



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Opondo Olotsi (Deceased) (Succession Cause
34 of 2009) [2024] KEHC 806 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 806 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 34 OF 2009

WM MUSYOKA, J

FEBRUARY 2, 2024

IN THE MATTER OF THE ESTATE OF OPONDO OLOTSI (DECEASED)

RULING

1. There is no certainty as to the exact date of death of the deceased herein. There is an affidavit by Duncan Oluoch Odhiambo, the administrator herein, sworn on 13th February 2009, and a letter from the Senior Chief of Elugulu Location, dated 12th February 2009, both of which indicate that the deceased died in 1963. There is another letter from the Chief of Elugulu Location, dated 30th March 2023, and filed herein on 12th April 2023, which indicates that he died on 6th March 1968. Anyhow, both Chiefs explain that the system of registration of deaths was not in place then, and therefore, no certificate of death was obtained. I see from the letter on record, from the Senior Chief, dated 12th February 2009, that the deceased had died without issue, and the administrator herein is indicated as the only surviving dependant. However, the letter from the other Chief, dated 30th March 2023, is silent on that issue. The affidavit sworn by the administrator, on 13th February 2009, identifies the deceased as his grandfather, who, at the time of his death, had a son and a daughter, whose names are not disclosed, and who are said to be since deceased.
2. Representation to the estate was sought by the administrator herein, in his purported capacity as grandson of the deceased. He listed himself as the sole survivor of the deceased. Marachi/Elukhari/1322 is listed as the property that the deceased died possessed of. The cause was gazetted on 9th April 2009. Letters of administration intestate were made to the administrator herein on 3rd June 2008, and a grant duly issued to him, on 3rd June 2009. I believe the proper date of the making of the grant must have been 3rd June 2009, for the cause herein was initiated on 13th February 2009. The administrator filed a summons, on 24th June 2009, for confirmation of his grant. He listed himself as the sole dependant of the deceased, and proposed that the sole asset be wholly devolved upon himself. That summons was placed before Onyancha J, on 22nd February 2010, and the grant was confirmed. A certificate of confirmation of grant was duly issued, dated 22nd February 2010.
3. What I am called upon to determine is a summons for revocation of grant, dated 22nd March 2023, by Gidion Omondi Odhiambo. I shall refer to him hereafter as the applicant. He asserts to be



the biological son of the deceased herein, and says that the administrator conducted the succession proceedings herein without involving him at all, with the result that he did not get a share of the property. He states that the administrator has since had the property transmitted to his sole name, to the exclusion of the actual beneficiaries of the estate. He argues that the administrator had not justified why he was entitled to a grant of representation, when he was not a son of the deceased, and that he did not disclose that there were other beneficiaries to the estate. He identifies the persons left behind by the deceased as himself, the late James Otieno Opondo, Henry Ngesa Opondo, the late Sylvanus Oduori Opondo, Auma Opondo, Syphrose Agutu Opondo and Rose Okinyo. He mentions that the deceased died possessed of Marachi/Elukhari/1322. He states that the administrator caused the confirmation of his grant, without the consent of the beneficiaries. He asserts that facts were concealed from the court, and that that was adequate to have the grant revoked.

