



In re Estate of Laila Chagadin Sidi (Deceased) (Succession Cause 85 of 2019) [2024] KEHC 1026 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 85 OF 2019**

JRA WANANDA, J

FEBRUARY 9, 2024

**IN THE MATTER OF THE ESTATE OF LAILA CHAGADIN SIDI (DECEASED)
SHAMSHUDIN JAFFERALI BOGHANI.....PETITIONER/ADMINISTRATOR**

VERSUS

**RAHEMET NAZARALI ALSO KNOWN AS RAHEMATBAI BAHADURALI
ISMAIL NAZARALLY NEE RAHEMUTBAI CHAGAN SIDI ALTERNATIVELY
RAHEMAT CHAGAN SIDI.....OBJECTOR**

RULING

1. This is yet another of litigation that reveals the now common, unashamed and regular display of the extent to which inheritance of property within families has totally destroyed the fabric of society such that laying hands on property of the dead now seems to be the only priority or motivation for mankind to continue identifying with their families, over and above the traditional set-up and ethos that ensured the upholding of familial unity, sharing and cohesion. It is no longer the same.
2. From the Certificate of Death presented in evidence, the deceased, Laila Chagadin Sidi died on 8/07/2017 aged 76 years. By the Petition for Letters of Administration Intestate dated and filed on 24/07/2019, the Petitioner then sought to be appointed the Administrator of the estate of the deceased. He described himself as a nephew of the deceased and in the Affidavit in support of the Petition, he deponed that the only known close relatives of the deceased, a brother and a sister were deceased. Pursuant thereto, the Grant was issued to the Petitioner on 17/09/2019. Subsequently, on 25/11/2019, the Grant was confirmed thus transmitting the entire estate to the Petitioner as the sole beneficiary. The Grant was confirmed before expiry of the 6 months statutory grace period by virtue of an order given upon an Application filed by the Petitioner to that effect.
3. However, on 5/06/2020, the Objector emerged and filed the Summons dated 28/05/2020 seeking Revocation of the Grant. The Summons was filed through Messrs Nyairo & Co. Advocates and is expressed to be brought under Section 47 and 76(b) of the *Law of Succession Act*, and Rule 44(1) and



73 of the Probate and Administration Rules and “all other enabling provisions of law”. The Summons is then supported by the Affidavit sworn by the Objector.

4. In the Affidavit, the Objector deponed that she is the sister and sole surviving sibling of the deceased and therefore the only legitimate beneficiary of the estate of the deceased, that the Petitioner obtained the Grant without full disclosure of material facts to the Court and by the making of a false statement or by concealment of something material to the case, and that the Petitioner is a far off relative not entitled to benefit from the estate.
5. However, before the Objector’s said Summons for Revocation of the Grant could be heard, various interlocutory Applications and counter-Applications were filed and these took quite some time before being disposed of. I have not come across any specific Response filed by the Petitioner expressly against the Summons but I note that although directions were earlier given that the Summons be canvassed by way of written Submissions, upon Application by the Petitioner, such directions were subsequently varied and it was then ordered that the Objection be heard by way of viva voce evidence.

Objector’s Witness Statements

6. In her Statement, the Objector reiterated the matters stated in her Affidavit and added that at the time of her demise, the deceased had no children and was not married and as such the Objector was the sole surviving sibling of the deceased and the only legitimate beneficiary to the estate. She stated further that she instructed her Advocates to Petition for Letters of Administration but on presenting the documents in Court, she was shocked to learn that the Petitioner had already obtained a Grant, on obtaining the documents submitted by the Petitioner she was shocked to learn that the list of beneficiaries filed did not reflect the correct position since her name was deliberately left out, that the Petitioner passed himself as the only surviving beneficiary yet he was aware that that the Objector was still alive as she used to communicate with the deceased, and that the Petitioner did not seek the Objector’s consent before obtaining the Grant.
7. She stated further that the Petitioner misled the Court into issuing the Grant and took advantage of the Objector’s absence to disinherit her despite the Petitioner having his own properties in Mombasa, that the deceased had some properties which she had rented out and which the Petitioner has transferred to his name, that the Petitioner is a far-off relative and is not entitled to benefit from the estate, that it is not the first time that the Petitioner has attempted to fraudulently obtain a Grant to the same estate, and that he had previously filed Succession Cause Kapsabet Principal Magistrates Succession Cause No. 124 of 2018 which was revoked vide Eldoret High Court Miscellaneous Succession Cause No. 23 of 2018 on account of material non-disclosure.
8. The Objector urged the Court to intervene, revoke the Grant and cancel all titles or dispositions of the deceased’s assets that were made on account of the fraudulently acquired Grant and allow the Objector as the sole beneficiary and dependent.

