



REPUBLIC OF KENYA



**In re EBO (Deceased) (Succession Cause 98 of 2014)  
[2023] KEHC 504 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 504 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 98 OF 2014**

**TM MATHEKA, J**

**FEBRUARY 1, 2023**

**IN THE MATTER OF THE ESTATE OF EVANS BARI OMUHINDI (DECEASED)**

**BETWEEN**

**CKM ..... 1<sup>ST</sup> PETITIONER**

**JWK ..... 2<sup>ND</sup> PETITIONER**

**AND**

**SNOM ..... 1<sup>ST</sup> OBJECTOR**

**DSO ..... 2<sup>ND</sup> OBJECTOR**

**JUDGMENT**

1. By way of undated amended summons for revocation or annulment of grant, brought under sections 47 & 76 of the *Law of Succession Act* cap 160 and rules 44(1) & 73 of the *Probate and Administration Rules*, the applicants seek revocation of the letters of administration issued to the respondents, to be enjoined to this cause as co-administrators of the deceased's estate and for costs of this application.
2. The application is based on grounds on its face and supported by an affidavit of SNOM and DSO sworn on the same date. They deposed that they were the 2<sup>nd</sup> wife and biological mother of the deceased respectively and thus dependents of his estate together with:-
  - A. JWO – 7 years, Deceased's son
  - B. DSA – 9 years, Deceased's niece
  - C. MAA - 7 years, Deceased's niece
3. They deposed that the above nieces were children of PAO a brother to the deceased who passed on in 2009 and upon his demise the deceased adopted and had been fully maintaining them until his demise.



4. They averred that the said children though being fully maintained by the deceased have been in custody of their grandmother, the 2<sup>nd</sup> objector herein.
5. It was their deposition that JWK (deceased's 1<sup>st</sup> wife) excluded them from the funeral arrangements of the deceased and ultimately his burial despite their efforts to participate in the same and ensured that and the dependents named above were disinherited. That as a matter of fact the before the entire family could arrange for the deceased's burial at his rural home in western, the respondents stole the body and buried it at Nakuru North Cemetery necessitating them to move to court for exhumation orders.
6. They averred that the respondents were intermeddling with the deceased's estate by wasting the same and have refused to cater for the other beneficiaries of the estate in contravention of the law.
7. They contended that they have information that the respondents have been withdrawing funds from the deceased's company accounts and squandering it.
8. They deponed that they fully depended on the deceased as they have no jobs and the children named above are of tender age and equally depended on the deceased for school fees, medical care, clothing, food and other miscellaneous needs.
9. They asserted that prior to the deceased's death he had kept all his documents relating to his properties in his Nakuru House where he lived with the respondents.
10. The respondents did not file any response to the above summons.
11. The matter was heard by way of viva voice evidence.

## **The Evidence**

### **The applicant's Case**

12. PW1, SNOM testified that she was the 2<sup>nd</sup> wife of the deceased having gotten married to him under Luhya Customary Law in 2005. She said that on February 3, 2006 they were blessed with one child, JWM and in the same year her dowry was paid. That three cows, 2 goats and Kes 25, 000/= was paid as her dowry at her home in Busia in presence of her uncles, HB, deceased's uncle one Okulo, and PAO, brother of the deceased.
13. She testified that she lived with the deceased in Busia and when he was transferred to Nairobi he would visit them every weekend. It was her testimony that when the deceased died, he was buried in Nakuru Cemetery but upon obtaining court orders he was exhumed and reburied at his rural home in Bunyore. She attended his burial. It was her further testimony that after the deceased's death, elders met and agreed to have a ceremony held at the deceased home in Bunyore in which her father, uncles and aunt were invited. That the area councilor, chief and her father in law were present and Kes 20,000/= was given to her father, uncles and aunt. She stated that her family and deceased family know each other and prayed to be considered a beneficiary of the deceased estate.
14. She reiterated that the deceased used to support and or take care of his aforementioned late brother's children and mother.
15. PW2, IWM testified that he is a paternal uncle to the 1<sup>st</sup> applicant. He saw the 2<sup>nd</sup> applicant once and could not remember her. He adopted his statement filed on March 4, 2016 as his evidence in chief. In that statement, he stated that the 1<sup>st</sup> applicant's father is deceased and confirmed he received dowry on her behalf in 2009 or thereabouts. It was his statement that the deceased had sent his paternal uncle one Okule, his brother PAO and friend HB Were to deliver three cows, one goat and a sum of Kes