4. Filed simultaneously with the revocation applications are what are headed “witness affidavit evidence” by Henry Ngesa Opondo and Margaret Atieno Okinda, both sworn on 22nd March 2023. Henry Ngesa Opondo avers to be a brother of the applicant, and a son of the deceased. He identifies the administrator as a grandson of the deceased, and a son of his late stepbrother, Boniface Odhiambo. He explains that the deceased had 2 wives, and each of the 2 families occupied distinct portions of the land, on which they settled and tilled. He states that he resides within Marachi/Elukhari/1322, and that he was surprised to see strangers move in and begin to cultivate the land. Upon enquiry, the said strangers informed him and the applicant that the land had been sold to them by the administrator. When he visited the lands office, he established that Marachi/Elukhari/1322 had been transferred to the administrator. Margaret Atieno Okinda claims to be a widow of the late Sylvanus Oduori Opondo. She states that she had been living on the estate asset with her late husband, and cultivating it. Then strangers moved in and began to use the land, saying that the land was sold to them by the administrator. She wishes that the succession process be conducted afresh, involving all those entitled.
5. The administrator filed a reply to the application, vide an affidavit that he swore on 1st August 2023. He avers that he was a grandson of the deceased, being a child of the late firstborn son of the deceased, known as Hipolitus Odhiambo Opondo. He discloses that the deceased had 2 wives, who he names as the late Marsella Ajwang Opondo and the late Cicilia Akumu. He explains that the late Marsella had 4 children, namely the late Hipolitus Odhiambo Opondo, the late Silvanus Oduor Opondo, the late Kelementina Anyango and Siphrose Agutu. He discloses that the late Cicilia had 8 children, named as the late James Otieno Opondo, Gidion Omondi, Henry Ngesa, Rose Okinyo, Onyango Opondo, the late Jenipher Opondo, Auma Opondo and the late Judith Night. He asserts that as a grandson, whose own father was dead, was entitled to a share in the estate as a beneficiary. He states that the deceased had demarcated the land amongst his children, although no title deeds were issued. He states that the late Silvanus Oduor Opondo had no wife nor children, and that it was he, the administrator, who took care of him, in his old age, and that the said Silvanus had gifted his share of the estate to him. He accuses the applicant of encroaching upon the said portion, meant for the late Silvanus. He says that he decided to do the succession himself, to enable all the beneficiaries to get their respective shares, and to enable him get the share given to him by his late uncle, Silvanus. He states that some of the survivors were summoned by the Chief, before the succession process commenced, but they ignored the summons. He says that his cause was gazetted, but there was no objection. He says that he had no objection with the family members over Marachi/Elukhari/1322, except on the portion that was willed to him by the late Silvanus. He says that after the succession was completed, he did not interfere with the portions occupied by the other beneficiaries, and accuses the applicant of encroaching on the portion that he, the administrator, had inherited. He accuses the applicant, and the others, of refusing to cooperate with the area Chief, after the grant was confirmed, to have the land subdivided. He accuses them of malice. He says that the application for revocation of grant was premature. He further avers



that the late Silvanus Oduori Opondo had a wife called Melisa Atsieno, who died on 18th February 1997, without issue.

6. He has attached several documents to his affidavit to support his case. There is the witness affidavit of Protus Otieno Odero, a neighbour, sworn on 9th August 2023, which is a replica of his own. There is a blurry document, dated 23rd May 2002, purportedly written by Silvano Oduori Opondo. It is said to be a contract on Plot No. 1323 Lugulu, purported to belong to Margaret Atsieno Ndubi and Plot No. 1322, purported to belong to him, Silvano Oduori Opondo. He expresses to exchange “the contract” with his son, the administrator herein. There is another illegible handwritten document, apparently of even date, whose contents I have been unable to decipher. There are copies of an identity card and certificate of death for the late Silvano Oduor Opondo. There is a handwritten document, unsigned and undated, purportedly relating to these succession proceedings. There is a consent form, under the Land Control Regulations, 1968, undated, but relating to a land control board application, dated 15th July 2010, and land control board meeting held on 15th July 2010, granting consent to the administrator herein, to subdivide Marachi/Elukhari/1322 into 3 portions, to be held by himself and the applicant. There is a certificate of official search, dated 25th June 2010, showing that Marachi/Elukhari/1322 was, as at that date, registered in his name as proprietor, and that a title deed had been issued. There is a certificate of death for Melisa Auma Atsieno, dated 9th August of an unclear year, showing that she died on 16th February 1997.
7. Directions were given, on 13th June 2023, for disposal of the application, dated 22nd March 2023, by way of oral evidence based on the affidavits on record.
8. The oral hearing was conducted on 26th September 2023, with the applicant being the first to take to the witness stand. He adopted the contents of his affidavit sworn in support of his application. He identified the deceased as his father, who had 2 households. He said that Oyata, from the 1st house, had been given land, by the deceased, but he asserted that he, the applicant, had not been given land. He stated that his own mother, Cicilia, was alive, and that he lived with her on the said land. He identified the administrator as his nephew, from the 1st house. He stated that the administrator represented the 1st house. He denied encroaching on the land belonging to the late Silvanus, who he identified as his brother from the 1st house. He said that he did not know that the late Silvanus had given his land to the administrator. He denied ever saying that the late Silvanus had been given land in 2010. He said that he took action after he established that the estate land had been registered in the name of the administrator. He said that the deceased was the grandfather of the administrator, and that the administrator did not inform him before he petitioned for representation. He further stated that the administrator did not disclose that the deceased died a polygamist.
9. Margaret Atieno Okinda testified next. She adopted her affidavit. She stated that she was the widow of the late Silvano, having married him in 1981 under customary law. She said that the late Silvano had another wife known as Melisa. She described herself as the first wife of the late Silvano, while Melisa was the second wife. She said that she left Silvano in 1988, but asserted that she lived in the compound of the deceased, although he was already dead by the time she got married into the family. Henry Ngesa Opondo followed. He adopted his witness affidavit. He identified the administrator as the son of his late brother, Odhiambo Oyata. He said that each house had its own land. He stated that each member of the family of the deceased was on the portion of the land, as had been given to them by the deceased, but they did not have title deeds to the portions they occupied and worked. He said that the administrator had sold the land where they, the witness and his siblings, lived.
10. The administrator testified next. He adopted his affidavit and the documents attached. He stated that the deceased was his grandfather, who had 2 wives. He said that his father had given him his land, and



