**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKEMEGA**

**SUCCESSION CAUSE NO. 1061 OF 2012**

**IN THE MATTER OF THE ESTATE OF CHARLES SHATSALA IKUNZA (DECEASED)**

**JUDGMENT**

1. Charles Shatsala Ikunza, whose estate is the subject of these proceedings, died on 14th August 1997, according to the certificate of death on record, dated 12th September 2012, serial number 262278. According to the letter from the Chief of Bukhungu Location, dated 17th September 2012, the deceased was survived by four sons and three daughters, being Henry Shichere Shatsala, Francis Itolondo Shatsala, Vitalis Shatsala, Henry Shatsala, Priscilla Shatsala, Janet Shatsala, Judith Shatsala and Judith Shatsala. It is mentioned that the deceased also had a son who had died, and who was survived by a widow, described as Beneta Shatsala. Two individuals are listed as interested parties, that is Nicholas M'mbolo and Erick Ikunza. The deceased is said to have had died possessed of a property known as Isukha/Shirere/969.

2. Representation was sought in the estate by Francis Itolondo Shatsala, in his capacity as son of the deceased, in a petition that was lodged in this cause on 3rd October 2012. He listed the four sons, three daughters and daughter-in-law listed in the Chief's letter as the survivors of the deceased. The two interested parties are listed in the liability section. The asset available for administration in the cause is listed as Isukha/Shirere/969. Letters of administration intestate were made to Francis Itolondo Shatsala, on 28th February 2013, and a grant was thereafter duly issued, dated 12th March 2013. I shall refer to Francis Itolondo Shatsala, hereafter, as the administrator.

3. The administrator mounted an application, dated 8th August 2013, filed in court on even date, seeking confirmation of his grant. He proposed distribution, at varied proportions, to the four sons, three daughters, the two interested parties, and another person who was neither in the Chief's letter nor in the petition. The daughter-in-law did not feature in the distribution. Henry Shichere was allocated 0.188 hectare, Francis Itolondo Shatsala 0.202, Vitalis Shatsala 0.150 hectare, and Henry M Shatsala 0.266 hectare. The daughters, Priscilla Muchanga Shatsala, Janet Khasiala Shatsala and Judith Shatsala were allocated 0.095 hectare to share between them. Erick Mzee Ikunza was allocated 0.162 hectare and Nicholas Mmbolo 0.236 hectare. The new entrant, Bonface Masheti Musaba, was allocated 0.206 hectare. The orders sought in the summons for confirmation of grant were granted on 17th February 2014, and a certificate of confirmation of grant, on the terms set out above, was issued, dated 26th February 2014.

4. What I am called upon to determine is a summons for revocation of grant, dated 23rd December 2014, and filed herein on 23rd January 2015. It is brought at the instance of Judith Muchanga Shatsala, who I shall hereafter refer to as the applicant. The grounds on the face of the application, upon which it is founded, are: that the administrator was using the grant in an irregular manner, as he had used it to sell Isukha/Shirere/969 to Nicholas Mmbolo; that the applicant, as a daughter of the deceased, was the rightful person to administer the estate; that the grant was obtained fraudulently and by concealment of material facts from the court; that the applicant was not aware of the institution of the cause; the administrator had shared out the estate to strangers and left out rightful heirs; and that signatures of some of the beneficiaries were forgeries, given that those beneficiaries were illiterate, and did not consent to the mode of distribution proposed at confirmation.

5. In her affidavit in support of the application, sworn on 23rd December, of an undisclosed year, the applicant avers that the deceased was a polygamist, who had married twice. The first wife was the late Dorcas Adoyi, while the second wife was Trufena Busolo. She listed the children of the first wife, or in the first house, as Henry Shichere Shatsala, Francis Itolondo Shitsala, Angelina Shikhoyi Shatsala, Sabina Shitsala, the late Ally Musaba Shitsala, Jeridina Shatsala, Vitalis Shatsala, Muteshi Shitsala, Joy Shatsala and Rose Shatsala. The children of the second wife, Trufena Busolo, are listed as the late Ernest Shatsala Azangalala, Priscilla Muchanga Shatsala, Henry Muhati Shitsala, Janet alias Linet Khasiala Opinde, and Judith Muchanga Shatsala. It is explained that the late Ally Musaba Shitsala was survived by his wife, Beneta Musaba, and a son Bonface Masheti Musaba. She states that Angelina Shikoyi Shatsala, Sabina Shitsala, Jeridina Shitsala, Muteshi Shitsala, Joy Shitsala and Rose Shitsala were completely left out of the process and were not provided for. She further states that the said grant was obtained without her consent and that of some of the other beneficiaries, all who had a right to also apply for representation. She avers that the intent of leaving them out was to disinherit them of their birthright. She avers further that the petition herein was lodged secretly without her knowledge, she had been denied her rightful share to her father's estate and provision was not made for other survivors of the deceased. She complains that the grant was confirmed, and the property was given to strangers, the two interested parties named in the Chief's letter referred to in paragraph 1 of this judgment.

