share in the estate of the Deceased.
21. That the Law of Succession Act outlines the persons entitled to a share of the estate of the Deceased. Among the persons outlined therein includes the children of the Deceased. The Consanguinity Table as provided in the Second Schedule of the Act lists the children of the Deceased as lawful beneficiaries to the estate.
 22. That, this Court is urged to find whether or not the Objector's mother qualifies as a beneficiary of the estate of the Deceased and whether she equally has life interest in the said estate just as the Petitioner. The Objector thus invites this Court to take note of the provisions of Section 3(5) and 2(a) of the L.S.A. Cap 160 which permits her to inherit as of right. This reads: - "Section 3(5) notwithstanding, the provisions of any other written law a women married under a system of law which permits polygamy is where her husband has contracted a previous or subsequent monogamous marriage to another woman never the less a wife for purposes of this Act and in particular, sections 29 and 40 thereof"
 23. Section 29 defines who a dependant of a deceased person for purposes of the inheritance is. It reads... "Section 29. For the purpose 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"
 24. That, in light of the submission above, it is the Objector's contention that by virtue of being a son to the Deceased, this Court should find that the Objector is entitled to a share of the estate. Thus this Court is further urged to judiciously exercise its discretion to determine such share from the estate of the Deceased.
 25. As to Whether or not the Application for revocation of Grant is merited and if yes, whether the Objector is entitled to the orders sought therein the objector submits that, the Law on revocation of Grants is settled. Section 76 of the Law of Succession Act provides for the grounds upon which a Grant may be revoked and/or annulled. In this instance, the Objector's Application seeking orders for revocation of the Grant, is fully premised on the ground that the said Grant was obtained fraudulently by concealing a material fact, that is, the Petitioner failed to disclose the fact that the beneficiaries of the estate of the Deceased included the Objector and his brother as well as his mother who were all related to the Deceased by virtue of being the children and widow of the Deceased.
 26. 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; that is, the Petitioner herein failed to disclose the fact that the Deceased had another family which he had taken care of until the time of his death. This has been sufficiently proven by the Objector through his pleadings, several sworn affidavits as well as supporting witness statements. A party is bound by its pleadings, and the Court only decides a matter based on the pleadings before it.
 27. That, Affidavit and oral evidence is intended to breathe life to the pleadings. For life to be successfully breathed into the suit or cause or application, to enable the Court grant the orders sought or meet the prayers made, the evidence tendered must be in sync with the pleadings.
 28. That, the deceased's estate herein includes among others, the shares held in his Companies, including Lake Tanners, Perch Hotel, Hotel WaterBucks and the land in Gilgil as well as the land on which the



Objector's mother lived before being evicted by the Petitioner, which the Petitioner was required to distribute. Distribution should be done in accordance with the certificate of confirmation of Grant which must contain identifies of beneficiaries and their respective shares in accordance with Section 71 of the Act.

29. That, in the foregoing, the Petitioner clearly failed to disclose all the survivors of the estate of the Deceased at the time of obtaining the Grant. Further, the Petitioner's contention that she has over the years upgraded, improved and/or developed the estate, in not only a well calculated step towards misleading the Court into believing that the Deceased left the estate in a dying/dilapidated state at the time of his death. No evidence is produced before this Court as proof that the said estate was in crisis at the time the Deceased died.
30. That, Section 76 of the Act was clearly expounded on by the Court, In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR where it was stated that:

“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.”

31. That, the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a 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.
32. That, the Objector submits that, having proven to this Court that, the Petitioner herein failed to include them as beneficiaries, it is in the interest of justice that this Court revokes the said Grant to pave way for proper administration of the estate of the Deceased. Thus, it is in light of this that the Objector prays that the Grant issued to the Petitioner herein be revoked and all the estate of the Deceased reverted to his name thereby to pave way for a lawful administration of the estate.



33. That, the Objector prays that this Court finds the Application dated the 19th day of June 2018 meritorious and thereto proceeds to revoke and/or annul the Grant issued to the Petitioner in respect to the estate of the Deceased.