- 50,000/= as dowry after three years of cohabiting with the 1<sup>st</sup> applicant. He stated that the marriage between the deceased and the 1<sup>st</sup> applicant was celebrated according to Bunyore - Luhya Customary rites and/or traditions and that the union was blessed with one issue, JWO . He testified that during dowry payment Gervas Peeti Munyanga, Mzee Okwara, youths from his village, Barasa and Liguru witnessed the ceremony. That there were no dowry negotiations and they just received what had been brought. It was his evidence that the deceased lived with the 1<sup>st</sup> objector in Nakuru and was aware that she was being married as a second wife. He said the deceased was not present during dowry payment and that his presence was not mandatory under the Luhya customs.
16. OW3 - DSO adopted her statement dated October 12, 2018 as her evidence in Chief. She testified that the deceased was her biological son and used to maintain her by paying her rent and medication.
  17. She testified that the deceased had children outside wedlock namely; CEO, GO and EO whom he used to take care of. She said the deceased also took care of his late brother's children DSA, PO And SCA however she did not have any proof of the said maintenance. She stated that the cause was filed by the 1<sup>st</sup> respondent without her knowledge. She denied that the 1st applicant was a wife of her deceased son. She denied that any dowry was paid by her son for the 1st applicant insisting that the two only had a child together JWM. She accused the 1<sup>st</sup> respondent for omitting some of the deceased's property in this cause. Her position was that the deceased's property be left to the children.
  18. On cross examination with respect to the proceedings for the exhumation of the deceased she denied that she wrote in the supporting affidavit that her son had two wives. She said she filed those proceedings with her children, not with the 1st objector applicant. She also denied swearing any affidavit in support of the citation that was filed by the 1st objector applicant. She denied all the affidavits and witness statements where it stated that the 1st objector applicant was a wife to her son. She said that the 1st objector applicant attended the 2nd burial of her son as the mother of her son's child who had escorted the child to the burial but not as a widow. She was insistent that she never collaborated with the 1st objector to file any matter in court.

#### **Petitioners'/respondents' Case.**

19. The 1<sup>st</sup> respondent adopted her replying affidavit sworn on May 6, 2015 (same not on record) as her evidence in chief. She testified that the deceased was her husband and that she excluded the applicants and the aforesaid children of the deceased's brother as they are not his dependents.
20. She said the deceased used to send money intermittently to the 2<sup>nd</sup> objector and that she was being maintained mainly by the deceased's brother, one Aggrey who resides in America.
21. It was her evidence that only her and her three children Namely; Eugenia Omuhindi; Elsie Omuhindi and Eric Omuhindi are the deceased's dependents. She disputed that the deceased had other properties other than the ones listed in the affidavit in support of letters of administration.
22. She testified that she was unaware the deceased had cash money in National Bank Branch Account number xxxxxxx and in Kenya Commercial Bank Nakuru Branch Account Number xxxxx. She confirmed the deceased bought a land Bukhayo/Mundika/3967 while working in Busia and that there was a house thereon. She said the deceased spent most of his time there however she was unaware he lived with the 1<sup>st</sup> objector. She stated that she knew the 1<sup>st</sup> objector after the demise of the deceased and disputed that she had a son with the deceased but confirmed that the birth certificate of JWO produced in evidence showed the deceased was his father. She got married to the deceased in the year 1996 and between the year 2000-2005 she lived with him in Busia and when he was transferred to Nairobi she moved to settle in Nakuru with her children.



23. She confirmed that she did not list Shabwell Enterprises Limited as one of the estate's properties.
24. She stated that Muhewa Contractors which was owned by the deceased died in the year 2000.
25. It was her further evidence that 21 million which was paid for one of the Projects handled by Shabwell Enterprises Limited was paid before the demise of the deceased and that she had no money for any of the Estate's property. She said upon the demise of her husband she continued running the company.
26. SOO , said he was an elder brother of the deceased and testified in support of the evidence of the 1<sup>st</sup> petitioner. He disputed the deceased married the 1<sup>st</sup> objector, that he had children outside wedlock and that he maintained his aforesaid late brother's children and their mother. It was his testimony that their mother used to do casual jobs but stopped working in 2003. From then he did not know how she maintained herself.