Petitioner’s Witness Statements

9. In the 1st Statement made by the Petitioner, he stated the deceased is his Aunt with whom he had lived since childhood, that throughout the deceased’s elderly life and for more than 35 years, it is him who lived with her, kept her company and tended to her needs at their family home in Kapsabet, sometime in 2015 the deceased suffered ill-health, was admitted in hospital and upon her discharge she became more aware of her mortality and executed a Will naming him as the beneficiary of her estate, that she was subsequently again admitted to hospital and eventually died on 8/07/2007, that during the burial on 12/07/2007 thieves broke into their hose and made away with important documents including the said Will, the thieves also installed a padlock on the door, and that the break-in was reported to the



police who came and broke the padlock. He stated further he later successfully petitioned for Letters of Administration in Kapsabet Magistrate's Court Succession Causae No. 9 of 2018, that at that time he was not aware of any other beneficiaries, that subsequently one Nazim Jiwa filed Eldoret High Court Miscellaneous Succession Cause No. 23 of 2018 seeking revocation of the Grant issued in the earlier Cause, the said Nazim Jiwa purported to be in possession of a Will executed by the deceased but the Court pronounced the Will as invalid, the Court also revoked the earlier Grant on the baist ghat it was issued upon incomplete information, the Court however allowed him to file a fresh Succession Cause that would cure the omissions cited, he then filed this instant Cause in which he obtained the Grant appointing him the Administrator and a Certificate of Confirmation appointing him the sole beneficiary.

10. He stated further that the Objector had no contact with the deceased or with any member of the family during her lifetime since she had cut contact with all of them in Kenya to the extent that she never attended any family functions including burials of any of the deceased's siblings, nobody in the family in Kapsabet has known or interacted with the Objector prior to her Application herein as she was never in the picture and had not been heard from for many decades, that to his knowledge the deceased had no survivors and the deceased is an impostor, there is no way of telling whether the person claiming to be the deceased's sister is the actual sister, that the family has a history of passing property from one generation to the next and the Objector had numerous opportunities to lay claim to the property when the deceased was alive which she failed to do, that the various objector applications seeking to disinherit him are connected and betray a common thread of persons who are taking advantage of the missing Will to fraudulently profit from the estate, being the only and closest heir of the deceased he was not only entitled to apply for the Grant but was also entitled to inherit the deceased's estate and that the Objector is an interloper banking on the fact that the bona fide "Rehmat Chagan Sidi" was estranged from the deceased's family to fraudulently enrich herself and those backing her.
11. The 2nd Witness Statement for the Petitioner was that of one Dr. Benjamin Kimagut Maiyo who stated that he was a neighbour and a close friend of the Chagan Sidi family. He gave a brief narrative of his background and history indicating that he is a retired senior civil servant with a distinguished career in government and currently still serves the community around Kapsabet in various capacities including in churches and a school. He added that he has known the Chagan family since about 1946, the Petitioner's wife and himself were brought up in the same village of Chebabar near Kapsabet, he had occasion to interact not only with the immediate family but also with its friends and extended relatives, that the family is well known in Kapsabet, that the Petitioner is the grandson of Chagan Sidi who acquired the property in dispute in the 1930s while the deceased is the daughter of Chagan Sidi and had acquired the property after the death of her father, the deceased was unmarried during her lifetime and never bore any children, that she therefore lived with the Petitioner at the said property and the Petitioner took care of her in her old age when she became frail, sickly and eventually died.
12. He added that the late Chagan Sidi and his wife had a daughter by the name Rahemat Chagan Sidi who is the alleged Objector and was raised and brought up in Kapsabet until her immigration to Canada in the 1960s, to the best of his knowledge, from the time that the alleged Objector immigrated she has never returned to the family's Kapsabet home and it is impossible for him to recognize her, that this is why he is using the term "alleged Objector" since neither himself nor the deceased's family members remaining have any way of confirming her identity, that after the alleged Objector emigrated and after he demise of Chagan Sidi, the relatives who remained in Kapsabet and resided in the family home were the Petitioner and his nuclear family as well the late Hashen Chagan Sidi who was a brother to the deceased and who lived with his wife in the same property until his death in 1988 and never sired a child, that his widow later emigrated to Canada where she remarried, after Hashen Chagan Sidi died in 1988, the deceased was taken care of by the Petitioner and his family, that in 2007 when the deceased died,



all of a sudden strangers appeared to lay claim to the property of the deceased, and that the Petitioner and his family are the 3rd generation of the Chagan Sidi family. He added that from his regular visits to the home, he observed that the Petitioner's family enjoyed a very close relationship with the deceased. He also strongly disputed the existence of the purported Will relied on in the earlier challenge to the Petitioner's initial Petition filed in the earlier Cause indicating that the deceased bequeathed her estate to charity. In conclusion, he stated that the Objector is unknown to anyone in Kenya and is taking advantage of the fact that nobody can truly verify her identity.