The Petitioners Case

34. It was the Petitioners/Respondents case that, the summons for revocation of grant which was taken out by Patrick Odhiambo on 19th June 2018. In it, he is seeking the following orders:
- a. That the application be certified urgent.
 - b. That grant of letter of administration issued herein be revoked and/or annulled.
 - c. That the Honorable Court be pleased to make such further orders as just and expedient.
 - d. That time within which such proceedings would have been brought be enlarged.
35. That this summons was the 4th application for revocation of the grant herein issued and confirmed by Hon Justice Ouko as he then was on 12th September 2013. And that the other pending applications for revocation were dated 17th September 2013, 27th October 2014 and 15th February 2015 respectively. Those other prior applications were compromised on 19th May 2022 leaving on record the applicants said application.
36. That, in paragraph 9 of the witness statement of the applicant's mother Jenipher Oriro made on 21st January 2018, she describes herself as part of the society in which the applicants lived and consequently must be deemed to have been informed of the pending applications before her son filed is application on 19th December 2018.
37. That paragraph reads as follows:
- “ the deceased children from the first family grew up and when they finished high school, they Joined the companies in various positions whereby I Interacted with the late Andrew Nderu Kinuthia and his wife Jane Wanjiru, the late Eric Ngethe and his first wife Rose Njeri and later his second wife Jane Wanza and Davis Kinyanjul and his wife Carol Gathoni”.
38. That it is evident from that paragraph that, although the application is made by her son, it was inspired by the mother who was one of the disgruntled people who used to associate with the members of the deceased family and felt that they should become heirs of his estate.
39. That application is misconceived in that:
- a. it is premised according to the grounds upon which it is made on an alleged keeping/leaving out of the applicant and alleged squandering of the estate by the Petitioner/Respondent: below, it is demonstrated that the applicant has not explained why he did not file an objection to the petition, the notice of whose filing was published in the issue of Kenya Gazette of 25th October, 1996, a copy of which is on the Court record and secondly, neither he nor the 3 witnesses who made witness statements in support of his case, gave evidence of squandering of the estate:
 - b. the implied case according to Sections 35, 38 and 40 of the *Law of Succession Act*, the deceased was a polygamist who had 2 wives, the petitioner and his mother; the succession is governed by sections 35, 38 and 40 of that Act and consequently, he is entitled to the remainder of what comes to his house after his mother dies. Because allegedly, the respondent/petitioner left out his second house out of the petition, he wants to purportedly remedy that defect by ensuring



that he, his alleged mother and his brother share in the estate of the deceased as per section 40 of the Law of Succession Act and further that the grant issued herein on 12th September, 2013 should be revoked and the estate be distributed between two (2) houses of the deceased;

- c. however, contrary to (b) above, the applicant brought that summons on its own behalf and even if he were to succeed and he submitted that he has not proved his case on a balance of probabilities because of the decision of the Provincial Insurance Company of East Africa versus Nandwa (1995-198) EACA 288. his application cannot benefit anybody else as the Court has no power to grant a relief which has not been sought; in that case, the law, was stated as follows:

“Cases must be decided on the Issues on the record, and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course.”

- d. In paragraphs 2 and 4 respectively of his mother's and uncle's witness statements, it was alleged that his mother was married in accordance with Luo/Kikuyu Customary Law but neither of the 2 tendered evidence of either or both Kikuyu and Luo Customary Law as required by Kimani versus Gikanga (1965) EA 735 in which the law was stated as follows:

“Held: (per NEWBOLD, V.-P., and DUFFUS, J.A., CRABBE, J.A. dissenting)

- (1) where African customary law is neither notorious nor documented it must be established for the Court's guidance by the party intending to rely on it. and this the appellant had failed to do:
- (ii) as a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties: s. 87 (1) of the Civil Procedure Act and s. 13, s. 51 and s. 60 of the Evidence Act, 1963, did not cast the burden of establishing the customary law on the Court through assessors, to do so would deprive the parties of an opportunity to test the assessors' views by cross-examination or further evidence.”

- e. it is also an implied contention of the applicant that section 118 of the Evidence Act applies to him. This provides that the fact that any person who was born during the continuous a valid marriage between his mother and any man is the legitimate son of that man; the applicant on whom the burden was of proving a valid marriage between him and his mother was not discharged, on the contrary, he adduced through the evidence of both his mother and his aunt. Dorothy Antalya that his mother was the employee of the deceased who at one time posted her to Mwanza to work and she left her children in Kenya and not under the care of the deceased. It is difficult to imagine a situation where a wife serves as an employee of the husband who posts her to work away from home.
- f. the applicant's mother produced 5 documents which show that at her place of work, she was known as Jennifer Ariro and not Mrs. Nderu and the documents include a complaint made to her late husband in the capacity of a managing director who underpaid her.
- g. the applicant chose to rely on a birth certificate allegedly showing that the deceased was her father and an identity card in which he described himself as a son of the deceased but did



not appreciate that according to human nature, no one can know whether one's parents were married or not and he did not call evidence in support of the 2 documents;

40. The Petitioner opposed the application through her own statement which is dated 6th May 2019 and two other statements made by her son Davis Kinyanjul Nderu on 1st March 2019 and a third one made by her daughter in law Caroline Gathoni Kinyajui also made on 1st March 2019. In her defence therefore, her case was that the Applicant's mother was only an employee of the family business and there never existed a relationship of husband and wife between the Applicant's mother and the deceased. It was also her care that the Applicant was not a child of the deceased. It was also their case that the application was an after-thought coming as it did, 22-years after the deceased died and was coming from a family with which the Respondents have no relationship as known in the African customary law. At paragraph 28 of her said witness statement sworn on 6th March 2019, she summed up her position as follows:

“Geoffrey Omondi, Dorothy and Jenipher have told lies in their respective statements. In her statement, Jenipher does not describe me as her alleged co-wife. In polygamous families, wives of one man know each. Their children socialize with the children of the other co-wives. Amongst the Luos, as among the Kikuyu, a marriage Involves families. Members of the family attend weddings and burials of one of their own. Jenipher did not attend the burlal of the deceased or those of Andrew or Eric. The deceased had a daughter known as Walthira who passed on in late 1970s, Jenipher did not attend the burial.”

41. At the trial, the Applicant, his mother and his uncle testified on the basis of their witness statements. After the Applicant closed his case, the Respondent/ Petitioner presented her case. Her son Davis testified first and was followed by her daughter in law, Caroline Gathoni Kinyanjui
42. The application is brought under Sections 73 and 74 of the Law of Succession Act. Since the application seeks revocation of the grant issued and confirmed on 12 September 2012, it is to be taken to have been made under section 76 of the Law of Succession Act which governs revocation of grants and not under Sections 73 and 74 of the Law of Succession Act which are referred to in the said summons. That section reads as follows:

76. Revocation or annulment of grant

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.
43. Husbands and wives work as partners as the petitioner/respondent demonstrated through her witness statements and its annexures; the properties are managed by them and registered in both names and have a place where they live as man and wife; the applicant's mother does not show where in Kisumu she lived as a wife with the deceased:
44. under African Customary Law, marriage is not a secret affair and co-wives work together and help one another and the marriage is an alliance of the family of the man and the family of the woman: these attributes are missing from this case.
45. The summons was supported by the Applicant's affidavit sworn on 19th June 2018, to which were annexed a number of exhibits. As the affidavit contained little information, the Petitioner applied for him to file a more detailed affidavit and it was filed on 21st January 2019, by which time directions had been given that summons be disposed of by way of viva voce evidence. Consequently, in addition to filing further affidavit, he filed a witness statement of his mother Jenipher Olilo Andiego, his aunt Dorothy Ann Paliah and his uncle Geoffrey Omondi Olilo.
46. The Applicant in his supporting affidavit did not give his clear status but merely deponed that, he was allegedly a son of the deceased without giving any context. It is in his second affidavit sworn on 21st January 2019 that his claim became slightly clearer. However, it is paragraph 2 of his mother's witness statement dated 21st January 2019 that one finds that he claimed he was relying on his mother's claim that in or about 1970, she allegedly married the deceased under what she described as Kikuyu/ Luo customary law and allegedly she had two children with him namely, the Applicant and his brother Stephen Kagombe Nderu. The latter did not part in the proceedings and did not file either a witness statement or an affidavit. In paragraph 4, of his statement dated 21st January 2019, Geoffrey Omondi Olilo alleged in paragraph 5 that his sister was married to the deceased under Kikuyu/ Luo customary law in late 1970s. In paragraph 4 of her witness statement his aunt Dorothy Ann Paliah, alleged that the Applicant's mother was his wife. It is a strange application in that the Applicant has a shy mother who delegates to her son who cannot know it, the task of proving that she was married to the deceased and that the uncle and the aunt happily join the Applicant in making a claim that she was a wife of the deceased who should have been named in the petition as a widow of the deceased when the petition was filed in 1996. According to paragraph 2 of the affidavit, the witness statement of the Applicant's mother, he was born in 1982 and consequently, was 14 years when the deceased died on 30th July 1996. Despite the fact that the fact of filing the succession cause was published in the Kenya Gazette, neither the Applicant nor his mother nor his aunt nor his uncle took interest in the case until 2018, that is 22 years after the cause was filed.
47. In her witness statement filed on 21st January 2019, Dorothy Ann Paliah states that she and the Applicant's mother worked with the businesses of the deceased. Dorothy herself described herself as "the Personal Secretary of the deceased" and her sister the mother of the Applicant as a "weighing clerk".
48. The Petitioner opposed the application through her own statement which is dated 6th May 2019 and two other statements made by her son Davis Kinyanjul Nderu on 1st March 2019 and a third one made by her daughter in law Caroline Gathoni Kinyanjui also made on 1st March 2019. In her



defence therefore, her case was that the Applicant's mother was only an employee of the family business and there never existed a relationship of husband and wife between the Applicant's mother and the deceased. It was also her care that the Applicant was not a child of the deceased. It was also their case that the application was an after-thought coming as it did, 22-years after the deceased died and was coming from a family with which the Respondents have no relationship as known in the African customary law. At paragraph 28 of her said witness statement sworn on 6th March 2019, she summed up her position as follows:

“Geoffrey Omondi, Dorothy and Jenipher have told lies in their respective statements. In her statement, Jenipher does not describe me as her alleged co-wife. In polygamous families, wives of one man know each. Their children socialize with the children of the other co-wives. Amongst the Luos, as among the Kikuyu, a marriage Involves families. Members of the family attend weddings and burials of one of their own. Jenipher did not attend the burlal of the deceased or those of Andrew or Eric. The deceased had a daughter known as Walthira who passed on in late 1970s, Jenipher did not attend the burial.”