that the late Silvanus was left alone, after his wife left. He said that it was the Chief who advised him to go ahead with succession, after the applicant hesitated in initiating the process. He said that the applicant did not cooperate, and that he had declined to give consent to have his share devolved to him. He named the 2 widows of the deceased as Marsella and Cicilia, and he proceeded to name their children as Ifilatus, Silvanus, Syphrose and Kelementina; and James Otieno, Auma, Gidion Omondi, Henry Ngesa, Onyango, Rosa Okinyi, Judith Night and James Opondo, respectively. He stated that at confirmation, the property was devolved to him, and not to the children of the deceased. He said that he did so as to secure his own interests, as the applicant was not cooperating. He conceded that he did not cause citations to issue to his uncles, the sons of the deceased. He said that he wanted his uncles to get title deeds to their property. He said that the estate was not distributed because of lack of cooperation from the applicant. He said that he only sold the portion that was due to him.

11. Protus Otieno Odero followed. He adopted his witness affidavit. He described himself as a neighbour of the family. He identified the applicant as a child of the deceased, and the administrator as a grandson. He said that Silvano was a son of the deceased, who he said was sickly, and gave out his share to the administrator. He said that the deceased had 2 wives, and he had shared out his land amongst the 2 houses. He said that the applicant was on the portion of the land given to his side of the family by the deceased. He said that he knew that the administrator had done succession to the estate, and that he had disclosed his relatives.
12. After the oral hearings both sides filed their respective written submissions. The applicant has argued that although the deceased died a polygamist, who had 2 wives, both of whom had several children, the administrator had only disclosed himself, in his petition, as the sole survivor of the deceased. It is further submitted that at confirmation of grant, the administrator did not consider the other survivors or beneficiaries, and he had the property devolved solely to himself. On the law, he has cited sections 51(2) and 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Rule 26 of the *Probate and Administration Rules*. On his part, the administrator cites section 29(b) of the *Law of Succession Act*, and *Re Estate of Wabome Njoki Wakagoto* [2013] eKLR, to argue that he was a dependant of the deceased, being a grandson, and, therefore, entitled to petition for representation to his estate, and to take the share due to his own late father. He also cites section 56(1a), ostensibly of the *Law of Succession Act*, for the contention that he was qualified to apply, for he was neither a minor, nor of unsound mind, nor a bankrupt. He stated that the late Silvanus had willed away his own share to him. He also cites section 31 of the *Law of Succession Act*, to argue that what was given to him, by the late Silvanus, amounted to a gift in contemplation of death. He submits that the succession process started after the Chief summoned all family members to discuss the devolution, but they shied away, and the Chief directed him to go ahead. He asserts that everyone was aware of the process, for the same was even gazetted, and no one raised any objection. He accuses the applicant of laches, and sleeping on his rights for 12 years. He also accuses the applicant of not making a full disclosure of all the survivors and beneficiaries of the estate. He submits that, should the grant be revoked, then 2 administrators should be appointed, to represent both sides of the family. Finally, he argues that the applicant should bear the costs of the application, for he had slept over his rights for over 13 years.
13. The summons for determination is for revocation of grant. The discretion to revoke grants is given under section 76 of the *Law of Succession Act*. There are 3 general grounds: challenges with the manner the grant was obtained, problems with administration of the estate, and the grant having become useless and inoperative. See *In re Estate of Luka Modole (Deceased)* [2019] eKLR (Musyoka, J), *Albert Kitbinji Njagi v. Jemima Wawira Njagi & another; Simon Nyaga Njeru & another (3rd Respondent/ Interested Parties)* [2020] eKLR (Njuguna, J) and *In re Estate of the Late Epharus Nyambura Nduati (Deceased)* [2021] eKLR (C. Kariuki, J). The grounds herein appear to revolve around the first general ground. The complaint is that the grant was obtained secretly and in a process that excluded some



persons, who were also entitled to a share in the estate. That is covered under section 76(b)(c) of the Act, which makes non-disclosure, misrepresentation and fraud a ground for revoking the grant. Failing to disclose persons who are also entitled to a share in the estate, amounts to concealment of the existence of those persons to the court. It also amounts to fraud, where their names are suppressed, so that the sole applicant gets to be the person inheriting everything. See *Samwel Wafula Wasike v. Hudson Simiyu Wafula* [1993] LLR (Kwach, Omolo & Tunoi JJA) and *In re Estate of Magangi Obuki (Deceased)* [2020] eKLR (Wendoh, J). It amounts to misrepresentation, for it creates the wrong picture or impression in the mind of the court, for distribution is based on how individuals were related to the deceased, and where some are not disclosed, an impression is created that they do not exist, and distribution is done excluding them. See *Chepkerich v. Murei & another* (Succession Cause 200 of 2012) [2022] KEHC 3115 (KLR)(Ogola, J).