### **Petitioners' Submissions**

27. The petitioners filed their submissions on June 20, 2022.
28. On whether the 1<sup>st</sup> objector was a wife of the deceased to qualify as a beneficiary of the estate as a dependent, the petitioners referred this court to *Njoki v Mathara and others* Civil Appeal No 71 of 1989 (UR), where the court rendered itself as follows regarding the onus of proving the existence of a customary marriage:
  - “(i) The onus of proving a customary marriage is on the party who claims it.
  - (ii) The standard of proof is the usual one for civil action, balance of probabilities.
  - (iii) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.”
29. It was submitted for the Petitioners that the 1<sup>st</sup> objector alleged that she was customarily married to the deceased under Luhya Customs. They took issue with the contention that the deceased's presence during dowry payment ceremony was not mandatory. They relied on the case of *Wambugi W/O Gatimu v Stephen Nyaga Kimani* (1992) KAR 292 where the court cited with approval the decision in *Kimani v Gikanga* [1965] EA 735 and held that:-

“Where African customary law is neither notorious nor documented it must be established for the Court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties.”
30. They thus argued that there was no evidence that the second objector's witness was an independent witness with expert opinion on Luhya Customs and accused the objectors for failing to procure the attendance of Mr. pataleo Barasa who allegedly was the only elder alive and who was allegedly present during dowry negotiations and presumably well versed in Luhya Customary practices. To bolster this position reliance was placed on *Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo* (2004) eKLR where it was stated as follows in regards to independent witnesses on proving customary formalities:-

“I find that the evidence adduced by the Protester in proof of her alleged marriage to the deceased fell short of proving the alleged marriage. Apart from her daughter and 2 brothers there were no other independent witnesses to the customary formalities. There was no



evidence that there was any Ngurario ram slaughtered nor was there any evidence that there were any elders from the deceased's relatives who participated in the alleged formalities.”

31. In furtherance to the above, they submitted that only the opinion of an expert would be sufficient to prove the existence of such a custom. In support of this position they cited the case of *Raphael Ratemo & another v Emily Nakbanu Musinai* [2017] eKLR where the court while addressing the issue of an expert opinion to prove the existence of a customary law stated as follows:-

“..In the instant case, I note that the applicant did not call any expert witness on the Luhya customs to confirm if payment of dowry to an aunt after the death of a ‘husband’ was part of their marriage custom. PW2 who testified on the alleged payment of dowry did not state that she was an expert on Luhya customary law. I therefore find that the applicant’s claim that she was married to the deceased under Luhya customary law was not proved.”

32. In view of the above, the petitioners argued that the 1<sup>st</sup> objector’s alleged marriage to the deceased was questionable.

33. In discussing the essentials of a valid Luhya Customary Marriage the petitioners took guidance from Eugene Contran’s book titled *Restatement of African Customary Law, The Law of Marriage and Divorce* Vol.1 at Page 53 cited in *DMK v II* [2012] eKLR and which outlined the essential ingredients of a Luhya Marriage as Capacity, Consent of parties & their respective families, dowry payment and cohabitation.

1. On capacity, they submitted that the deceased having married under customary law had capacity to marry another woman.
2. On consent, they submitted that there was no consent since the petitioners’ disputed knowledge of the 1<sup>st</sup> objector’s marriage to the deceased and her dowry payment.
3. On the issue of payment of dowry, the petitioners submitted that the evidence of the objectors witnesses’ was contradictory in that Mr. Maloba stated that there was no dowry negotiations and that they received what was brought while Mr. Muyaga stated that dowry was paid in form of three cows one goat and sum of 50,000 and that there was permit to transport the same but it was never produced. That there was also no proof of payment of Kes 50, 000/=. They submitted that no dowry was paid and there was no marriage.
4. On cohabitation, the petitioners submitted that the objector alleged to have cohabited with the deceased from the year 2004 which statement was countered by 2<sup>nd</sup> objector who stated in her further statement that the 1<sup>st</sup> objector only lived with the deceased for one year in 2004 then left after the birth of their son the same year. The petitioners submitted that proof of cohabitation is both qualitative and quantitative to be drawn from long cohabitation and acts of general repute. For this proposition reliance was placed on the case of *Phylis Njoki Karanja and 2 others v Rosemary Karanja and another* [2009] e KLR .