13. The matter then proceeded for hearing viva voce before me on 24/10/2023.

Objector's Evidence

14. The Objector testified as PW 1. Led in her evidence-in-chief by her Counsel, Ms. Odwa, she was said to be 89 years of age and testified virtually from Canada while in a nursing home. She was visibly experiencing medical challenges and appeared to be quite weak and in great agony. It required a lot of patience from the Court and the Counsels to conduct the hearing and receive her evidence.
15. She stated that she lives in Canada but she was born in Kapsabet, Kenya. She listed the names of her parents and her siblings and stated that they are all now deceased. She stated that the deceased was not married and never had children. She then adopted her Witness Statement and List of documents and added that she filed the objection because she wants the truth to come out and reiterated that the Petitioner did not include her name in the Court papers and the Grant should therefore be revoked and instead, the same be issued to her. She confirmed that the Petitioner is the son to the Objector's sister.
16. In cross-examination by Counsel Mr. Mureithi representing Messrs Benson Kuria & Co. Advocates, she stated that she is a Canadian citizen, that she could not recall when she left Kenya but has never come back since she left, that she used to interact with the deceased on phone, she used to call her every month, that the property that belonged to the deceased came from their father, the property went to the deceased because she was the one present when their father died, that the Petitioner is the son of her sister "Rabia", she conceded that she cannot recall when she was last on the family property, that she learnt of the deceased's death through phone calls from friends and relatives, and that the deceased used to live alone in their father's properties – Kapsabet Municipality Block 432 and 433.

Petitioner-Administrators' Evidence

17. The Petitioner testified as DW 1. He stated that the deceased was his aunt - her mother's sister, that her mother was Rabia Jaffarali Bhogani, that he had known the deceased for 24 years, that he used to live in Kapsabet with the deceased, he has lived there for 30 years, he used to also live there with his grandmother, that the deceased used to frequent hospital very often as she suffered ill-health, he is the one who used to take the deceased to hospital from Eldoret to Kisumu where she passed away, that the deceased's income was from rental houses, it was not much but was enough to sustain her, that he took care of the deceased for almost 30 years until she died, that even her grandmother and 2 sisters were under the Petitioner's care, he was not aware of any other sister outside Kapsabet, that when he was young, he heard that one sister had migrated to Canada, he has never met her and has only seen her in photographs, and that the said sister Objector never even attended the burial of the deceased.
18. He stated further that the burial was conducted by an Eldoret Imam, that after the burial they returned home about 11 pm when the guards informed him that somebody had come during the day and locked all the houses, that he called the police who came and broke the padlocks, from the deceased's house they discovered that the deceased's ornaments, passport, Will and other documents had been taken away, that he presumed that the deceased had a Will since his grandfather, grandmother and all



in the family had made Wills, that the deceased herself got her property by virtue of a Will from his grandfather, that he had earlier applied to inherit the deceased's estate but the Court rejected the same because he was told that somebody from Nairobi had objected to the Petition, that the Court asked him to apply afresh, that the Objector has never participated in any family events or attended any of the family burials nor was she in communication with them. He doubted that the deceased was in communication with the deceased, the deceased never mentioned the Objector, that he has nothing to confirm that the deceased was a sister to the deceased, that he last saw the sister when he was 8 years old, that the Petitioner's mother died when the Objector was 3 months old, that his grandfather took the Petitioner to Mombasa but he used to be brought to Kapsabet occasionally, he returned permanently to Kapsabet when his uncle - Fazal - died to take care of the family. He then adopted his Witness Statement and bundle of documents.