14. Section 76(a) is also relevant. It makes substantive defects in the process of obtaining representation a ground for revocation. Whereas section 76(b)(c) is about statements made by the administrator in his petition, section 76(a) is about the formalities and the processes, such as obtaining consents, renunciations and filing affidavits, so that where some of these processes are omitted, then the process of obtaining the grant would be defective. See *Mwathi v. Mwathi & another* [1995-1998] 1 EA 229 [1996] eKLR (Gicheru, Kwach and Shah, JJA), *Musa v. Musa* [2002] 1 EA 182 (Ringera, J), *In Re Estate of James Kiarie Muiruri (Deceased)* [2004] eKLR (Kooome, J), *In re Estate of Festo Akwera Kusebe (Deceased)* [2019] eKLR (Musyoka, J) and *In re Estate of Eliza Isigi Asamba (Deceased)* [2020] eKLR (Musyoka, J). Some of these procedural requirements serve the purpose of accountability, transparency and inclusiveness, which are bywords in *Constitution of Kenya*, 2010. See *In Re Estate of Siameto Ole Munguti (Deceased)* [2015] eKLR (Musyoka, J), *In re Estate of Festo Akwera Kusebe (Deceased)* [2019] eKLR (Musyoka, J), *In re Estate of Festo Lugadiru Abukira (Deceased)* [2019] eKLR (Musyoka, J), *In re Estate of Chirigu Kangerue (Deceased)* [2021] eKLR (Njuguna, J) and *In re of Annah Nenchungei Koikai (Deceased)* [2021] eKLR (Gikonyo, J). What ought to go into an application or petition for representation is set out in section 51(2) of the Law of Succession Act and Rule 7(1) of the Probate and Administration Rules. Omission of the material specified in these provisions would amount to a defect in the process. Rules 7(7) and 26 of the Probate and Administration Rules are also relevant. They talk about consents and renunciations of survivors being obtained, and affidavits being filed where such consents and renunciations cannot be obtained. See *In the Estate of Naftali (Deceased)* [2002] 2 KLR 684 (Waki, J), *Christine Kajuju Mwenda v. Gervasio M'Rukunga* [2006] eKLR (Lenaola, J), *AKM & another v. AKA* [2015] eKLR (Mrima, J), *Monica Adhiambo v. Maurice Odero Koko* [2016] eKLR (Nagillah, J), *In re Estate of Peter Ambani Mataywa (Deceased)* [2019] eKLR (Musyoka, J), *Albert Kitbinji Njagi v Jemima Wawira Njagi & another; Simon Nyaga Njeru & another (3rd Respondent/ Interested Parties)* [2020] eKLR (Njuguna, J) and *In re Estate of Reuben Mutuku Kiva (Deceased)* [2021] eKLR (Odunga, J). They also provide for issuance of citations in appropriate cases. These devices are designed to ensure that all entitled have notice of the proceedings, and have consented to the matter proceeding in the manner adopted by the petitioner. Failure to obtain the consents or renunciations, or to file the affidavits, or to have the citations issued, would amount to defects in the process, for which the grant could be revoked.
15. I will start with section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules, and follow with Rules 7(7) and 26 of the Probate and Administration Rules. The parties herein have proceeded on the basis that the deceased died intestate, and, therefore, the



relevant provisions are those relating to administration in intestacy. Under section 51(2)(g), it is provided that

“An application shall include information as to – in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased...”

Under Rule 7(1)(e) of the *Probate and Administration Rules*, it is provided

“... the application shall be by petition ... supported by an affidavit ... containing ... the following particulars – in cases of total or partial intestacy – the names, addresses, marital state and description of all surviving spouses and children of the deceased, or where the deceased left no spouse or child, the like particulars of such persons who would succeed in accordance with section 39(1) of the *Act* ...”