They submitted that the 1<sup>st</sup> objector during cross examination stated that she lived with the deceased from 2004-2009 yet during the same period the deceased lived in Huruma estate in Nairobi as per the 2<sup>nd</sup> objector’s testimony on the same. They argued that it was possible the deceased on accounts of travels for work visited the 1<sup>st</sup> objector from time to time whereby they would keep each other company and which company might have led to the birth of the child but that alone does not confer a presumption of marriage. They referred this court to *Vincent*



*Aliero Ayumba v Livingstone Eshikuri Liakayi & 2 others* [2017]eKLR which the court stated that:-

“ .. The fact of two people, a man and woman visiting each other and keeping each other company does not necessarily lead to the conclusion that the two are married. Such parties must expressly make their intentions known to the public, their friends and family members. In this modern age it has to be accepted that there are couples who just want to live together without any label of being man and wife. There are various reasons for these so called “come-we-stay” sort of relationships. The wishes of such people must be respected. If any party involved in such a relationship wants the court to impute the presumption of marriage, the person must adduce concrete evidence to prove so...”

34. The petitioners urged this court to find that the 1<sup>st</sup> objector was not a wife to the deceased and that in the event the court finds otherwise they submitted that the 1<sup>st</sup> objector was married to another man with whom she has children with and which claims have not been controverted by the 1<sup>st</sup> objector. That in those circumstances, even if the court was to infer a marriage she would not be entitled to the life interest in the estate of the deceased by the fact of her remarriage after the demise of the deceased. See *In the Matter of the Estate of Charles Muigai Ndung'u* P & A 2398 of 2002.
35. On whether the 2<sup>nd</sup> objector is a dependent of the deceased - it was argued for the petitioners that pursuant to section 29 of the *Law of Succession Act*, the 2<sup>nd</sup> objector ought to have proved that she was being maintained by the deceased prior to his demise but failed to do so. They argued that proof of dependency immediately prior to the death of the deceased is a condition precedent for benefit in the estate for the category of the dependents listed in the above Section. For this proposition the petitioners cited *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR.
36. On whether the deceased had taken his nieces into his family as his own, the petitioners submitted that there was no evidence in support of this position.
37. On whether the 1<sup>st</sup> objector's child JWO is the deceased's child, the petitioners argued that although a birth certificate is crucial in determination of paternity it is not the only and final proof of the same. They argued that the onus of proving paternity as was held in the *Re Estate of James Muiruri Waweru (Deceased)*[2010] eKLR lay on the person claiming so.
38. As regards Cynthia Winslet & Gilbert Muhunya the Petitioners submitted that there was no proof they were the deceased's biological children or being maintained by him immediately prior to his demise.
39. With regard to whether the grant should be revoked the petitioners argued that no ground for revocation of grant as provided for under section 76 was established by the objectors.
40. They urged this court to dismiss the objection with costs.

### **1<sup>st</sup> Objector's Submissions**

41. The 1<sup>st</sup> objector filed her submissions on May 23, 2022. Her counsel argued that there was proof of legal marriage between the deceased and the 1<sup>st</sup> objector since her dowry was paid and that the deceased cohabited with the 1<sup>st</sup> objector in Busia and out of cohabitation JWO was born.
42. On presumption of marriage, the counsel submitted that the evidence on record shows that the deceased cohabited with the 1<sup>st</sup> objector as a husband and wife in Busia for 7 years which cohabitation resulted into the birth of JWO . That at the time the deceased died he was still married to the 1<sup>st</sup> objector



the reason why she moved the court and obtained exhumation orders in order to bury the deceased at his ancestral home. He submitted that the deceased's family and the 1st objector's family knew each other and asked this court to find that there was presumption of marriage.