19. In cross-examination, he stated that his grandfather's name was Chagan Sidi, father to the Petitioner's mother – Rabia Jaffarali Bhogani. He then listed her mother's siblings and stated that the deceased was the last born, that he only came to know of the sister later, that most of the family members used to have Wills, that his own parents had properties in Mombasa but are both dead, the property went to him and that he moved back to Kapsabet. He conceded that he had filed an earlier Succession Cause in Kapsabet No. 9 of 2018 but the Grant issued therefrom was revoked in Eldoret High Court Miscellaneous Case No. 23 of 2018. He conceded that he used to be the deceased's tenant in Kapsabet and used to pay rent. He agreed that he did not include the name of the Objector in the Petition herein
20. In Re-examination, the Petitioner agreed that he inherited his parent's property in Mombasa. He then stated that he returned to Kapsabet when his grandfather requested the Petitioner's father to release the Petitioner to return to care of the family in Kapsabet. He conceded that he used to pay the deceased Kshs 40,000/- for a shop which he was operating but he never used to pay rent for the residence. He stated that there was no Will and that the purported Will was rejected in Eldoret High Court Miscellaneous Case No. 23 of 2018, and that it was produced by a 3rd party. He urged the Court to grant him the properties since the sister (Objector) has never participated in anything.
21. DW 2 was one Dr. Benjamin Maiyo. He stated that he is a resident of Kapsabet, that he has known the deceased's family for about 50 years, he knew the grandfather – Sidi Chagan - and the family members, that he is a retired civil servant and a former Chairman of the National Housing Corporation, he has been involved in churches around Kapsabet, the deceased was known to her, they were Asians who came to Kenya way back even before independence, there were more than 10 Asian families in Kapsabet, Sidi Chagan was as shrewd businessman, the deceased herein – Laila Chagan – was his family friend, that the deceased was married but got divorced because she could not give birth, after the divorce she returned to the father's home, she suffered from ill-health and experienced medical problems so she spent most her time indoors and rarely came out, that Sidi Chaga owned a shop which he got from the "whites", he spoke good English so all the "white" customers went to his shop. He added that the deceased– Laila Chagan – and the Petitioner used to live together, that they had an amiable/cordial relationship. He stated that he had heard of the name "Rahmet", he knew her as a young lady, it seems she acquired other names along the way, she saw her last around 60 years ago after which she disappeared and he was told that she had relocated to Canada, he never heard that she had ever come back. He stated further that he used to attend the family events, including birthdays and other festivities, the family built a small Ismaili Mosque, the Chagan family attended DW2's granddaughter's graduation from Rwanda, he has never met Rahmet again since she left, he would not recognize her if she met her today, he understands that she is now in an old people's home, all siblings in the Chagan family were dead, he however does not know whether Rahmet is alive, that the Chagan property has passed from generation to generation, the last inheritor was the deceased – Laila Chagan, and that the family has always lived in the same property.



22. In cross-examination, DW2 stated that he interacted with the whole family, not just one person, that his home and that of the Petitioner's wife is about 1 kilometre apart, his education is up to University of Wales where he was on 3 separate occasions between 1971 and 1984, he spent 9 months when he first went there, he returned in 1977 and spent 9 months then he went again for his Masters in 1983 and came back to Kenya in 1984. He conceded that when he was a civil servant he used to move from one place to another but he had his home in Kapsabet, Rahmet is the only one who may be alive although he cannot confirm or deny, he only heard that she is still alive, he does not know the current status of each and every family member, although the family property has always passed down through Wills, he was not a witness to any of the Wills nor an executor for any of them, that this is the first dispute he has heard over the family's property, that the information at paragraph 19 of his Witness Statement was given to him by the Petitioner.
23. In Re-examination, DW2 stated that he knew the Petitioner's wife since she was a child, long before she got married to the Petitioner since she too was brought up in the same area, that although he used to travel around when he was a civil servant, he used to go to Kapsabet every week, about Rehmat being in an old people's home, it is the Petitioner and his wife who informed him, that the Petitioner and his wife are the only surviving members of the family that he knows, they still own the shop in Kapsabet – hardware, that the Petitioner and his wife told him that they too only heard about Rehmat, he has kept in touch those members of the family who are in Kenya

Submissions

24. Upon close of the trial, the parties agreed and were directed to file written Submissions. The Objector's Counsel filed his on 17/07/2022. A copy of the Petitioner's Submissions is also in the Court file but the same does not seem to bear a Court stamp. I cannot therefore ascertain when it was filed. The same is however dated 19/10/2023.

Objectors' Submissions

25. In his Submissions, Counsel for the Objector recounted the background of the matter and also the witness' testimonies. She then submitted that the issue for determination is whether the Objector meets the threshold for revocation of a Grant within the meaning of Section 76 of the [Law of Succession Act](#). According to her, the Grant herein is fit for revocation given that the Petitioner fraudulently obtained it by deliberately failing to disclose to the Court that the Objector is a sister and the sole surviving sibling of the deceased in view of the fact that the deceased had no surviving children, husband or parent, despite the fact that this Court had in its Ruling delivered in on 11/07/2019 in Eldoret High Court Miscellaneous Succession Cause No. 23 of 2018 revoked the Grant issued to the Petitioner for this very same estate for material non-disclosure of facts and despite being alive to the existence of the Objector, the Petitioner, again, at the time of petitioning the Court for Grant of Letters of Administration, deliberately failed to disclose material facts and specifically that the Objector was the sole beneficiary to the estate of the deceased by virtue of being the sole surviving sibling of the deceased and who ranks higher in order of consanguinity/preference than the Petitioner, it is on account of the fraudulent misrepresentation that the Petitioner obtained the Grant without including the Objector as a beneficiary or seeking her consent to apply for Letters of Administration or distribute the property as is required under Rule 26 of the Probate and Administration Rules and Section 51(2)(g) of the [Law of Succession Act](#).
26. Counsel submitted further that in opposing the Objection, the Petitioner alleged that the Objector abandoned the deceased and did not participate in any family activities and was therefore not entitled to benefit from the deceased's estate. Counsel posed the question whether this reasoning is founded



