Kosgei v Cherono (Family Appeal E002 of 2023)
[2024] KEHC 1337 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1337 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

FAMILY APPEAL E002 OF 2023

JRA WANANDA, J

FEBRUARY 16, 2024

BETWEEN

BARNABA KIPRONO KOSGEI .... APPELLANT

AND

TERIKI TAPYOTIN CHERONO .... RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling made on 5/07/2023 in Iten Senior Resident Magistrates Court Succession Cause No. 11 of 2009 in which the Appellant was the Objector and the Respondent herein was the Petitioner-Administrator. By the said Ruling, the Court dismissed the Appellant's Application seeking revocation of a Grant of Letters of Administration.
2. The said Ruling was made as a result of the Appellant's Summons dated 30/03/2023 which sought orders as follows:
   i. Spent [.......]
   ii. Spent [.......]
   iii. Thatthe Grant of Letters of Administration intestate made in favour of the Petitioners/ Respondents be revoked and/or annulled.
   iv. Thatthe costs of this Application be in the Cause.
   v. Any other and further relief that this Honourable Court shall deem just and expedient to grant.
3. The Summons was filed through Messrs Songok & Co. Advocates and was expressed to have been brought under Section 76 as read together with Sections 36, 37 and 39 of the *Law of Succession Act* and Rule 44 and 37 of the Probate and Administration Rules. The Summons was then supported by the Affidavit sworn by the Appellant.

4. In the Affidavit, the Appellant deponed that he is a grandson of the late Cherono Arap Cheptarus who had 2 wives – Salina Kimoi Cherono (Appellant's grandmother-1st house) and Teriki Tapyotin Cherono (Petitioner-Respondent/2nd house), that Salina Kimoi Cherono was married around 1949 and was blessed with 4 children, the 1st born being the Appellant's father, Wilson Kipkosgei, that the Respondent was married around 1965 and was blessed with 9 children, that the 2 wives did not get along and in 1965, Salina Kimoi Cherono moved away with her two youngest children leaving behind her elder children, that the deponent's father – Wilson Kipkosgei - got married and settled on Irong/Korkitony/149 and continued living in harmony with the Respondent and her children and he eventually died in 1997 and was buried on the same land, that the Appellant was born and raised on the said parcel and so has many siblings and children, that he was not aware of any conflict until he was served with the Chief's letter dated 22/03/2022, that the 1st house was completely kept in the dark as to the Succession proceedings instituted in 2009 by the Respondent and were not named as beneficiaries of the estate, that he received a demand letter stating that the 1st house vacates the said parcel, and that his family and him know no other home and the parcel is also their source of livelihood. He deponed further that the Petitioner concealed vital information from the Court and fraudulently obtained the Grant.

Respondent' Replying Affidavit before Magistrate's Court

5. In opposing the Application, the Respondent swore the Replying Affidavit filed on 26/04/2023 through Messrs Mathai Maina & Co. Advocates. She deponed that she is the wife of the deceased herein – Cherono Cheptarus – who died on 10/01/1984, that the deceased had 2 wives – Salina Kimoi Cherono and herself – and before his demise had given each wife land where to settle, that Salina Kiboi Cherono was given Moiben/Moiben Block 8(Tangasir)122 measuring 6.48 Ha on which she is the registered owner, that prior to the commencement of these proceedings, the Respondent consulted Salina Kimoi Cherono but she declined because the parcel of land where she resides had not been registered in the deceased's name and she would transfer it direct from the Government to herself and that is what she did, that the Appellant being a grandson of the deceased under Section 29 of the *Law of Succession Act* on degree of consanguinity and affinity cannot move the Court for revocation of Grant, that the Appellant is a son of the late Wilson Koskei Cherono who was the son of the Respondent's co-wife – Salina Kimoi Cherono – and hence under Section 40 of the *Law of Succession Act*, the Appellant's share of inheritance is with the co-wife, that the Court has no jurisdiction to entertain a dispute on land, that the Application falls short of the required threshold for revocation of Grant, that this is not a case for revocation but one where the Court has powers under Section 47 of the Act to either rectify the Grant under Section 74 or Review under Rule 63 of the Probate and Administration Rules, that the Application is meant to defeat the suit that the Respondent had filed against the Appellant's mother to vacate from the parcel of land known as Irong/Korkitony/149.