49. It is submitted that the Applicant has not established any of the three grounds on which a grant may be revoked and therefore his application is for dismissal with costs. He did not demonstrate any defect in the process that resulted in the issuance of both the grant of representation or certificate of confirmation. Nor did he give evidence let alone prove that the petitioner/respondent has squandered the estate. The fact of filing the petition was advertised in the Kenya Gazette on 25th October. 1996 and the application was being brought 22 years later by a man who never mourned the death of his alleged father and was only discovering his existence more than two decades later.
50. The grounds discussed above apply where the applicant has locus standi to make it on account of the fact that he is a dependant or an heir of the estate of the deceased.
51. In the 2nd Edition of the Law of Succession, Justice Musyoka discusses revocation of grants at pages 352 to 354 and that the applicable decision to this case is that of Lady Justice Aroni who in Nairobi High Succession Cause Number 33 of 2010 In The Matter of the Estate of Beth Nyambura Wagako dismissed the application for revocation of grant because the applicants had not discharged the burden of proof. Her Ladyship pronounced herself as follows:

“In the circumstances therefore and having arrived at a conclusion that the respondent has sufficiently explained herself and for the reasons remunerated in preceding paragraph above the application is declined in its entirety.”
52. The Petitioners/Respondent urges this Court to find that the Applicant has no locus standi, and never filed his objection within statutory timeline and that the summons for revocation of grant lack merit and is perfect candidate for dismissal with costs to the Respondent

Analysis and Determination

53. Upon considering the pleadings, response thereto and the respective submissions filed, I find the following to be the one broad issue that arises for determination:

“Whether the Summons for revocation of grant has merit?”
54. The Applicant called her mother and uncle to testify in aid and the following are common ground that Applicant's mother was in in the employment of the deceased there is no evidence to prove that the



child's parents were married or had a relationship or that the deceased ever lived with or acknowledged the Objector and his siblings.

55. There cannot be customary marriage unless a part of dho-I-keny (bride price) was paid. The author goes ahead to state that nowadays, if the husband has independent means and can pay dho-i-keny without the assistance of the family he may marry even without their consent.
56. While this the Applicant moved Court 18 years it is apparent that the motion was instigated by the Applicants mother by dint of her witness statement prepared and dated 21st January 2018 almost six months to the filing.
57. In my view, the production of the birth certificate alone is not proof that that child is the deceased's. Sentiments echoed in *In re Estate of Patrick Mwangi Wathiga- Deceased* [2015] eKLR.
58. While a Birth Certificate can be used to prove paternity, It was thus incumbent that the Applicant do prove on a balance of probabilities that is required to demonstrate that he was dependent of the deceased during his lifetime and are therefore a dependent under Section 26 of the *Law of Succession Act*.
59. The standard and burden of proof provided by the *Evidence Act* ought to be discharged; he who alleges must prove. Section 107 of the *Evidence Act* places the burden of proof on the party that alleges. In *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* (2014) eKLR the Supreme Court held inter alia: the person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.
60. In the Absence of proof of marriage, or that the deceased ever lived with the Applicant and the belated nature of the summons it would be important for the Applicant to demonstrate that, the deceased had accepted him as his child and that the Applicant was maintained by the deceased immediately before his demise.
61. I am afraid that this evidence is lacking and the Applicant never tendered any evidence that the deceased had accepted him as his own and took care of him immediately before his demise.
62. While the birth certificate produced indicates the names of the deceased as the Applicants father, this piece of evidence falls short of the test set by Section 26 of the *Law of Succession Act*.
63. Children born out of wedlock that seeks recognition in adulthood as beneficiaries to an intestate deceased person must showcase and demonstrate that the deceased had accepted him/her during his lifetime and took care off him/her without which such a person cannot be regarded as a dependant.
64. While the Applicant has produced an unimpeached birth certificate showing that the deceased was his father the evidence falls short in proof that the petitioner was aware of his existence as a dependant and deliberately or otherwise omitted his name from the succession cause.
65. I thus find that the Summons for Revocation of Grant dated the 19th day of June 2018 lacks any merit and the same is hereby dismissed with costs to the petitioner.

It is so Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 2ND DAY OF MAY 2025.

MOHOCHI S. M.



JUDGE