in any law? She submitted that her answer is simply no because of the provisions of Rule 7(7) of the Probate and Administration Rules. Counsel contended further that it was not up to the Petitioner to elect who is to benefit from the deceased's estate and who is not and that mere fact that the Petitioner alleges to have been staying on the deceased's property which stay may not have been at the invitation of the deceased's property especially when it is clear that the Objector has prior preference within the meaning of Rule 7(7) aforesaid, that the Petitioner has his own property having inherited the same from his parents as was confirmed by the Petitioner himself during the hearing and therefore he had no business with the deceased's property.

27. Counsel then cited Section 66 and also 39 of the *Law of Succession Act* and submitted that the order of preference is provided therein and that where the intestate has left no surviving spouse or children as in the present case, the position is clear. She added that the Objector produced documents proving that she is a sister of the deceased which position was confirmed by both the Petitioner and his witness, hence the Objector ranks in priority so far as being a beneficiary to the estate, that the Petitioner was all along aware that the Objector was alive and residing in an elderly home in Canada which position was confirmed by the Petitioner's own witness, Dr. Benjamin Kimagut, but still went ahead to exclude the Objector in the Petition, that from the above it is clear that the Grant should be revoked.

Petitioner-Administrators' Submissions

28. On his part, Counsel for the Administrators submitted that this Cause relates around an Objector who has emerged "out of the blues" alleging a familial connection to the deceased and staking a claim to the estate of the deceased, that the deceased died in 2017 having executed a Will in 2015, however during the burial of the deceased, burglars entered the deceased's house and made away with documents, including the Will, thus rendering it impossible to ascertain the deceased's intentions over her estate leading to her being deemed to have died intestate, that subsequently the Petitioner applied for a Grant of Letters of Administration for the deceased's estate in Kapsabet Magistrates Court Succession Cause No. 9 of 2018, that regrettably, this Grant was challenged in Eldoret High Court Miscellaneous Succession Cause No. 23 of 2018 by one Nazim Jiwa Mitha who claimed to possess a valid Will executed by the deceased directing her entire estate towards unspecified charitable purposes, that fortunately the Court swiftly discerned the dubious nature of the Applicant's challenge and declared the alleged Will invalid and also prohibited the Applicant from interfering with the estate, in the process the Court also nullified the Grant issued to the Petitioner by the Magistrate's Court due to incomplete information presented during the initial Petition, that the Petitioner complied with the Court's directions and successfully petitioned the Court for a Grant through a fresh Application in this Cause.
29. Counsel submitted further that the proceedings commenced by the Objector herein was a complete shock to the Petitioner who had resided with the deceased and had been her primary caregiver considering that deceased had no surviving siblings at the time of her demise, that given previous attempts by third parties to seize control of the estate as mentioned earlier, the Petitioner is justifiably apprehensive that the Objector is an impostor who seeks to unfairly benefit, that this apprehension arises from the lack of verifiable evidence supporting the Objector's claim of being related to the deceased, that the Petitioner's bona fide attempts at inheriting the property has faced such strong opposition from illegitimate claimants to the estate, this stems from the stealing of the deceased's Will, that the multiple objection Applications are interlinked and reveal a common thread of persons taking advantage of the absence of the Will to fraudulently profit.
30. Counsel then recounted the testimonies given by the Witnesses during the trial and submitted that Section 39 of the *Law of Succession Act* is instructive on who can inherit a deceased person who has left no surviving spouse or children and that Section 66 grants final discretion to the Court to determine



the preference of persons to be granted Letters of Administration with precedence being issued to surviving spouse with or without association of other beneficiaries according to their beneficial interests. He cited the case of re Estate of Gamaliel Otieno Onyango (Deceased) 2018 eKLR. Counsel contended that since the deceased had no surviving parents, spouse or child, her estate would pass to the brothers and sisters and any child or children of the deceased's siblings in equal shares as stipulated under Section 39(1)(c).