43. On costs - the counsel cited section 27 (1) of the *Civil Procedure Act* cap 21 Laws of Kenya submitted that the 1<sup>st</sup> petitioners' act of excluding all the beneficiaries whilst petitioning for letters of administration intestate necessitated filing of this application and as such all costs incurred in this matter should be catered for by the estate.

## 2<sup>Nd</sup> Objector's Submissions

44. She submitted two issues. Namely:-
1. Whether the proceedings to obtain the grant were defective in substance.
  2. Whether the grant was obtained fraudulently by the concealment from the court of something material to the case.
45. On the first issue, she submitted that the 1<sup>st</sup> respondent failed to list some beneficiaries and assets of the deceased when she applied for grant of the letters of administration intestate. She averred that the 1<sup>st</sup> respondent in her testimony confirmed she never involved the deceased's family in this cause contrary to the provisions of section 51(2) of the *Law of Succession Act*. She cited the case of *Re Estate of Nathan Dick Mole* [2009] eKLR where the court revoked a grant on grounds that the petitioner left out other beneficiaries & the entire estate of the deceased contrary to section 51 of the *Law of Succession Act*.
46. On the second issue, she submitted that the grant was obtained fraudulently through the concealment from court that the deceased had three children born out of wedlock and two adopted children of his late brother PAO Ateko. She argued that adopted children and those born out of wedlock have a right to inherit as provided for under article 53 of the *Constitution* 2010 and section 3(2) of the *Law of Succession Act*. To buttress this position reliance was further placed on the case of *James Munene Mugo v John Chomba Mugo & another* [2016] eKLR quoted with approval *Isaiab Gichimu Waweru v Elijah Nganga Waweru* [2015] eKLR.
47. The 2<sup>nd</sup> objector submitted that the respondents never disclosed that the deceased was a shareholder and director in Shabweld Enterprises Limited with 30 % shareholding that the deceased also owned Muheva Construction. Curiously the company is not listed as one of the assets owned by the deceased in the inventory provided in the petition for letters of administration.
48. She argued that non-disclosure of companies which are a major component of the deceased's estate materially alters the assets for the estate that are available for distribution in the estate. She thus humbly submitted that the letters of administration herein be revoked since the petitioner by her own admission failed to include part of the deceased's estate.
49. She argued that during the hearing the petitioners admitted that Kes 21 Million had been paid for one of the projects handled by Shabweld Enterprises Limited yet no accounts on how money was spent were ever provided. She accused the 1<sup>st</sup> petitioner of wasting the estate and stated that it would be prudent that the grant be revoked and new administrators appointed. She cited the case *In Re Estate of the Nathan Washiko Fedha (Deceased)* [2021] eKLR where Justice Kimaru revoked a grant of letters of administration on, among other grounds, failure by the administrators to disclose part of the estate of the deceased and thus interfering with the court's mandate to reach a just distribution of the estate of the deceased to the beneficiaries and creditors.



## Analysis & Determination

50. From the summons for revocation by the objectors and the evidence adduced by the parties to the claim, central issues emerging for determination are:-
1. Whether the deceased was married to the 1<sup>st</sup> objector in accordance with Luhya (Bunyore) customary law.
  2. Whether presumption of marriage is applicable in the circumstances of the case.
  3. Who are the dependents of the deceased?
  4. Whether the grant should be revoked.

### **Issue No.1- Whether the deceased was married to the 1<sup>st</sup> objector applicant in accordance with Luhya (Bunyore) customary law.**