16. The question then is, did the administrator herein comply with these 2 provisions, and provide the particulars anticipated in them? He only disclosed himself, as sole survivor, describing himself as a grandson. Was he a sole survivor? Should he have disclosed other survivors? Both sides are in agreement on the lineages connecting both of them to the deceased, the administrator as a grandson and the applicant as a son. There is agreement that the deceased had contracted 2 marriages, from which he got children from both wives. The administrator is from the 1st house of the deceased, while the applicant is from the 2nd house. There were 4 children in the 1st house and 8 in the second. The 2nd spouse of the deceased, the mother of the applicant herein, and step grandmother of the administrator, Cicilia Akumu, was alive at the time representation was sought, and even at the oral hearing of the revocation application. From the filings and testimonies of the administrator and the applicant, and their witnesses, only 1 child of the deceased survived, as at the date of the hearing, Siphrose Agutu, a daughter, said to be married. Hipolitus Odhiambo Opondo, Silvanus Oduor Opondo and Kelementina were said to be dead at the material time. Apart from the administrator, the son of Hipolitus Odhiambo Opondo, it was not disclosed whether the other children of the deceased had children of their own. It was also not disclosed whether the administrator was the sole child of the late Hipolitus Odhiambo Opondo. From the 2nd house, 4 children were alive at the material time, being the applicant, Henry Ngesa, Okinyo, Onyango and Auma. James Otsieno Opondo, Janefer Opondo and Judith Night were said to be dead. No disclosures were made as to whether the dead children of the deceased had children of their own. That would mean that the administrator was not the sole survivor of the deceased, for there were other claimants to the estate of the deceased. So, the administrator should have disclosed, in his petition for representation, the surviving spouse of the deceased, the 6 surviving children of the deceased, and all the surviving grandchildren of the deceased, whose own parents were dead, like himself.
17. What about the status of Margaret Atieno Okinda? An issue arose as to whether she was the widow of the late Sylvanus alias Silvanus alias Silvano alias Silfano Oduori Opondo. The said Silvanus Oduori was from the 1st house. The administrator, who is from the 1st house, took an ambivalent position regarding the marital status of the late Sylvanus. He averred, in his affidavit in reply, that he had no wife nor children, then later averred that he had married a Melisa Atsieno, who died without issue. He asserted that Margaret Atieno Okinda was never a spouse of the late Sylvanus. When Margaret Atieno Okinda testified, she stated that she was the first wife of the late Silvanus, having married him under customary law in 1981, after which she left him in 1988. She did not go into details of the circumstances of her leaving, whether it was following a separation or divorce. Curiously, during examination-in-chief, the



administrator appeared to recognize that the late Sylvanus had married Margaret Atieno Okinda, when he testified that,

“My father Sylvanus was left alone after his wife left.”

Was she really a widow of the late Sylvanus? I am unable to make a definitive determination of that point in these proceedings, for the material placed on record is not adequate for me to make a determination on the matter, one way or the other. In any case, Margaret Atieno Okinda claims as a daughter-in-law of the deceased. As such, she has no direct claim to a stake in the estate of the deceased. See *In re Estate of Eliza Isigi Asamba (Deceased)* [2020] eKLR (Musyoka, J). She can only claim such a stake on behalf of the estate of her late husband, and to do so she will need to obtain representation to his estate. See *In re Estate of Luka Modole (Deceased)* [2019] eKLR (Musyoka, J) and *In re Estate of Imoli Lubatse Paul (Deceased)* [2021] eKLR (Musyoka, J). She did not present any proof that she had been appointed the administratrix of his estate, to vest her with authority to stake a claim to his father’s estate.