Ruling of the Magistrate's Court

6. As aforesaid, by the Ruling delivered on 5/07/2023, the Magistrates Court dismissed the Summons. In so doing, the Court found that the Summons was improper because, while it purported to seek revocation of the Grant of Representation under Section 76 of the *Law of Succession Act*, what it sought was in fact revocation of the Certificate of Confirmation of Grant, and which, according to the Learned Magistrate, was not available under Section 76. The Learned Magistrate also held that the matter appeared to be a land dispute and therefore belonged to the Environment & Land Court. He therefore held that the Court lacked jurisdiction.

Appeal

7. Aggrieved by the said decision, the Appellant filed this Appeal on 19/07/2023. The grounds preferred are as follows:

    i. Thatthe Learned Magistrate erred in law and fact by failing to consider Section 76 of the *Law of Succession Act*. It is a fact that the Respondent concealed material facts in her Petition for Letters of Administration the fact being that she failed to put it to the Court that the 1st house existed and did not include them as beneficiaries.

    ii. Thatthe Learned Magistrate misdirected himself in finding that there was no proper application for revocation of grant of letters of administration whereas the Appellant made the very prayer both in the application and in the submissions.

    iii. Thatthe Learned Magistrate erred in his claim that the Honourable Court does not have jurisdiction and referred the matter to the Environment and Land Court.

    iv. Thatthe Learned Magistrate erred in dismissing the Summons for Revocation of Grant against the weight of evidence presented.

Hearing of the Appeal

8. It was then directed that the Appeal be canvassed by way of written submissions. Pursuant thereto, Messrs Bulbul-Koitui & Co. Advocates, acting for the Appellant, filed their Submissions on 24/11/20203 while Messrs Mathai Maina Co. Advocates, acting for the Respondent, filed theirs on 8/12/2023.

Appellants' Submissions

9. Counsel for the Appellant submitted that the Summons for Revocation was based on Section 76(b) of the *Law of Succession Act*, that when the Petitioner filed the Petition, she excluded the 1st wife and her children. He also cited Section 51(2)(g) which requires the inclusion in a Petition, of "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". He also cited the case of Succession Cause No. 885 of 2015-Re Estate of Stephen Mwangi [2018] eKLR. He then submitted that the Appellant and the 1st house as a whole were not aware that the Petitioner had applied for the Grant or that a Succession process was underway, that the 1st house was also not aware that the title deed for Irong/Korkitony/149 had been issued to the Petitioner until 13 years later on 22/3/2022 without their knowledge or consent. He cited the case of Re estate of Moses Wachira Kimotho (Deceased)-Succession Cause No. 122 of 2002 [2009] eKLR and also the case of Probate and Administration Appeal No. 69 of 2015-Re estate of Murei Munyambe [2021] eKLR. He also cited Section 40 of the Act which stipulates that the estate of a polygamous deceased who dies intestate is to be divided among the houses, that in his letter, the Chief stated that the deceased had only one wife whereas this was false, that under Rule 26(1) of the Probate and Administration Rules, it is provided that 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, that in this case, the Petitioner and the 1st wife – Salina Kimoi Cherono – are entitled in the same degree, that is, first degree of consanguinity and the Petitioner ought to have informed the Court of the same.

10. On whether the Appellant has locus standi in the matter being a grandson of the deceased, Counsel cited the case of In re Estate of Imoli Luhaste Paul (Deceased) [2021] eKLR in which the rights of

grandchildren to claim their parents' share in the estate of their grandfather where the father is deceased was recognized.

Respondent's Submissions

11. On his part, regarding the principles applicable in Applications for revocation of Grants under Section 76 of the Act, Counsel for the Respondent cited the case of re Estate of Prisca Ongayo Nande (Deceased) [2020] eKLR. He added that the power to revoke a Grant is a discretionary one and cited the case of Albert Imbuga Kisiswa vs Rech Kavai Kisiswa-Succession Cause No. 158 of 2000. He submitted that the Appellant sought to have the Grant of Letters of Administration dated 24/03/2010 revoked or annulled, that there was no Grant that was issued on 24/03/2010 since the same was issued on 31/03/2009, it is the Certificate of Confirmation of Grant that is dated 24/03/2010. He therefore agreed with the trial Magistrate's findings. He added that the Appellant did not state who were the beneficiaries of the estate who ought to have inherited from that parcel of land known as Irong/Korkitony/149, that the Appellant did not also disclose that there was a pending suit being Iten SPM E&L Case No. 207 of 2022 which touches the same subject parcel of land in this Cause and that it was the suit that prompted the Appellant to move the Court herein.