31. Counsel argued further that to qualify as a beneficiary the Objector ought to be a bona fide sibling of the deceased, that given the evidence presented, the Objector is not such sibling. Counsel referred to what he described as contrasting and contradictory explanations for discrepancies in the Certificate of Birth, Marriage Certificate and Passports produced by the Objector to prove her identity and submitted that it is perplexing that a single individual can have such inconsistencies in name and identity across official government-issued documents and expect the Court to accept the validity of the documents without corroboration. He argued that the Objector should have presented certification from the Registrar of Births and Deaths to serve as conclusive evidence that the Birth Certificate is a valid document in accordance with Section 26(4) of the *Births and Deaths Registration Act*, that if the Objector's name changed after birth as evidenced in the Marriage Certificate, then it should have been duly recorded with the Registrar as per Section 14 of the same Act, that regarding the Objector's passport, she should have furnished a certified copy from the Director of Immigration, that Section 32 of the *Kenya Citizenship and Immigration Act*, 2011 stipulates that the possession of a Passport does not preclude inquiry, investigation or judicial proceedings regarding the validity of the Passport, that under Section 68(1) and 68(2) of the *Evidence Act*, if the Objector wished to rely on secondary evidence as she did, then such evidence should have been presented by an expert skilled in examining documents, that in the circumstances, the Court cannot be persuaded that the Objector is not an impostor.
32. Counsel argued further that the Objector has relied on secondary evidence in contravention of the "best evidence rule". He cited the case of re Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased [2016] eKLR and submitted that if the originals could not be presented then the copies provided ought to have been certified by the government, that the identity of the Objector has been disputed, given the previous evidence of fraudulent conduct by third parties in trying to disinherit the Petitioner of the estate, the Court should exercise caution prior to admitting any person as a beneficiary, nothing would have been easier than for the Objector to call a relative of the deceased as a witness to confirm her identity, not even during the burial of her own parents and siblings was the bona fide "Rahemet" involved, the burden of proving relationship lies with the Objector, under Section 66 of the *Law of Succession Act*, the Court has the discretion to sift out bona fide beneficiaries. He cited the case of re Estate of Macharia Muguima (Deceased) [2019] eKLR and submitted that the Objector resisted the hearing of this suit viva voce and opted to proceed virtually, she also resisted a DNA test, that the Petitioner and DW2 who had extensive knowledge and familiarity with the family denounced the identity of the Objector. According to Counsel, the Objector failed to prove her case as required under Section 107 of the *Evidence Act*, and under Section 76 of the *Law of Succession Act*. He cited the case of Evans Otieno Nyakwama v Cleophas Bwana Ongaro [2015] eKLR and also Ignatius Kwama v Bernadetta Shituku [2016] eKLR. He averred further that where the Court is required to determine which between two accounts coincides with the truth, it scrutinizes from the evidence what version of events was more probable. He cited the case of John Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR.
33. According to Counsel, it is highly improbable that the Objector who wishes the Court to believe that she maintained close relationship with the deceased learnt of the death of the deceased 3 years later, the Objector failed to participate in any of the numerous Succession Causes filed in respect to the estate herein which Causes were duly advertised in the Kenya Gazette, and that the Petitioner's case is more



probable than the Objector's. He cited the case of *William Kabogo Gitau v George Thuo & 2 Others* [2010] eKLR. He added that revocation of a Grant is a fundamental prayer and ought not to be made lightly and that the Court's power of revocation of a Grant is a discretionary power. He cited the case of *re Estate of Kimining Arap Kiboigut* [2021] eKLR and on exercise of such discretionary power, he cited the Supreme Court case of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* [2019] eKLR.

Analysis & Determination

34. Upon examination of the Application, the pleadings filed, including the Affidavits and respective parties' Submissions, I find that the issue that arises for determination to be "whether the Grant issued herein and subsequently confirmed should be revoked.

35. Section 76 of the *Law of Succession Act* provides as follows:

"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."

36. It is clear that the Objector's Summons advances allegations that would attract the provisions of sub-Sections (a), (b) and (c) above.

37. The Objector's case is that at the time of petitioning the Court for Grant of Letters of Administration, the Petitioner deliberately failed to disclose material facts and specifically that the Objector was the sole beneficiary to the estate of the deceased by virtue of being the sole surviving sibling of the deceased and



who therefore ranks higher in order of consanguinity/preference than the Petitioner. The Objector relies on Sections 39(1) of the *Law of Succession Act*, Cap. 160 which is premised as follows:

- “ 39. Where intestate has left no surviving spouse or children
- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority –
 - (a) father; or if dead
 - (b) mother; or if dead
 - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
 - (d) half brothers and half sisters, and any child or children of deceased half brothers and half sisters, in equal shares; or if none
 - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