18. Following from what I have discussed above, it would mean that the administrator herein should have disclosed the surviving spouse of the deceased in his petition, the surviving children of the deceased, the grandchildren of the deceased whose own children were dead or the administrators of the estates of such dead children of the deceased. Those who ought to have been disclosed should have been Cilia Akumu, all the children of the late Hipolitus Odhiambo Opondo or the administrator of his estate, all the children of the late Sylvanus Oduori Opondo or the administrator of his estate, all the children of Kelementina Anyango or the administrator of her estate, Siphrose Agutu, all the children of James Otsieno Opondo or the administrator of his estate, Gidion Omondi, Henry Ngesa, Okinyo, all the children of the late Janefer Opondo or the administrator of her estate, Auma, and all the children of the late Judith Night or the administrator of her estate. If any of the dead children of the deceased had pre-deceased the deceased, without a spouse or an issue, that should have also been disclosed. The non-disclosure of these individuals amounted to a substantive defect in the process, for the law expects total disclosure of the information contemplated in section 51(2)(g) and Rule 7(1). The application by the administrator was, therefore, defective in that respect. See *ETR v. JKR* [2015] eKLR (Kimondo, J), *In re Estate of Job Kibiwott Tanui (Deceased)* [2016] eKLR (Kimondo, J) and *In re Estate of Nyanduko Kanyimbo (Deceased)* [2019] eKLR (Ougo, J). It was also fraudulent as it amounted to concealment of matter from the court and a misrepresentation of the true facts. The administrator misled the court to believe that he was the only person entitled to a share in that estate, when the truth was that he was not the sole survivor, the deceased had been survived by other individuals. See *Musa v. Musa* [2002] 1 EA 182 Ringera, J).
19. Let me now bring in Rule 7(7) and 26 of the *Probate and Administration Rules*. They are related. The two rules hinge on section 66 of the *Law of Succession Act*, which provides a guide on who is entitled to appointment as administrator of the estate of a dead person, and gives a schedule of preference, based on Part V of the *Law of Succession Act*, sections 35 to 39. See *In re Estate of Gichia Kabiti (Deceased)* [2004] eKLR (Kooame, J), *In re Estate of Magangi Obuki (Deceased)* [2020] eKLR (Wendoh, J) and *In re Estate of Stephen Saitieu Kaloi (Deceased)* [2021] eKLR (DK Kemei, J). Under that list, surviving spouses have a prior right to administration, followed by surviving children, followed by siblings, and other relatives in that order. Of course, the court is left with some discretion to determine who the administrator should be, and may pass over a person with prior right, for recorded reasons. See *Loise Selenkia v Grace Nanetu Andrew & another* [2017] eKLR (Muigai, J) and *In re Estate of Gamaliel Otieno Onyiego (Deceased)* [2018] eKLR (JA Makau, J). The law is, as set out in Rules 7(7) and 26 of the *Probate and Administration Rules*, that the persons with a lesser right, or equal right, to those not



applying or petitioning for representation, must obtain the consents of those with prior right, or those with equal right to them, or otherwise obtain their renunciation, or get citations issued to them.

20. Section 66 of the [Law of Succession Act](#) provides:

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

- a. surviving spouse or spouses, with or without association of other beneficiaries;
- b. other beneficiaries entitled in intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. the Public Trustee; and
- d. creditors:

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

21. Rule 7(7) applies where the petitioner does not have preference or prior right or entitlement to administration over the other survivors. That is where the petitioner has a lesser right to apply for representation compared with the rest. Cicilia Akumu, as a surviving widow of the deceased, had a prior right to administration over the children and grandchildren of the deceased. The applicant was a son of the deceased. He had a prior right to administration over the grandchildren of the deceased. See [In re Estate of Samuel Simekha Chalingo \(Deceased\)](#) [2017] eKLR (Thande, J). So, both the surviving spouse and the surviving children of the deceased had a prior right to administration over the administrator, who was a grandson. The administrator argued that he was claiming what was due to his father. Did that put him at par with the surviving spouse and the children of the deceased? Section 41 of the [Law of Succession Act](#) elevates grandchildren, whose own parents are dead, to a status equal to that of their aunts and uncles, by way of such grandchildren taking the share due to their own parents, without having to seek representation to their estates. See [Martin Munguti Mwonga v. Damaris Katumbi Mutuku](#) [2016] eKLR (Thande, J) and [In re Estate of Cecil Peter Okumu \(Deceased\)](#) (Succession Cause 576 of 2005) [2022] KEHC 2992 (KLR) (Musyoka, J). That would appear to have put the administrator at par with the surviving children of the deceased. However, he still had to contend with the position of Cicilia Akumu, the surviving spouse. She still had a superior right of administration to him, and he should have sought her consent, or renunciation, or caused citations to be issued to her. See [Naomi Watiri Githuku v. Naphtali Kamau Githuku & another](#) [2006] eKLR (Koome, J) and [Patrick Ng'olua M'Mungania v. Fredrick Kimathi Ng'olua & 8 Others](#) [2013] eKLR (JA Makau, J). The non-compliance with Rule 7(7) of the [Probate and Administration Rules](#), with respect to Cicilia Akumu, made the process of obtaining the grant defective.

22. Rule 7(7) of the [Probate and Administration Rules](#) provides that:

“Where a person who is not a person in the order of preference set out in section 66 of the [Act](#) seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has -

- (a) renounced his right generally to apply; or



- (b) consented in writing to the making of the grant to the applicant; or
- (c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

23. Where there is an incidence of equal right or entitlement to apply for representation, rule 26 would apply, which says:

“26. Grants of letters of administration

- 1 Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- 2 An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
- 3 ...”