6. In response to the summons for revocation of his grant, the administrator swore, on 31st May 2016, what he describes as a further affidavit, which he filed herein on 21st June 2016. He avers that before he died, the deceased had convened a family meeting, at which the

family had agreed on the sharing of his land, and minutes of the meeting were recorded. Subsequent to that meeting the land was demarcated in 1997, and the beneficiaries took possession of their respective portions. He asserts that he filed the instant succession cause, and the same was concluded and a certificate of confirmation of grant was issued. He avers that seven of the daughters of the deceased had stated that they were not interested in the estate. He avers that the applicant was included in the succession proceedings, and was given a share in the estate. He avers further that two sons of the deceased Ernest Azangalala and Henry Muhati, had sold their parcels of land to Erick Ikunza, who was then included in the proceedings as a purchaser. It is averred that Ernest Azangalala was lame, and his cousin, Nicholas Mmbolo, was taking care of his daily needs. He states that before the said Ernest Azangalala died, he had declared Nicholas Mmbolo should take over the share of the land due to him, which was echoed at his funeral.

7. The administrator has attached two documents to his affidavit. The first are minutes of a meeting allegedly held on 17th April 1997. It was purportedly attended by Charles Shatsala Ikunza, Henry Shichere Shatsala, Francis Idolondo Shatsala, Ernest Atsangalala Shatsala, Vitalis Mukhatsa Shatsala, Henry Muhati Shatsala, Dorcas Andoyi Shatsala and Joseph Achesa Lumiti. Trufena Busolo Shatsala and Beneta Musaba were said to be absent. It is recorded that the deceased had expressed a wish to share out the land amongst his children. Some of the children are recorded to have had made remarks at the meeting. The second document is the certificate of confirmation of grant issued herein, dated 26th February 2014.

8. Filed on the same day, 21st June 2016, with the affidavit of the administrator, are six (6) affidavits, all sworn on 21st May 2016, by Joy Shatsala, Rose Shitsala, Angelina Shikhoyi Shatsala, Jeridina Shistala, Muteshi Shitsala and Sabina Shatsala. The affidavits are standard and are replicas of each other. The principal averments in all six are that all six deponents are daughters of the deceased, they were all married and living with their husbands at respective addresses, they were not interested in their father's estate and they supported the mode of distribution reflected in the certificate of confirmation of grant dated 26th February 2014.

9. There is also an affidavit, said to be of evidence, that was sworn on 3rd October 2016, by Timona Shipwondo Ikunza, and filed herein on 5th October 2016. Much of what is deposed in that affidavit is already on record. The deponent confirms that the deceased was a polygamist, having married two wives, who begat him fifteen (15) children. He avers that the deceased had not sold any portion of his land, Isukha/Shirere/969, to anyone before he died. He states that Henry Muhati Shatsala and the late Ernest Shatsala had sold portions of the land, measuring about ¼ acre, without the consent of the rest of the family and, therefore, Erick Mzee Ikunza, who apparently was the buyer, was not a beneficiary, and was not entitled to a share in the estate. He further avers that Nicholas Mmbolo was not a child of the deceased, nor a beneficiary of the estate, and he was not entitled to a share in the estate. He further avers that the family was not involved in the distribution of the estate by the administrator, which, he avers, was contrary to Luhya customs. He avers that the distribution reflected in the certificate of confirmation of grant dated 26th February 2014 was not just or fair. He further avers that as a family, they were not aware of any family meeting held on 17th April 1997, and that from the minutes of that meeting it appeared that nothing was discussed about distribution of the property of the deceased.

10. The last affidavit on record, described as supplementary, was sworn by the applicant, on 3rd October 2016, and was filed in court on 5th October 2016. It largely responds to the affidavits sworn by the administrator and the six daughters of the deceased in reply to her application. She states that none of the daughters, in their affidavits, stated whether they had consented to the administrator petitioning for representation to their father's estate. She avers that she came from the second house of the deceased, and that the consent of her side of the family was not sought prior to the filing of the petition, and that she was not satisfied with the distribution of the estate, amongst the beneficiaries and strangers. She reiterates that the grant was obtained through a fraudulent process where material facts were concealed from the court.