38. The deceased having died intestate, having not left behind a spouse or a child, and her parents having also both died, clearly the Objector, if indeed she is a sister and the only surviving sibling or member of the nuclear family of the deceased, would rank much higher in priority under Section 39(1) above over and above the Objector who is a nephew to the deceased in respect of inheritance of the deceased’s estate.
39. However, the issue of the identity of the Objector was central to the determination of this matter and was hotly contested. The Objector was put on early notice of this fact when the Petitioner insisted on viva voce hearing to be conducted in open Court and also for the Objector to undergo a DNA test. Since the Objector was living in Canada, was of advance age (if I heard her right, she stated that she was 89 years old), was seriously ill and further, was confined in a nursing home, it was agreed that the best option was to allow her to testify virtually from Canada which she did. This however did not in any way diminish the Objector’s duty and obligation to lay to rest the “elephant in the house” – proof of her identity and relationship to the deceased. The question is; did she discharge this burden?
40. Sample this – the Chagan Singh family was a prominent and well-known family in Kapsabet, even long before Kenya obtained independence, operating successful businesses within the area. The evidence on record is that the Chagan Sigh family was made up of the two parents and their 6 children. One daughter by the name “Rahemat” was said to have relocated or immigrated from Kenya many decades ago although none of the witnesses who testified is certain on when exactly she left. Although very little seems to be known to about her, the fact of “Rahemat” existence in those far off years is confirmed by both the Petitioner and his witness, DW2. It has been alleged that she left Kenya even before independence. Considering that Kenya attained independence in the year 1963, it means that at the least, the said “Rahemat” has been away from Kenya for not less than 61 years to date. There is no evidence that she has ever travelled back to Kenya since she left, not even on a single occasion. There is also no evidence that she maintained contact with any of the members of the family since she left.



41. While “Rahemat” was away, the father died in the year 1988 and the mother in 2005. Her siblings also eventually all died. The last sibling to die was the deceased who died in 2017. In short, the entire family died while she was away. The evidence is that “Rahemat” never attended any of the burials for her parents or any of her siblings. As aforesaid, there is also no evidence of any nature before the Court to show that while away in Canada, “Rahemat” was in communication with any member of the family or even with any relatives from the extended family. For all intents and purposes, “Rahemat” remained a mystery and a non-existent sibling as far as her family was concerned. The Petitioner, a niece of the said “Rahemat” and who resided with the grandparents in Kapsabet and apparently the only visible relative in Kenya swears that “Rahemat” was never in communication with anyone within the family for all these years. He also states that the last time that he saw “Rahemat” was when he was himself still a child of about 8 years old. DW2, Dr. Benjamin Maiyo testified that he grew up in the same neighbourhood as the Chagan family in Kapsabet and continued to live with the family in the same neighbourhood for many years thereafter even in adulthood and that he is therefore a close family friend and confidant to date. Both the Petitioner and DW2 were emphatic that they would not be able to recognize “Rahemat” were they to meet her today.
42. From the copy of his Identity Card on record, the Petitioner was born in 1949. If as he states, he last saw “Rahemat” when he was about 8 years old, then it means that he last saw “Rahemat” about 1957. This tallies with the Petitioner’s allegation that the Objector left Kenya even before independence.
43. According to DW2, the deceased tried marriage but failed because she was unable to have children and was also sickly. She therefore died without leaving behind a husband or child. From the evidence on record, the deceased owned at least 4 different parcels of land in Kapsabet, including the erstwhile family home, and also had other substantial investments. Before she died, she ailed for quite a long time and was regularly in and out of hospitals. During all this time, the evidence is that it is the Petitioner who throughout cared for and catered for the deceased including taking her to hospitals and ensuring that she received medical treatment. From the record, the deceased was taken to various hospitals in Nairobi, Eldoret and Kisumu where she eventually succumbed. It is also the Petitioner who organized and oversaw the funeral and last rites of the deceased. If “Rahemat” was alive, then it is not clear whether she was even aware of the death. If she knew, then she was never heard from and did not attend the burial. There is no evidence that “Rahemat” at any time during the deceased’s sickness or even in the deceased’s last days gave any assistance to the deceased in any way or was even in communication with the deceased. After the deceased died in 2017, at least 3 Succession Causes relating to her estate were instituted ending with the instant one in which the Petitioner was on 17/09/2019 appointed the sole Administrator of the estate and on 25/11/2019 was eventually confirmed as the sole beneficiary. “Rahemat” never participated in any of these Causes. It is therefore not in dispute that since the deceased died in the year 2017, it is the Petitioner who solely oversaw the estate of the deceased as the caretaker and unofficial “trustee”.
44. Enter the Objector – she suddenly emerged and appeared into the scene in June 2020, 3 years after the death of the deceased challenging the appointment of the Petitioner as the sole Administrator and beneficiary of the estate. She claimed to be the long lost and forgotten “Rahemat”. During the trial, she was unable to prove that she had been in communication with the family during the time that she was away in Canada, she curiously claimed that she could not remember when or which year she left Kenya, apart from the Petitioner, she did not name any other family member known to her, not single one. She confirmed that she has never returned to Kenya since she immigrated many years ago, she did not deny that she never attended the burial of her parents or for any of her 5 siblings or any family functions such as weddings, birthdays or graduations. There was also no evidence that any family member had ever travelled to Canada to visit her. It was clear from her evidence that she is and has been always completely



out of touch with the situation or status of the family. She offered no explanation whatsoever on why if indeed she is the said “Rahemat”, she chose to cut herself off from her family for all this time – not less than 61 years.