24. This provision expects a petitioner, with equal right with another survivor, who is not applying, to notify that other survivor of the application. The process of notification is that detailed in Rule 26(2), by way of filing a written consent or renunciation of the right to apply, in Forms 38 or 39, basically allowing the petitioner to go ahead. In default of such renunciation or written consent, the petitioner should file an affidavit, essentially to explain why he did not file the consent or renunciation, either because the other survivor is out of the jurisdiction or has refused to cooperate. See *In re Estate of Peter Alusiola Mulamula (Deceased)* [2020] eKLR (Musyoka, J) and *In re Estate of Reuben Mutuku Kiva (Deceased)* [2021] eKLR (Odunga, J). The administrator herein did not file any of these documents. He did not comply with Rule 26 of the *Probate and Administrations Rules*, and his application was defective in substance. See *In re Estate of Reuben Mutuku Kiva (Deceased)* [2021] eKLR (Odunga, J).
25. The administrator has advanced the argument that the late Silvanus had gifted or willed his share in the estate to him. I doubt whether I should get into that issue. The estate the subject of these proceedings is that of the deceased herein, and not of Silvanus Oduori Opondo. That issue should arise in proceedings in the estate of the late Silvanus. It would be improper to conduct succession to the estate of the late Silvanus within the succession proceedings in respect of the estate of his father. See *In re Estate of Rolf Rainer Schmid (Deceased)* [2017] eKLR (Musyoka, J). Let the administrator obtain representation to the estate of the late Silvanus, and present that argument there, for that issue to be determined in those proceedings, alongside the claim by Margaret Atieno Okinda that she is a widow of the late Silvanus.
26. The administrator has asserted that he was entitled to apply and obtain representation as a dependant of the deceased. The issue of dependency does not arise here. Provision for dependants is provided for under Part III of the *Law of Succession Act*. It arises where persons who are entitled to a share in an estate are not adequately provided for, and section 26 of the *Law of Succession Act* gives them a remedy, to seek court intervention, by way of an application, filed either by them or on their behalf. The issue of inadequacy of provision has not arisen in this matter. No one has raised it. No application has been filed under section 26 of the *Law of Succession Act*, by anyone, to warrant the court considering whether the administrator was a dependant of the deceased, for whom provision should be made. See



In re Estate of Daniel Mulwa Kavithi (Deceased) [2019] eKLR (Odunga, J). In any case, there was no chance that the administrator could have been dependent on the deceased, as he, the administrator, was born long after the deceased had passed on, going by the papers that the administrator has filed herein. The deceased died in 1963, according to the administrator, or in 1968, according to the applicant, while the administrator was born on 1st January 1976, according to his national identity card, number 20910759, copy of which is attached to the affidavit of the administrator, sworn on 9th August 2023. Section 26 is worded in a manner which suggests that the issue of dependency can only arise where an application is mounted under section 26. *In re Estate of Rhoda Ndini Nzioka (Deceased)* [2018] eKLR (Odunga, J), *In re Estate of Ateka Kiage (Deceased)* [2019] eKLR (Maina, J) and *In re Estate of Daniel Mulwa Kavithi (Deceased)* [2019] eKLR (Odunga, J). It is not something that the court can consider suo moto. Neither can it be raised or arise in another application, say for confirmation or revocation of grant, in the absence of a summons under section 26, for reasonable provision. If it was intended that the discretion in section 26 could be exercised suo moto, then the drafters of that law would have used language similar to that used in section 76, where a court is empowered to revoke a grant on “its own motion.”

27. For avoidance of doubt, section 26 of the *Law of Succession Act* provides:

“26. Provision for dependants not adequately provided for by will or on intestacy

Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.” (Emphasis added)

28. The administrator has argued that the applicant was aware that the administrator was to apply for representation, and, therefore, no stealth was employed. He talks of the Chief having summoned the applicant and others to a meeting to discuss succession, and that when they failed to attend it, the Chief advised the administrator to go ahead and apply for representation. The procedure that the administrator alludes to, in that argument, is not in the *Law of Succession Act*, nor the Probate and Administration Rules. It would be well for the Chief to advise parties to go to court, after attempts to mediate on a matter fails, but such advice should not be construed to mean that the party ought not comply with the laid down law and rules. The same applies to the argument that the cause was gazetted. That did not obviate the need for the administrator to comply with the law and the rules. Indeed, section 76 of the *Law of Succession Act* empowers the court to revisit the process of obtaining a grant, with a view to ensure that the right procedures were followed. See *Joyce Ngima Njeru & another v. Ann Wambeti Njue* [2012] eKLR (Githinji, Nambuye & Maraga, JJA). The objective is to avoid what eventually happened here, where the administrator concealed existence of his relatives, and had the entire estate devolved to himself, to their total exclusion. Gazettement of the cause, and the failure by potential objectors, to file objections after the gazettement, within the given timelines, does not make a grant, obtained irregularly, irrevocable. A grant is available for revocation, despite the cause having been gazetted, and the applicant, in the revocation application, having failed to file an objection to the grant being made.