11. The application was disposed of by way of *viva voce* evidence. The oral hearing commenced on 10th April 2019, with the applicant on the witness stand. She testified that the deceased was a polygamist. His first wife had ten children, only one of them was dead, Ely Musaba Shatsala, who was survived by a wife and children. The second wife had five children, two of them had died, being Ernest Shatsala Azangalala and Janet Khasiala Shatsala. Ernest Shatsala Azangalala did not have children, while Janet had three daughters. She stated that she did not know how the administrator was appointed, as he did not involve her in the process. She said that she did not know how he distributed the estate. She said that she had never signed any document in the cause, consenting to the distribution, and that he did not attend the court during the confirmation of the grant. She further said that she was invited to the hearing. She stated that Ernest Shatsala Azangalala and Henry Muhati Shatsala had sold land to two persons, one of them being Erick Ikunza. She said that she did not know Nicholas Mmbolo, and that he never saw him on the land. She said that the deceased had shared out the land between the two houses before he died. He was said to have had fixed a boundary to separate the two portions. She testified that the deceased never held a meeting to distribute his land. She said that she did not attend the meeting reflected in the minutes attached to the affidavit of the administrator. She was not party to it and she did not know what was discussed. She said that she was an administrator of the estate, and that the family did not sit to agree on an administrator. She asserted that she filed her application as she was not involved in the process. She also said that the daughters in the first house filed their papers after she filed hers, and that they had not been involved in the process at the initial stages.

12. During cross-examination, she stated that she was the youngest child from the second house, and that only one son was surviving from her house, being Henry Mwashi. She said that she was not involved in the succession process, and so was her brothers. She said she was married, and lived at Kisii. She said that while the deceased was alive, she would get information on what was going on within the family. Regarding the alleged meeting, where the land was allegedly distributed, she said that she was not aware of it, and had not been notified of it. She said that she was not aware whether her brother attended court at the confirmation of the grant, adding that he did not represent her at that the confirmation. She stated that the deceased had only shown members of the family where to cultivate. She said that there were markings on the ground, demarcating the portions of the two house, and thereafter the mothers showed the sons where to cultivate. She said that none of her brothers had families. She said that Henry lived in Lubao, and farmed a portion of Isukha/Shirere/969. She said that he was not allocated a portion by the deceased. she said that there were three daughters in the second, none of who was consulted. She also said that some of the daughters from the first house were excluded. She said that on her part she did not consent. she said that if the daughters in the first house supported the distribution, she, on her part, did not. She explained that Ernest Shatsala Azangalala and henry sold land to Erick, but said that she did not know whether Erick processed deeds to the said portions.

13. Timona Ikunza testified on the side of the applicant. he testified that he was a brother of the deceased. he confirmed that the deceased was

a polygamist, who had two wives. He said that the land in question had a boundary separating the lands of the two houses. He stated that the deceased had not shared out the land amongst his children before he denied. He said if the deceased had wanted to do so, noting prevented him. He would have called a meeting of elders for that purpose. He said that he was not called to any such meeting, and that he was unaware of any such meeting having been called by the deceased. he said he had other brothers, who were also not involved. He said the deceased had daughters, some married, some not, some lived on the land, some did not. He said he did not know Nicholas Mmbolo, but he did know Erick Ikunza, as a son of his brother. He said he supported a redistribution of the land. He said that he did not know if all the children of the deceased had been involved in the process. He said that the deceased was his neighbour, and that he had not asked him to take care of his family. He said if the deceased had wanted to call a family meeting, he would have told him so.

14. The case for administrator opened on 22nd January 2020, with the administrator on the witness stand. He said that the deceased distributed the land on 17th April 1997, after he called a meeting of all his children, including the applicant. he said that deceased said he wanted to distribute his land. After that they began to use the land according to his instructions. The surviving wife at the time, he said called government officers who came and assisted them implement those instructions. He said that the last house was allocated its share of the land. He said that all the children of the last house were listed in the certificate of confirmation of grant. He stated that the applicant refused to give her consent to the proposed distribution. He furthers stated that all the daughters were involved in the process. All the children attended the court proceedings on 17th April 2014, when the grant was confirmed, and that no one protested, as they all agreed with the distribution. He stated that the applicant was married in Kisii, and was aware of the court proceedings. He stated that the applicant knew about the issue of Nicholas Mmbolo and Erick Ikunza. Adding that Ernest Shatsala Azangalala and Henry Muhati Shatsala did not have land, as they had sold it to Erick Ikunza. He stated that the two were the applicant's blood brothers, who had no children, and who decided to sell the property to persons who could take care of them. He said Mmbolo took care of Ernest Shatsala Azangalala, and so Ernest Shatsala Azangalala sold his share to him. He said that the daughters from the second house had all been allocated shares.