Analysis & Determination

12. Upon examination of the Memorandum of Appeal, the Record of the lower Court, and the respective parties' Submissions, I find the issue that arise for determination in this Appeal to be the following:

    i. Whether the Application before the trial Court was defective insofar as it is alleged to have sought Revocation of the Certificate of Confirmation of the Grant rather than Revocation of the Grant of Letters of Administration as it purported.

    ii. Whether, being a grandson of the deceased, the Appellant had the prerequisite locus standi to apply for Revocation of the Grant.

    iii. Whether the lower Court should have revoked the Grant of Letters of Administration and/or the Certificate of Confirmation thereof.

13. I now proceed to determine the said issues.

Whether the Application before the trial Court was defective insofar as it is alleged to have sought Revocation of the Certificate of Confirmation of the Grant rather than Revocation of the Grant of Letters of Administration as it purported

14. I am aware of several authorities which advance the view that Section 76 of the *Law of Succession Act* only envisages revocation of a Grant of Letters of Administration and not also revocation of a Certificate of Confirmation of Grant. I cite, for instance, the decision of Hon. Lady Justice L. Njuguna made in In re Estate of Saverio Ruri Njuiri (Deceased) [2021] eKLR in which she held as follows:

    "

    " 10. The applicants essentially seek revocation or annulment of the certificate of confirmation of grant of administration of the Estate of Saverio Ruri Njuiri (deceased herein) issued on 16.04.1993 in Embu SRM Succession Cause No. 65 of 1992. The ground in support of the said application is that they were not involved in the succession process. Charles Njiru Njeru deposed that the applicants were never involved since they were married. As such it is not

disputed that indeed the applicants were never involved in the process of confirming the grant.

11. However, section 76 provides for revocation of grant. The circumstances under which the same can be revoked are well spelt out in the said section. As I have regularly opined and which position I still hold, from the reading of section 76, the same allows for revocation of grant before or after confirmation. However, the conditions under which revocation can be done are clearly limited to obtaining of the said grant (where the proceedings to obtain the grant were defective in substance; and/or where 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; and/ or where 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).

12. As thus revocation proceedings can only be limited to the process of up to issuance of the grant such that even where non-disclosure of material facts or where fraud is alleged, the same can only be limited to up to the stage of issuance of the grant. As the Learned Judge held in re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR and which decision I find persuasive; -

....

15. The Learned Judge In re Estate of Juma Shitseswa Linani (Deceased) [2021] eKLR held that where a person is unhappy with the process of confirmation of grant, such a person ought not to move the court under section 76 for revocation of grant. Instead, the person should file an appeal against the orders made by the court on distribution or apply for review of the said orders. This is because the court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review."

15. Similarly, Musyoka J in the case of re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR held as follows:

" 16. Section 76 of the *Law of Succession Act* has nothing to do with confirmation of grants. It carries no provisions which relate to what a court should do with confirmation orders or certificates of confirmation of grant. Indeed, the provision says nothing about the powers prescribed in it being used for the purpose of the court intervening in the confirmation process, once orders are made on a confirmation application. The only connection between confirmation of grants and revocation of grant is that set out in section 76 (d) (i) of the *Law of Succession Act*. It has nothing to do with a grant having been confirmed, rather it deals with situations where a personal representative or holder of a grant or administrator has failed to apply for confirmation of their grant. Section 76 of the Act relates to confirmation of grants to that very limited extent, not with confirmation itself, but the failure to apply for confirmation. A person who is aggrieved by the orders made with respect to a confirmation application, which are encapsulated in the certificate of confirmation of grant, has no remedy under section 76 of the *Law of*

> [*Succession Act*](), for that provision does not envisage revocation of certificates of confirmation of grants.
>
> 17. I have very closely perused through the provisions of the *Law of Succession Act*, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the *Law of Succession Act*, which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the *Law of Succession Act*, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the *Law of Succession Act*. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure ....”