29. The administrator has argued that the revocation application was mounted long after the grant was obtained and confirmed. That may be so. However, section 76 of the *Law of Succession Act* does



not have time stipulations on when such an application should be filed. It can be filed at any time. See *Elizabeth Kamene Ndolo v. George Matata Ndolo* [1996] eKLR (Gicheru, Omolo and Tunoi, JJA), *Miriam Njoki Muya v. Nahashon Gichuhi Kamau & another* [2021] eKLR (Kasango, J), *In re Estate of Jeremiah Njoroge (Deceased)* [2021] eKLR (Onyiego, J) and *In re Estate of Rolf Robert Meier (Deceased)* [2021] eKLR (Onyiego, J). The test on reasonableness may come into play, however, I doubt that it would apply where a survivor of the deceased totally excludes the other survivors. That would amount to fraud, and such conduct borders on criminality, and the statute of limitation does not apply to criminal acts. See *Stephens and another v. Stephens and another* [1987] KLR 125 (Apaloo, JA), *In re estate of Mariko Nyamu M'Ibiri (Deceased)* [2017] eKLR (Gikonyo, J), *Samuel Nyankanga Areri v. Francis Omundi Gwako & another* [2019] eKLR (JM Mutungi, J) and *Miriam Njoki Muya v. Nahashon Gichuhi Kamau & another* [2021] eKLR (Kasango, J). Passage of time does not extinguish the inheritance rights of survivors, whose existence has been concealed from the court by the administrator. It would also not apply where the administrator is in possession of the estate property, as in this case, where the property is registered in his name, or where the administrator has possession of the proceeds of estate property. See *Samuel Nyankanga Areri v. Francis Omundi Gwako & another* [2019] eKLR (JM Mutungi, J). The rationale is that the office of administrator is for life, and an administrator may be called upon to render an account, at any time, even years after completion of administration, following distribution.

30. I believe I have said enough, to demonstrate that the summons for revocation of the grant herein is merited, for the process of obtaining it was defective, and was tainted by fraud and misrepresentation. The grant ought to be revoked. The acts of concealment and misrepresentation were so egregious that I should not even consider exercising the discretion not to revoke the grant, and to appoint additional administrators instead. I doubt that an administrator who commits such blatant acts of concealment of his relatives should merit being re-appointed, following revocation of his grant. Appointment of fresh administrators shall take into account that the deceased died a polygamist, and the appointment should reflect that, so that the interests of each house are taken into account, to avoid creating a sense of exclusion. I find it curious that the administrator makes that proposal, yet he did not find it necessary to take that route in 2009, when he sought representation to the estate.
31. The final orders shall be as follows:
- a. That the grant made herein, on 3rd June 2009, and issued on even date, to Duncan Oluoch Odhiambo, is hereby revoked;
 - b. That, as a consequence of (a), above, the orders made herein on 22nd February 2010, confirming the grant of 3rd June 2008, are hereby vacated, the certificate of confirmation of grant, dated 22nd February 2010, is hereby cancelled;
 - c. That, as a consequence of (b), above, any and all transactions carried out on the basis or strength of the said certificate of confirmation of grant, dated 22nd February 2010, are hereby cancelled, and the Land Registrar, responsible for Busia County, is hereby directed to cancel any transactions relating to Marachi/Elukhari/1322, including its transmission in accordance with the said certificate of confirmation of grant cancelled above, and to revert the property to the name of the deceased herein, Opondo Olotsi;
 - d. That the matter shall be mentioned after 30 days, for appointment of 2 administrators, each representing the 2 houses of the deceased, and who shall not include the administrator herein, Duncan Oluoch Odhiambo;
 - e. That the new administrators, upon being appointed, shall, jointly or severally, apply for confirmation of their grant in the next 45 days, from the date of their appointment;



- f. That each party shall bear their own costs; and
- g. That any party, aggrieved by these orders, has leave of 30 days, to appeal against the same, at the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 2ND DAY OF FEBRUARY 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates:

Mr. Ouma, instructed by B.M. Ouma & Company, Advocates for the applicant.

Ms. Onono, instructed by Orego & Odhiambo, Advocates for the administrator.