15. During cross-examination, he stated that he was the one who initiated the cause, and all the children of the deceased had signed consents. He said he was given a form for the children to sign, but he was not aware whether all the children signed the form. He said that when the form was taken to court, it was accepted. He said that the first house had six daughters, and the form listed only three of them. He added that the six daughters of the first house later filed affidavits. He said that those who were allocated land were those who had signed the form. He said that the meeting where the deceased distributed his land was recorded in minutes, which he had attached to his affidavit. He said that no one signed the minutes. He said that the meeting was held in 1997, and, according to him, daughters were not then entitled to a share in their father's estate according to tradition. He stated that the deceased gave land to his children, and he reduced the same into writing. He said that the deceased did not leave a will, but he had set aside land for his daughters, although that was not recorded in the minutes. He said that the daughters had told the deceased that they did not want a share in the estate, and that was why he did not allocate them any shares. He stated that the confirmation application was filed in 2012, yet the six daughters of the deceased from the first house swore their affidavits in 2016. He said that not all the children of the deceased attended court at confirmation, but he asserted that the six daughters from the first house were in attendance. He stated that he had no evidence that the applicant was aware of the confirmation proceedings. He said that the deceased had not transferred property to the children before his demise, and that he did not share the land equally. He stated that the daughters did not sign any documents, and not all of them attended court at confirmation. He further stated that the second house did not agree on the distribution proposed., and that he did not give them any land, as tit was the deceased who distributed his property.

16. Sabina Akhonya Shatsala testified next. She stated that the deceased had distributed his land before his death, amongst the sons, and did not give anything to the daughters. She said that she was not aware when the estate was distributed, and that she just got to hear that the matter was in court. She said that a person identified as Geraldine was sent to inform the applicant about the matter, but he did not come to court. She said that the administrators shared out the land according to how the administrator had shared it out. She said that she did not think that any of the sons had title deeds. She said that the deceased had left a will, as she had heard about it. She said that she had not signed any document on distribution, and that the day she came to give evince in court was her first day in court over the matter. She testified that Nicholas M'Mbolo was his nephew, being a child of one of his sisters. She said that the deceased did not allocate nay land to him. She explained that Erick Ikunza had bought land from one of his stepbrothers, or so she heard. She said that she was not interested in a share in the estate., but she would have no problem with her younger sisters getting a share. She explained that Nicholas M'Mbolo did not buy land from Ernest Shatsala Azangalala, instead, he built a house for him, used to assists him.

17. Rose Salima Ali testified next. She said that the deceased had shared out the land amongst the two houses, or his two wives. Then again she said the land was shared amongst the sons. The land was said to have been marked by boundaries. Daughters were not given land. She said she was very small when all this happened, and she did not understand the sharing. She stated that the deceased shared out the land according to how the deceased had shared it. She said that she did not know Nicholas Mmbolo. At cross-examination, she stated that the day she was giving testimony was also her first time in court over the matter. she said that she did not participate at the initiation of the cause nor at the confirmation of the grant. She said that the only document that she signed in the matter was her affidavit of 21st May 2016. She stated that the deceased had shared out his land before he died, and that the administrator did not did not allot any land to the daughters. She averred that a boundary separated the piece for the first house from that of the second house. she confirmed that she was not in court on 17th February 2014, when the grant was confirmed. She said that she did not know Nicholas Mmbolo, but Erick Ikunza was a familiar family name.

18. Joyce Khaluyi Shatsala was the next witness. She stated that the deceased had shared out his land before he died. No title deeds were given. She further stated that the daughters were not allocated land. She said that he attendance in court to give evidence was the first time she was involved in the matter. She said she never sat in any event where land was shared out. She said that she knew both Nicholas Mmbolo and Erick Ikunza. She said that she had heard that Erick Ikunza had bought land from Ernest. she further said that the property was still in the name of the deceased. she said she knew nothing about how the land was to be distributed.