16. On my part, I beg to differ. My interpretation is that Confirmation of a Grant is a continuation of the process of issuance of the Grant of Letters of Administration. It is a consequence of the former and is directly interconnected to it. The two go hand in hand. A certificate of Confirmation of Grant cannot come into existence without first there being the initial Grant. I would therefore avoid a narrow and literal interpretation of Section 76 and instead adopt a liberal interpretation thereof and apply a purposive approach. In my view, a prayer for revocation of a grant is wide enough to be interpreted as also including a prayer for revocation of the Certificate of Confirmation of the Grant.

17. In case I am wrong on the above, I would still resort to the provisions of Section 47 of the *Law of Succession Act* and also Rule 73 of the Probate and Administration Rules which provide as follows, respectively:

    Section 47 of the *Law of Succession Act*

    > “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.
    >
    > Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

    Rule 73 of the Probate and Administration Rules

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

18. The two provisions clearly cloth the Courts with wide discretion to do what is necessary to ensure that the ends of justice are met (see the decision of C. Kariuki J in the case of Millicent Mbatha Mulavu & another v Annah Ndunge Mulavu & 3 others [2018] eKLR).

19. I also note that in recognizing the above inherent power of the Court, Hon. Lady Justice L. Njuguna in the said case of In re Estate of Saverio Ruri Njuiri (Deceased) [2021] eKLR already referred to above, stated as follows:

> " 15. However, it is trite that this court can revoke a grant suo moto where the grounds under section 76 are evident. The Court in the case of Matheka and another v Matheka (2005) 2 KLR 455 held that even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. So can the grant herein be revoked by this court on its own motion?

20. I am of the view that the overriding objective in litigation is a policy issue which the Court invokes to obviate hardship, expense and delay and instead, places focus on substantive justice. Apart from the Court's inherent powers as aforesaid, there is also Article 159(2)(d) of *the Constitution* of Kenya, 2010, whose introduction changed the way in which Courts operate. I believe that by introducing the overriding objective principle in litigation, the Court is now mandated to consider aspects like the delay likely to be occasioned and the cost and prejudice to the parties when called upon to summarily reject actions. In short, the Court has to weigh one position against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159(2)(d) makes it clear that the Court ought to render justice between the parties "without undue regard to technicalities of procedure". Of course, this does not mean that procedural lapses should be ignored at will. What it means is that the Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party before sending away a litigant from the seat of justice without hearing him on merits. This is how a Court is enjoined to exercise its judicial discretion.

21. In any event, in this case, while the Learned Magistrate faulted the Appellant for allegedly seeking revocation of the Certificate of Confirmation rather than revocation of the Grant, I cannot that agree with that view. The prayer in the Summons before the Magistrate's Court expressly seeks "that the Grant of Letters of Administration intestate ..... be revoked and/or annulled". The only error made by the Appellant is in quoting the date of the Grant as 24/03/2010 which was in fact the date of the Certificate of Confirmation. In my assessment, this is an inadvertent minor error that cannot be deemed to go to the root of the substantive matters for determination before the Court. The prayer made was unmistakably for revocation of the Grant of Letters of Administration.

22. I therefore hold and find that the Learned Magistrate erred in taking the position that he could not entertain the Summons for Revocation for Grant merely because according to him, the body of the Summons sought revocation of the Certificate of Confirmation of Grant rather than revocation of the Grant of Letters of Administration.

Whether, being a grandson of the deceased, the Appellant had the prerequisite locus standi to apply for Revocation of the Grant

23. On the issue of inheritance by grandchildren, although the Learned Magistrate did not make a determination thereof, the issue was in contention before him and has also again featured in this Appeal.

24. On that issue, my first port of call will be Section 41 of the *Law of Succession Act*, which provides as follows:

> " 41. Property devolving upon child to be held in trust Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate." (emphasis added)

25. In short therefore, Section 41 provides that where one of the children of the deceased is himself/herself deceased, and such deceased child is survived by a child or children of his/her own, then the share due to him/her ought to devolve upon his/her said child, and where more than one, the children would take equally. This question was addressed in the case of Re Estate of Wahome Njoki Wakagoto (2013) eKLR where W. Musyoka J held as follows:

> " Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

26. Further, the Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] eKLR held as follows:

> " Although Section 35 and 38 of the *Law of Succession Act* is silent on the fate of surviving grand children whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The Law is section 41. If a child of the intestate has pre- deceased, the intestate then that child's issue alive or in centre as mere on that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate's death".