45. From the evidence adduced, I inevitably fell into serious doubt regarding the true identity of the Objector. I could not understand how one could just disappear from the face of her own family “world” and wholly cut all links in the manner that the Objector does not deny to have done. I found this quite intriguing. More curiously she offered no explanation whatsoever on why she has decided to re-appear now and even so, not for anything else, but only to claim her sister’s property, a sister with whom she had cut all links and whom, I dare to say, most likely did not even know properly and never bothered to assist when she was ailing. Why now? That is the question.
46. Since, as aforesaid, the issue of the identity of the Objector was crucial in this case, I expected her do all within her ability to prove that she was one and the same person as the said “Rahemat”. I expected her to present cogent evidence to prove this fact. One of the easiest ways of bringing this proof was by calling, as a witness, someone who was familiar with the family in the same manner that the Petitioner called the said Dr. David Maiyo. However, all the Objector produced were photocopies of alleged identification documents which however only add more confusion considering the discrepancy and inconsistencies apparent in the names and dates of her birth appearing therein, as follows:

Document	Name on document
Certificate of Birth	Rehamutbai (Father’s name – Chagan Sidi)
Marriage Certificate	Rahamat (Father’s name – Chagan Sidi) Husband’s name – Bahadurali Esmail Nazarali
Kenyan Passport	Rahematbai Bahadurali Ismail Nazarally
Canadian Passport	Rahemet Nazaralli

Document	Date of Birth indicated
Certificate of Birth, Kenyan Passport and Canadian Passport	21/03/1934
Marriage Certificate	18 years in 1955 (meaning she was born in 1937)

47. Apart from the said apparent discrepancies, the versions of the documents produced are copies that are not even certified. I appreciate that the Objector resides in Canada and would not have logically been expected to produce originals of personal documents such as her passport. I also appreciate that production of the copies was not objected to at the trial or at pre-trials. This is why I have not raised any issue regarding the admissibility of the documents. What I am concerned with however is the probative value of the copies produced, in the absence of corroboration, given that the identity of the Objector was in dispute.
48. The said confusion is also apparent from the title to her Summons herein in which she is curiously described as “Rahemet Nazarali also known as Rahematbai Bahadurali Ismail Nazarally, nee Rahemutbai Chagan Sidi, alternatively Rahemat Chagan Sidi”.



49. As aforesaid, and in accordance with Section 107 and 108 of the Evidence Act, Cap. 80, it is the Objector who stands to lose this case were she to fail to discharge the burden of proving that indeed she is the same “Rahemat” referred as being a sister of the deceased. On this point, I cite the remarks of Mativo J (as he then was) in the case of *In re Estate of the late Havaton Kavava Maingi* [2019] eKLR:

“It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.^[9] The standard of proof in civil and criminal cases is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,^[10] Lord Denning said the following about the standard of proof in civil cases:-

‘The ... {standard of proof }... is well settled. It must carry a reasonable degree of probability..... if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist. I respectfully conclude that the evidence tendered by the objector is manifestly wanting and I hereby find the answer to issue number three is in the negative.”

50. Like the Judge in the authority above, I too find that the evidence presented by the Objector to address the issue of her identity viz-a-viz her alleged relationship to the deceased to be wholly insufficient.
51. In conclusion, I find that in view of the inconclusive evidence in respect to the issue of identity, it is not possible for this Court to conclusively determine whether the Objector, and who has only recently emerged, is indeed the same “Rahemat”, the sister of the deceased who left Kenya about 61 years ago.
52. In light of the above, I am unable to find that the Petitioner fraudulently obtained the Grant or that the proceedings leading to issuance of the Grant were in any way defective in substance in the manner contemplated under Section 76 of the Law of Succession Act. In the circumstances, the Application cannot succeed

Final Orders

53. In the end, I rule and order as follows:
- i. Objector’s Summons dated 5/05/2020 seeking Revocation of the Grant issued and confirmed herein is hereby dismissed.
 - ii. Costs to the Petitioner-Administrator.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF FEBRUARY 2024

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WANANDA J.R. ANURO
JUDGE