19. At the conclusion of the trial, directions were given for filing of written submissions. Both sides filed written submissions, which I have read through and noted the arguments made.

20. In her written submissions, dated 25th January 2021, and filed herein on 29th January 2021, the applicant submitted on several grounds. She submits that she and the daughters of the deceased were not involved in the process of petitioning for representation to the estate and confirmation of grant. She has cited decisions, in *In re Estate of Jacob Odhiambo Wangánya (Deceased)* [2020] eKLR (Musyoka J) and *In*

*re Estate of Francis Masanganjila Andala, Deceased* [2019] eKLR (Musyoka J), to support her case. She also submitted that consequential orders ought to be made to revert the property to the name of the deceased, to facilitate redistribution. She cites *Monica Adhiambo vs. Maurice Odero Koko* [2016] eKLR (Nagillah J). She submits that the administrator had been dishonest, and, therefore, did not deserve being appointed administrator, and that she should be appointed administrator in his stead. She relies on *In re Estate of Francis Masanganjila Andala, Deceased* [2019] eKLR (Musyoka J).

21. The administrator on his part, in his written submissions, dated 19th January 2021, and filed herein on 20th January 2021, cited *Anil Behari Ghosh vs. SMT, Latika Bala Dassi & others* [1955] AIR 566 SCR (2) 270,(Sinha P.) on the interpretation of "defective in substance." He submits that he had disclosed everything that needed to be disclosed about the deceased and the beneficiaries, and that nothing was concealed. He further submits that he involved all the beneficiaries in the process, including the applicant, and the estate was distributed according to how the deceased had distributed it. He submits further that the estate had been demarcated in 1997, and the distribution at confirmation was in conformity with the 1997 demarcations, and that the beneficiaries took possession in accordance with the said demarcations, and were utilizing the land. He finally invites the court look at the record so as to satisfy itself of the events at the confirmation of the grant.

22. The application for determination seeks revocation of a grant of representation. The deceased died in 1997, which was after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation in 1981. His estate, therefore, falls for administration and distribution in accordance with the provisions of the said Act.

23. The Law of Succession Act provides for revocation of grants under section 76, which states as follows:

> *"76. Revocation or annulment of grant*
>
> *A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
>
> *(a) that the proceedings to obtain the grant were defective in substance;*
>
> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
>
> *(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
>
> > *(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*
> >
> > *(ii) to proceed diligently with the administration of the estate; or*
> >
> > *(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
>
> *(e) that the grant has become useless and inoperative through subsequent circumstances."*

24. Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt. In the instant case, the applicant appears to anchor her cases on the first general ground, that there were issues with the manner the grant was obtained.

25. The framework for applications for grants of representation is set out in section 51 of the Law of Succession Act. The most relevant portions, for the purpose of this application, are in subsection (2)(g), which state as follows:

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

*(a) …*

*(b) …*

*(c) …*

*(d) …*

*(e) …*

*(f) …*

*(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;*

*(h)..."*

26. Section 51(2) (g) requires the petitioner to disclose all the surviving spouses, children and other close relatives of the deceased. The provision is in mandatory terms. The administrator herein disclosed, in the petition that was lodged herein on 3rd October 2012, himself and three other sons, two daughters and a daughter-in-law of the deceased. It transpired form the filings made in connection with the summons under determination, and from the oral hearings, that the deceased had more children than those disclosed in the petition. The total number of children disclosed were seven against the actual number of fifteen, which means that eight of them were not disclosed. Indeed, the deceased had died a polygamist, having married more than once. That fact was not disclosed. In view of that I hold that there was no compliance with section 51(2) (g).

27. The applicant complains that she was unaware of the proceedings, as she did not know how the administrator got appointed as such. That would mean that she was not consulted before administration was sought, or her consent was not obtained before representation was sought by the administrator.

28. Section 66 of the Law of Succession Act sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

29. These provisions state as follows:

"*66. Preference to be given to certain persons to administer where deceased died intestate*

*When 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 on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors …"*

and

"*7 (7). 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. "*

30. Rule 26 of the Probate and Administration Rules is also relevant. It states as follows:

> *"26(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."*

31. Rule 26(1) (2) would apply where representation is sought by a person with equal right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with equal entitlement with notice. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

32. The record here would indicate that the deceased was not survived by a spouse, but by sons and daughters, and grandchildren, being children of his own children who were since dead. All the surviving children of the deceased had equal right or entitlement to apply for administration, going by section 66 of the Law of Succession Act. A reading of section 66 and Rule 26 of the Probate and Administration Rules together, would mean if any one of the surviving children of the deceased sought representation to the estate, to the exclusion of the others three, there would, then, be need to comply with the requirements of Rule 26 of the Probate and Administration Rules, since that provision applies to persons who seek representation while they had an equal right to administration. The administrator herein had equal right to administration with the applicant and the other daughters. He, therefore, needed to obtain their consents or their renunciation of right to administer or, in lieu thereof, to have filed an affidavit to explain why the consents or renunciations were not forthcoming, before he applied for representation to the estate of their late father.