27. I am aware of some authorities which advance the view that a grandchild can only claim the share in his/her grandparent's estate if he/she holds a grant of representation over his own late parent's estate.

I am aware for instance, to the case of Cleopa Amutala Namayi vs. Judith Were Succession Cause 457 of 2005 [2015] eKLR where Mrima, J observed as follows:

> “Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents (sic) who died intestate after 01/07/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents (sic) indirectly through their own parents, the children of their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren’s own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say, such grandchildren must hold appropriate representation on behalf of their parents.” (emphasis mine)

28. In my view, having described himself as a grandson of the deceased and it not being in dispute that the Appellant’s father died before distribution of the estate of the Appellant’s grandfather, I find that the Appellant disclosed a legally recognized interest. I do not agree that the said interest was dependent on his being a legal representative. The only burden that the Appellant was to discharge was to prove the allegations made in his Summons.

29. On this view, I find company in the decision of H.K. Chemitei J in In re Estate of Hellen Wangari Wathiai (Deceased) [2021] eKLR in which, in declining to shut out a grandchild from claiming a share in his grandfather’s estate on the alleged ground of not holding a grant of representation over his parent’s estate, stated as follows:

> “52. The evidence on record suggest that the Applicant herein brought these proceedings on behalf of his father; Abdi Ibrahim Hassan (deceased) who was the beneficiary to his father’s estate. The Applicant’s interest emanates from the fact that his father was a beneficiary to the suit property, thus the Applicant being dependent to his father Abdi Ibrahim Ibrahim’s estate within the provisions of Section 29 of the *Law of succession Act*, he acquires an interest in his grandfather’s estate; the suit property by virtue of his father’s share. Therefore, in the court’s view, the instant Application is properly before this court.
>
> 53. In my humble view, therefore, it is clear that the applicant had the locus standi and he was rightfully before the court to fight for the interests of the estate of his late father with regard to the deceased grandmother’s estate. The fact that he was a grandchild of the deceased taken care of by his deceased grandmother prior to her death and a dependant of his father’s estate has not been disputed.
>
> 54. This therefore supports the fact that he and his sister acquired interest over the deceased’s grandmother’s estate and thus he had the necessary locus standi. ....”

30. There is also the case of In re Estate of Imoli Luhatse Paul (Deceased) [2021] eKLR, where W. Musyoka J stated as follows:

> “3. In the instant case, the applicant, in the summons for revocation of grant, is a child of a dead son of the deceased herein. The applicant is claiming directly by dint of In re Estate of Veronica Njoki Wakagoto (Deceased) [2013]

eKLR (Musyoka J) and In re Estate of Florence Mukami Kinyua (Deceased) [2018] eKLR (T. Matheka J), and does not require to take out letters of administration to intervene in the estate of her late grandfather, where her own parents are dead. Secondly, apart from case law, the provisions of the *Law of Succession Act* cover these situations. Section 39 of the *Law of Succession Act* makes grandchildren heirs in intestacy, where their own parents, who are biological children of the deceased, are dead. Section 41 of the *Law of Succession Act* is the provision that enables grandchildren to step into the shoes, of their own parents, and to step into those shoes they need not take out letters of administration."

31. In the circumstances, I find that the Appellant, claiming as a grandson of the deceased and claiming his own late father's share of the grandfather's estate, had the prerequisite locus standi to apply for Revocation of the Grant.

Whether the lower Court should have revoked the Grant of Letters of Administration and/or the Certificate of Confirmation thereof

32. 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."

33. It is clear that the Appellant came under sub-Sections (a), (b) and (c) cited above.

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

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

35. The framework for applications for grants of representation is set out in Section 51 of the *Law of Succession Act*. The relevant portions, for the purpose of this Appeal, is subsection (2)(g), which provides as follows:

> " 51. Application for Grant
>
> (1) ....
>
> (2) Every application shall include information as to—
>
> ....
>
> (g) 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;
>
> ....