51. Marriage is defined by *Black's Law Dictionary*, 9<sup>th</sup> ed as “The legal union of a couple as husband and wife”. It also elaborates the essentials of a valid marriage as: (1) parties legally capable of contracting to marry, (2) mutual consent or agreement, and (3) an actual contracting in the form prescribed by law.
52. The definition of marriage under the *Marriage Act*, 2014 is in tandem with Black's law dictionary. Section 3 (1) of the said Act provides that:
- “Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.”
53. Dowry under Section 45(2) of the *Marriage Act* 2014 is defined as :-
- “any token of any stock, goods, moneys, or other property given or promised in consideration of an intended marriage.”
54. In his book *Restatement of African Customary Law, The Law of marriage and Divorce* Vol.1 Eugene Cotran at page 53 mentions the essentials of a valid Luhya marriage as:-
- Capacity to marry
  - Consent by parties to the marriage and their respective families
  - Payment of dowry
  - Cohabitation
55. Cotran states that there can be no valid Luhya marriage unless bukhwī (dowry) has been paid. The dowry has to be negotiated between the families and can be paid by cattle or by money and can be paid by installments commencing before the marriage and continue afterwards.
56. The court in *Re Estate of Kebeya (Deceased)* High Court Nairobi Civil Case No.1403 of 2001 exhaustively dealt with the issue of what constitutes a Luhya customary marriage. The court held that negotiations between the two families have to take place and that the agreed dowry has to be paid by cattle or money, and that can be paid in installments commencing before the marriage and continuing afterwards.
57. Guided by the above statutes and precedents, it emerges that the 1<sup>st</sup> objector has not established what amounts to a Luhya customary marriage for the following reasons:-



1. There was contradictory evidence on record. Objector testified that she was married to the deceased in 2006 while her witness and paternal uncle OW2 testified that she was married in the year 2009. The first objector also stated that the amount in cash paid as part of dowry was Kes 25, 000/= and that another Kes 20,000/= was paid after the deceased died while OW2, stated that the same was Kes 50, 000/=.
2. None of the deceased's family testified in support of the 1<sup>st</sup> objectors marriage to the deceased & there was no evidence that they consented to their marriage
3. There was no evidence of dowry negotiations. The OW2 was categorical that there were no dowry negotiations and they just received what was brought.
4. There was no independent witness to the alleged marriage
5. No evidence was tendered in support of the marriage herein by an expert in Luhya customs. OW2 did not state whether he was an expert in the said custom.

**Issue No.2- Whether presumption of marriage is applicable in the circumstances of the case**

58. According to the *Halsbury's Laws of England*, 3<sup>rd</sup> Edition vol.19 at para.1323 the presumption of marriage from cohabitation is imputed where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation being a man and a wife, a lawful marriage may be presumed though there may be no positive evidence of any marriage having taken place, and the presumption can only be rebutted by only strong and weighty evidence to the contrary.
59. In *Njoki v Muthero* (1985) KLR 487, Nyarangi, JA (as he then was) stated that:-
 

“In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute.”
60. In the instant case the 1<sup>st</sup> objector testified that she cohabited with the deceased while he was working in Busia. Neither did she specifically state the number of years which she did so nor state whether the same was continuous. She testified that she was married in 2005 and in 2006 they were blessed with a child.
61. There was no evidence to prove that the deceased lived with her in Busia. Evidence of OW2 was contradictory. According to him the deceased lived with the 1<sup>st</sup> objector in Nakuru.
62. From the circumstances of this case there was no evidence of cohabitation between 1<sup>st</sup> Objector and the deceased which evidenced an intention of living together as husband and wife.
63. In any event, the 1<sup>st</sup> Objector did not plead that she was married to the deceased by cohabitation and none of the deceased's relatives recognized her as his wife. In addition, giving birth to a child during such relationship cannot lead to a presumption of marriage.

**Issue No.3- Who are the dependents of the deceased?**

64. Section 29 of the *Law of Succession Act* defines dependents of a deceased person to includes wife, wives, former wife or wives, children of the deceased whether or not maintained by him at the time of death, parents, step parents, grandparents, stepchildren... children who the deceased had taken in and were being maintained by the deceased prior to his death.
65. The parents of the deceased are dependents if they were maintained by the deceased prior to his death.