33. I have perused the record before me relating to the process of application for grant herein. I have noted that there is a consent form to the making of grant that was lodged herein on 3rd October 2012. It is in the prescribed Form 38, it bears signatures purported to be of the applicant and the other two daughters of the deceased, Priscillla Shatsala and Janet Shatsala. The applicant has denied signing any document during the process in question, saying that she only discovered the existence of the proceedings after confirmation of the grant. I am not a handwriting expert, and I claim no expertise whatsoever in that field, but it is clear to any discerning eye, that the signatures alleged to be of Priscilla, Janet and Judith were by the same hand. I have compared the signature of the applicant on the affidavit that she swore on 23rd December 20 and filed herein on 23rd January 2015, as well as her signature on her witness statement dated 23rd December 2014, with that in the consent form filed herein on 3rd October 2012, and I do not see any similarity. I do not require any persuasion by a handwriting expert to convince me that the signatures in the consent form filed on 3rd October 2012 were not by the daughters of the deceased as alleged. It cannot, therefore, in my view, be argued that Rule 26 of the Probate and Administration Rules was complied with. I am persuaded that the grant was not obtained procedurally. There was defect in the process and am persuaded that fraud was practiced.

34. Even without considering the authenticity of the signature in Form 38 that is purported to be that of the applicant, it came out very clearly at the trial that there were other children of the deceased who were not disclosed in the petition, and who, therefore, did not sign Form 38, and for whom no forged signatures were appended to the form. Three of them testified on 2nd November 2020, and they were categorical that they were not involved in the process of obtaining representation to the estate, and that they did not sign any papers with respect to application for representation, and they conceded that the only documents that they ever executed in the cause were their affidavits sworn and filed in 2016, long after the grant was made to the administrator on 28th February 2013 and confirmed on 17th February 2014. The six daughters who swore and filed further affidavits on 21st May 2016, that is to say Joy Shatsala, Rose Shitsala, Angelina Shikhoyi Shatsala, Jeridina Shistala, Muteshi Shitsala and Sabina Shatsala, were not disclosed or listed in the petition filed by the administrator, as daughters of the deceased, and they did not execute any consents in Form 38. To that extent, the administrator did not comply with Rule 26 of the Probate and Administration Rules, and Section 51(2)(g) of the Law of Succession Act. I am not persuaded that a disclosure of children of the deceased after confirmation and in response to a revocation application, who ought to have been disclosed when the administrator was seeking representation, can cure that anomaly. The administrator has not sought to explain why he did not comply with section 51(2)(g) and Rule 26, by excluding such a large number of survivors of the deceased from the schedule of the survivors of the deceased.

35. A full disclosure of all the survivors of the deceased, in intestacy cases, such as the present, is crucial. Distribution is dependent on the number of the survivors, and how they related to the deceased. That should be very clear from the language of Part V. Where the deceased is survived by a spouse and children, section 35 applies. The surviving spouse should be disclosed, and so should the children. The surviving spouse should be disclosed, because she has first priority in distribution. Her or his entitlement is to the personal and household effects of the deceased and a life interest in the net intestate estate. Where there is a surviving spouse, he or she ought to be disclosed so that the court can properly allocate to him or her, the personal and household effects and the life interest in the net intestate estate. Under section 35, the surviving children are not entitled immediately to the net intestate estate, so long as there is a spouse enjoying life interest. Their right to the estate is suspended, in terms of distribution, until the surviving spouse either exercises power of appointment under section 35(2), or the life interest, enjoyed by the surviving spouse, terminates and the property is devolved to the children by dint of section 35(5) of the Act. The children can only effectively benefit under either section 35(2) or section 35(5), if they are disclosed, for whoever is not disclosed may miss out on the exercise of the power of appointment under section 35(2) or the equal distribution envisaged in section 35(5).