36. Rule 7(1)(e)(i) of the Probate and Administration Rules then provides as follows:

> " 7(1) where an applicant seeks a grant of representation to the estate of a deceased person ... the application shall be by a petition... containing... the following particulars-
>
> (e) in cases of total or partial intestacy –
>
> (i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left

no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with Section 39(1) of the Act."

37. On its part, Rule 26(1) and (2) provides as follows:

> " (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 equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

38. On the above provisions, Hon. Lady Justice Njuguna in the case of In re Estate of Eston Nyaga Ndirangu (Deceased) [2021] eKLR stated as follows:

> " 18. Rule 7 of the Probate and Administration Rules 1980 provides that application for grant of representation in relation to an estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 otition supported by an affidavit. The said affidavit must contain amongst other details, the names, addresses, marital status and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with Section 39(1) of the Act {Rule 17(e)(i)}.
>
> 19. Rule 26 provides that 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. Further that in 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.
>
> 20. The effect of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than him. The 1st and 2nd respondents having been brothers to the applicant and other beneficiaries, it therefore means that all the remaining beneficiaries ought to have consented to them being given the grant of letters of administration in relation to the estate herein. I have perused the court record and I note that consent to the making of a grant of letters of administration intestate which was filed contemporaneously with the petition was only made by two beneficiaries (being Joyce Ngithi Nyaga and Julius Kinyu) and wherein they were giving the consent to one John Ndii Nyaga, Kennedy Nyaga and Lucy Wanjiku Nyaga (3rd respondent). There is no consent as to the other brothers and sisters having consented to the grant being given to the 1st and 2nd respondent. It is my view therefore that the said

grant was obtained pursuant to proceedings which were defective in substance. The respondents ought to have obtained consent from all the other brothers and sisters. In Antony Karukenya Njeru –vs- Thomas M. Njeru [2014] eKLR, a grant of letters of administration was revoked as persons with equal priority did not consent to the petitioners therein applying for grant of letters of administration. (See also In the Matter of the Estate of Muriranja Mboro Njiri, Nairobi H.C. Succ. Cause No. 890 of 2003).

21. It is my considered view therefore that the failure by the respondents more so the 1st and 2nd respondents to obtain the consents from the other siblings makes the proceedings of obtaining the same to be defective in substance and the said grant ought to be revoked and a new grant issued to the applicants."

39. There is also Rule 7(7) of the Probate & Administration Rules which deals with cases where a person with a superior right to seek representation is reluctant to do so. The Rule provides as follows:

"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 for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant."

40. Turning to this instant matter, I have carefully perused the Respondent's Replying Affidavit filed before the Magistrate's Court and established that the Respondent has not denied, and even to some extent has confirmed, that indeed the Objector is a grandson of the deceased. It is also not denied that when the Respondent filed the Petition, she excluded her co-wife, (1st wife) and all her children and also never obtained their consents to file the Petition. This was against the *Law of Succession Act* which provides that 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. In this case, the Petitioner and the 1st wife – Salina Kimoi Cherono – were entitled in the same degree, that is, first degree of consanguinity and the Respondent ought to have disclosed this true position to the Court.

41. It is clear that where representation is applied for by a person with equal or lesser right to others, the Petitioner is expected to notify these other persons of the filing of the Petition. These other persons would then be at liberty to participate in the proceedings or renounce their rights to administration or sign consents in Forms 38 or 39 acceding to the filing of the Petition. Where such consent or renunciation has not been filed, the Petitioner is required to file an Affidavit confirming that he/she duly notified these other persons.

42. In this instant case, both in the Petition and in the Summons for Confirmation of Grant, the Respondent, under oath, listed only herself (2nd house) and her children as the survivors of the deceased. She totally excluded the 1st house. The Chief's letter attached to the Petition also advanced this inaccurate account. In view of this, no evidence of notification to any family member and no consent or renunciation from any family member was presented to the Court since, according to the Respondent, there were no other surviving family members. From the Appellant's Summons for

Revocation, it has now turned out that the statements made by the Respondent above were in fact false and misrepresentations. It has now been established that the deceased had two wives and each had several children.