66. The court in *re Estate of Stephen Mwaura Kungu (Deceased)* [2022] eKLR observed that there will be occasions when a parent can establish through evidence that he/she was wholly dependent on his/her deceased child, and therefore that reasonable provision should be made for him/her from the estate of the deceased. When there is proof, the court will under sections 27 and 28 of the Act determine whether the provision be periodically or be a lump sum, and it will upon whatever conditions that may be appropriate to the case. In making such determination, there has to be evidence regarding how much assistance the parent was getting. There has to be evidence regarding his/her needs so that a sensible order has to be made.
67. In this case, the 1<sup>st</sup> objector testified that as a result of her relationship with the deceased JWO was born. She produced a birth certificate which indicated the deceased as the father to her child. There was no contrary evidence adduced and therefore, JWO is a dependent by virtue of being the deceased son pursuant to Section 29 of the [Law of Succession act](#).
68. There was also contention that the deceased maintained the children of his late brother PAO namely DSA & MAA . However there was no evidence to support this position.
69. There is no dispute that the 2<sup>nd</sup> objector was the deceased's mother. She testified that she had no job and that the deceased used to maintain her immediately prior to his death. The 1<sup>st</sup> objector corroborated this position. The petitioners on her part disputed the same but stated that once in a while the deceased used to send money to her. Petitioner's witness & brother to the deceased one Simon confirmed that their mother stopped working in 2003 and from then he did not know how she maintained herself. The 1<sup>st</sup> petitioner's contention that her brother in law Aggrey used to support the 2<sup>nd</sup> objector was not proved.
70. Based on the above evidence and on a balance of probabilities, and the lived reality of the majority of Kenyans, it would not be far fetched to draw the conclusion that the deceased used to maintain his mother immediately prior to his demise and as such she is a dependent. I am guided further by the holding in the persuasive decision in [In re Estate of Kenneth Roy Muigai \(Deceased\)](#) [2022] eKLR where the court stated:
- “In their evidence Virginia, Rose and Karen is that the deceased took care of Karen's upkeep after her retirement. The court has no reason to doubt this evidence. Under the definition above she qualifies as a dependant. As in an African setup it is not lost that in old age parents rely on their children to take turns to care for them. This is not farfetched it is a reality in many homes...”
71. The upshot is that the 2<sup>nd</sup> objector, John Wayne Muindi, the 1<sup>st</sup> petitioner and her three children are the deceased's dependents.

#### **Issue No.4- Whether grant should be Revoked**

72. A grant is revocable under section 76 of the [Law of Succession Act](#) if it was obtained fraudulently and / or through non-disclosure of material facts.
73. Flowing from the above it is apparent the 1<sup>st</sup> petitioner excluded the 2<sup>nd</sup> objector and JWO as the rightful beneficiaries of the deceased estate.
74. The petitioner also did not disclose that the deceased owned Shabweld Enterprises Limited & Muheva Construction. The contention that the latter collapsed in 2000 was not backed by any evidence.



75. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in Albert Imbuga Kisigwa v Recho Kawai Kisigwa Succession Cause No. 158 of 2000 where Mwita J stated:-

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

76. The question then is whether a revocation of the grant would be in the best interests of everyone beneficially entitled to the estate. It is my considered view that that would not be.

77. Upon the demise of a person the spouse becomes the person with the highest ranking with respect to the estate of the spouse. That is the position held by the Petitioner. The court however has the residual power to determine who would act in the best interests of the estate of the deceased and all those beneficially entitled to it.

78. The Petitioner has not demonstrated full honesty in her dealings with the estate of the deceased. In the circumstances it would be in order in lieu of revocation of the grant to allow the objection to a certain extent. This the court can do under the provisions of Section 66 and 73 of the Law of Succession Act.

#### **Determination**

1. The Protest is allowed to the extent that the Mother to the deceased DSO and the child JWO are both beneficially entitled to the deceased’s estate.
2. The Petitioner filed an amended form P & A 5 to include;
  - i. The two named above as beneficiaries of the deceased estate, and
  - ii. The two companies of the deceased and all the documentation related to them and their assets.
3. The Petitioner to do the above and to file a Summons for Confirmation of grant within 60 days hereof.
4. In default the grant issued to the Petitioner will stand revoked and a fresh grant to issue to DSO .
5. Each party to bear its own costs

**DATED, SIGNED AND DELIVERED VIA EMAIL THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**MUMBUA T. MATHEKA**

**JUDGE**

C/A Jeniffer

N. Ikua & Company Advocates

Olonyi & Co Advocates,

tomolonyi@yahoo.com

Kariuki & Kayika Advocates.

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