36. Where the deceased is survived by a spouse but no child or children, then section 36 will apply. For the court to determine whether to exercise the power of distribution under section 35 or section 36, there must be a clear disclosure of the survivors, denoting whether they are spouses or children of the deceased, for the two categories of survivors are entitled differently, and, therefore, the patterns of distribution applying to them are different. Non-disclosure of the some of the survivors would distort the picture, and the court may find itself distributing the estate contrary to the law. A surviving spouse is not entitled to the entire estate, but, under section 36, he or she would be entitled to the personal and household effects at the first instance, absolutely; then to 20% of the net intestate estate and life interest in the remainder, to terminate upon death or the remarriage of the widow.

37. Where the deceased is survived by a child or children only, then section 38 would apply. The child would take the net intestate estate absolutely. If there be more than one child, then they would share the estate equally. It is critical, therefore, that there be a full disclosure of all the children, so that all can take their share, as stipulated in section 38. Suppressing the existence of any child distorts the picture. It amounts to fraud, it would mean, ultimately, that the estate would be distributed in the absence of some children, and the shares due to them would be allocated to other individuals without their consent.

38. Section 40 caters for the family of a polygamist. It spells out how the estate of such polygamist ought to be distributed. For the court to effectively apply section 40, the petitioner ought to make disclosure, of the fact that the deceased died a polygamist, and of all his wives and all his children from each house. Again, failure to make a full disclosure distorts the picture, and may lead to a distribution that is skewed in favour of and against some beneficiaries.

39. It cannot be emphasized enough that full disclosure of the survivors of the deceased is critical. It is required by section 51 of the Act, at the point of making the application for resonation. It should not be rubbished or causally waved aside in the manner that the administrator is doing herein. He was obliged by section 51 of the Act, to disclose all the survivors of the deceased, for the reasons that I have given above, but he failed to do so. That meant that at distribution of the estate some of the survivors of the deceased were not catered for, for the court did not know that they existed, and the court could not get their concurrence on the distribution proposed, for it did not know anything about them. The administrator is only waking up to this non-compliance after it is raised by the applicant, and it is on that basis that he has gotten his six sisters to renounce their interests. That he should have done when he was seeking representation, and not when his grant is being challenged for failing to comply with the strict requirements of the law.

40. It would appear that part of the reason why the applicant is so unhappy is because she was not involved when the grant was being confirmed and the estate distributed. Looking at the provisions relating to the filing and disposal of applications for confirmation of grant, in Rules 40 and 41 of the probate and Administration Rules, all the survivors of the deceased and other persons beneficially entitled to a share in the estate ought to be involved in the process. There is a requirement for filing of consents in the format in Form 37, for those who support the proposals made in the confirmation application; and for filing of affidavits of protest, by those who do not support the proposals. The manner of the hearing of the application is spelt out in Rule 41, where the court is required to hear all the parties, that is the survivors and all persons beneficially entitled to a share in the estate. failure to involve the parties, could have the result of some people being left out of the process of distribution, and disinherited altogether.

41. It should be of note, however, that problems or difficulties with the process around which a grant is confirmed are not fatal to the grant itself. A grant should not be revoked merely because the processes set out in Rules 40 and 41 relating to confirmation of grants were not complied with. Under section 76, the confirmation process, as a factor in revocation of grants, is relevant only in cases where an administrator fails to apply for confirmation of their grant within one year from the date of its making. That is stated in section 76(d). I underlined the fact that revocation with respect to confirmation is where there is failure to apply for confirmation of grant under the circumstances stated in that provision. Where a confirmation application is mounted, but which is deficient, for non-compliance with Rules 40 and 41, there would be no failure to apply, and the grant, as confirmed, would not be available for revocation for such noncompliance.

42. Therefore, a lot of the issues that the applicant has raised relating to non-compliance with the rules governing confirmation of the grant herein, may not be altogether relevant, since the administrator did not fail to apply for confirmation of grant, it cannot be said that his grant ought to be revoked for such non-compliance. The issues, however, even though, on their own, are not sufficient to support a case for revocation, corroborate the argument that the administrator proceeded to administer the estate in a manner that excluded many of the survivors of the deceased, suggesting a motive to disinherit the survivors that he sidelined from the process.