43. The Petitioner was required, by law, to have laid before the Court the truth. She ought to have disclosed the names of all survivors despite the existence of any agreements within the family or even wrangles, disagreement or reluctance from the other family members to act, if at all, The Court requires truthful and full disclosure of information in order to reach a judicious decision. Instead, the Respondent misrepresented facts to the Court..

44. Having made the above findings, the question now is whether the transgressions committed by the Respondent in the process leading to issuance of the Grant are by themselves sufficient to justify revocation of the Grant and order for re-distribution of the estate. This question arises because Section 76 of the *Law of Succession Act* gives the Court discretion whether to revoke or annul a grant. It is not therefore the position that any breach or violation must always or automatically lead to revocation of a Grant. Power to revoke a Grant is a discretionary power that must be exercised judiciously and only on sound grounds. The Court must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice. The discretion must therefore not be exercised whimsically or capriciously (see decision of Mwita J in the case of Albert Imbuga Kisigwa v Recho Kavai Kisigwa [2016] eKLR).

45. In this case I find that due to the exceptional and/or unique circumstances arising in this matter, it will not serve the interest of justice to revoke or annul the Grant.

46. The exceptional circumstances arising include the fact that the deceased died in the year 1984, 40 years ago and the Succession Cause was itself filed in the year 2009, 15 years ago. The Grant was then issued on 31/03/2009 and was subsequently confirmed on 23/03/2010, about 14 years ago. I am not convinced that during all this time, the Appellant was never aware of the Succession proceedings and the orders given therein. This is more so because the Appellant states that he has been residing in the same homestead throughout all these years. He must have therefore been interacting with rest of the family. I am therefore also not convinced that the Appellant is himself being candid. There has been unexplained and inordinate delay on the part of the Appellant in enforcing his rights, if any. On this point, I cite the principle that "equity aids the vigilant, not the indolent".

47. I also note the statement made by the Respondent that prior to his death, the deceased had distributed his two parcels of land to his two wives and that the Appellant's grandmother, (co-wife to the Respondent) - Salina Kiboi Cherono - was given the parcel of land known as Moiben/Moiben Block 8(Tangasir)122 measuring 6.48 Ha on which she is now the registered owner. The Respondent alleged further that prior to the commencement of the Succession Cause, the Respondent consulted or invited the said Salina Kiboi Cherono to participate therein but that the latter declined because the said parcel of land in which she resides had not been registered in the deceased's name and stated that she would therefore transfer it directly from the Government to herself and that this is what she did. According to the Respondent therefore, the Appellant being a son of the late Wilson Koskei Cherono who was the son of the Respondent's co-wife – Salina Kimoi Cherono – under Section 40 of the *Law of Succession Act*, his share of inheritance is with the co-wife. I have taken into account the fact that Respondent never denied or controverted this allegation. Without any challenge from the Appellant, I presume these submissions to reflect the correct position.

48. I also note that the Appellant has alleged that the 1st house was not aware that the title deed for Irong/Korkitony/149 had been issued to the Petitioner until 13 years later on 22/3/2022 without their knowledge or consent. However, the Respondent answered by submitting that the filing of the

Summons for Revocation was only meant to defeat the suit that the Respondent had filed against the Appellant's mother seeking that the latter vacates from the said parcel of land Irong/Korkitony/149. He added that the Appellant did not state who were the beneficiaries of the estate who ought to have inherited from that parcel of land known as Irong/Korkitony/149. The Respondent submitted that the Appellant did not disclose that there was such pending suit, namely, Iten SPM E&L Case No. 207 of 2022 which touches the same subject parcel of land in this Cause and that it was that suit that prompted the Appellant to move the Probate Court. Again, the Appellant having not denied nor controverted these allegations, I take them as true.

49. For the said reasons, I do not think that it will be in the interest of justice to revoke the Grant and send the protagonists back to the drawing board. I therefore decline to set aside the Magistrate's Court's decision.

Final Orders

50. The upshot of my findings above is that this Appeal fails. Accordingly, I order as follows:

    i. This Appeal is dismissed.

    ii. I grant no order on costs considering that although I have upheld the decision of the Magistrate's Court, I have done so on different reasons from those preferred by the Learned Magistrate.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF FEBRUARY 2024

....

WANANDA J.R. ANURO

JUDGE