43. Most of those excluded altogether from the process and those sidelined are daughters. The theme that runs throughout the narrative by the administrator is that the applicant was a daughter, who was married, and so were the other daughters. Traditionally, according to him, daughters have no say in administration of their dead parents' estates and are not entitled to a share. That could a proper rendition of what culture and tradition says about the matter. But succession or inheritance, and in particular to the estate herein, are not governed by culture and tradition. Succession and inheritance to the estate of a Luhya resident of Kakamega County, dying after 1st July 1981, is governed by the Law of Succession Act, by dint of section 2(1). It has been held by the courts, that section 2(1) of the Law of Succession Act ousted the application of African customary law of succession to estates of Africans who died after 1st July 1981. See *Rono vs. Rono and another* [2005] 1 EA 363 (Waki JA), *In Re the Estate of Harrison Gachoki (Deceased)* [2005] eKLR (Okwengu J), *In the Matter of the Estate of Mwangi Giture (Deceased*) [2004] eKLR (Koome J), *In re Estate of Juma Shiro - Deceased* [2016] eKLR (Mwita J), and *Kuria and another vs. Kuria* [2004] KLR eKLR (Musinga Ag. J), *In re Estate of Gamaliel Otieno Onyiego (Deceased)* [2018] eKLR (JA Makau J) and *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Muchelule J). The deceased herein died in 14th August 1997, long after the Law of Succession Act applied in 1981, and ousted the application of Luhya customary law to estates of residents of Kakamega. It is the provisions of the Law of Succession Act which apply to the estate herein, not Luhya customary law.

44. Under the Law of Succession Act women are treated equally with men. The Act is, therefore, gender neutral. Reference to children in the provisions in Part V, and in particular sections 38 and 40, which apply to the circumstances of the instant matter, would mean both sons and daughters of the deceased, regardless of their marital status. Furthermore, the promulgation in 2010 of the new Constitution reinforced that position. Article 27 of the Constitution envisages equal treatment of men and women in all spheres of life, including succession. That constitutional position cannot be contradicted by any custom, tradition or culture, for the Constitution renders any law, which is inconsistent with it, null and void. So any argument founded on customary law or culture designed to disinherit women, on account of nothing more than their gender, is worthless.

45. I do not think that I should expend any more energy discussing all the other issues raised, for the applicant has made out a case that the grant herein was obtained through a process that was defective, to the extent that there was no full compliance with section 51 of the Law of Succession Act and Rule 26 of the Probate and Administration Rules. The process was also undermined by the exercise of fraud, misrepresentation and concealment of important matter from the court, to wit, that the deceased had been survived by many more individuals, beyond those listed in the schedule of survivors in the petition. The skewed disclosure in the petition led to a skewed distribution of the estate at confirmation of the grant. The grant herein is liable to revocation, and I shall exercise the discretion given to me under section 76 of the Law of Succession Act to revoke it.

46. In the end, the final orders that I shall make in this matter are as follows:

**(a) That I hereby revoke the letters of administration intestate made to Francis Itolondo Shatsala on 28th February 2013 and the grant issued on 12th March 2013, and confirmed on 17th February 2014;**

**(b) That, as a consequence of (a) above, I order cancellation of all the transactions carried out on Isukha/Shirere/969, on the basis of the certificate of confirmation of grant dated 26th February 2014, and I hereby direct the land registrar responsible for Kakamega County to cancel any titles created from Isukha/Shirere/969 and to revert the property to the name of the deceased herein;**

**(c) That I hereby appoint Francis Itolondo Shatsala and Judith Muchanga Shatsala administrators of the estate herein;-**

**(d) That the administrators appointed under (c), above, or any one of them, shall, with due dispatch, and, in any event, within the next forty-five (45) days from the date of their appointment, apply for confirmation of their grant;**

**(e) That the said administrators shall, in that application, comply with all the requirements of section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules;**

**(f) That the administrators shall cause the application, to be filed, to be served on all the children of the deceased, including daughters;**

**(g) That any individuals who are beneficially interested in the assets of the estate, and who shall be dissatisfied with the proposals made in the application, to be filed under (d), above, shall be at liberty to file affidavits of protest making their own proposals on distribution;**

**(h) That such individuals and all the survivors of the deceased, and persons beneficially interested in the estate, shall thereafter attend court, on the date to be appointed for the hearing of the confirmation application, to state their position, or otherwise file documents stating their position or renouncing their entitlement to a share in the estate;**

**(i) That the matter shall be mentioned thereafter for compliance and for further directions;**

**(j) That each party shall bear their own costs; and**

**(k) That any party, aggrieved by the orders made herein, has leave to appeal against the same at the Court of Appeal, within the next twenty-eight days of this judgment.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE 2021**

**W. MUSYOKA**

**JUDGE**