



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISC. APPLICATION NO. 394 OF 2008

IN THE MATTER OF THE ESTATE OF EDWARD KARIUKI KIMANI (DECEASED)

JUDGMENT

1. Before the Court for determination is the summons for Revocation of Grant dated **26th October 2011** in which the Applicant **PETER MWAURA KARIUKI** seeks the following orders:-

“1. The Grant of letters Administration for the Estate of the Deceased made on the 11th June 2008 and confirmed on 8th November 2010 be revoked and/or annulled.

2. The costs of this application be provided for by being paid by the Respondent.”

2. The Application which was brought under **section 76 (a) (b) (c) (d) Succession Act Cap 160, Rule 44 (1) Probate and Administration Rules** was premised upon the following grounds:-

“(a) That the Grant of the letters of Administration intestate were granted to a person who was not entitled to be appointed and who was not rightly entitled to be a sole administrator of the Deceased’s Estate.

(b) That the petition for the Grant of the letters of Administration by the Respondent and the application for confirmation of the Grant were fraudulently, dishonestly, deceitfully and by suppression of substantial material particulars made and the same misled the Honourable court by failing to disclose the full list and particulars of both the proper defendants and beneficiaries, and the properties, assets and liabilities, of the Deceased’s Estate.

(c) The Objector, a son and defendant and beneficiary and the assets set out in the affidavits filed herein together, were dishonestly left out.”

3. The application was supported by the Affidavit of even date sworn by the Applicant, the Further Affidavit sworn by the Applicant on **15th July 2019** and the Supporting Affidavit dated **26th October 2011** sworn by **LILLIAN WAKIYA MWAURA**. The Respondent **MARY KANYI KIMANI** who was the Administratrix of the estate of the Deceased opposed the Summons through the Replying Affidavit dated **9th December 2011**. The summons was canvassed by way of *viva voce* evidence. **Hon Justice John Onyiego** heard the evidence of all the witnesses. Following the transfer of the **Hon Trial Judge** to **Mombasa High Court** I took over the matter and it fell upon this court to prepare the judgment.

BACKGROUND

4. This Succession Cause relates to the estate of **EDWARD KARIUKI KIMANI** (hereinafter the **Deceased**) who died intestate on **24th July 2006**. Following the demise of the Deceased his Widow **Mary Kanyi Kimani** petitioned the High Court for Grant of letters of Administration Intestate. In the Affidavit dated **31st January 2008** in support of said petition the Deceased was said to have been survived by the following persons:-

(a) Mary Kanyi Kimani – Wife

(b) Edward Kimani Kariuki – Son

(c) **Margaret Wanjiru Kariuki - Daughter**

(d) **Tabitha Nduta Kimani – Daughter**

(e) **Grace Nyambura Kimani – Daughter**

(f) **Edith Njeri Kimani – Daughter**

(g) **Paul Njenga Kimani – Son**

5. The estate of the Deceased was said to comprise of the following assets: -

(a) **LR No. MN/11/460**

(b) **LR MAELA/NDABIBI BLOCK 2/19**

(c) **Bank Account No 2150091501 Bank of India.**

The Estate which was valued at **Kshs 2,500,000/-** was said to have no liabilities.

6. Following her petition Grant of letters of Administration Intestate was made to the widow **MARY KANYI KIMANI** on **11TH June 2008**. The grant was thereafter confirmed vide a certificate of confirmed Grant issued on **8th November 2010**.

7. The Applicant then in **October 2011** filed this summons for revocation/annulment of Grant, alleging that the Applicant was not entitled to be sole Administratrix of the Estate of the Deceased. That the Grant was obtained fraudulently by suppression of relevant material and by misleading the court by failing to disclose the full list and particulars of the beneficiaries of the estate as well as the full lists of assets comprising said estate. The Applicant claimed that he was a biological son to the Deceased, was dependant on the Deceased and was therefore a beneficiary of the estate.

8. As stated earlier the summons was heard by way of oral evidence. **PW1** was the Applicant. He relied entirely upon his witness statement dated **3rd July 2018**. The Applicant stated that he was the biological son of the Deceased having been born on **3rd January 1980** to the Deceased and one **MS LILLIAN WAKIYA MWAURA**. The Applicant told the court that during his lifetime the Deceased cared and provided for him as a son. That the Deceased provided the Applicant with fatherly love and attention paying for his upkeep and catering for all his spiritual, material, financial and educational needs.

9. The Applicant states that his father the Deceased passed away on **24th July 2006** after which he tried unsuccessfully to engage the Respondent and her children so that joint Succession Cause could be lodged in court. That he also reached out to the Deceased's business partners, managers and employers in his efforts to participate in the administration of the estate, but that these efforts were ignored.

10. The Applicant complains that he was deliberately excluded from these proceedings and alleges that the letters of Administration were obtained fraudulently by concealment of material facts being the identity of the beneficiaries to the estate and the full list of assets comprising of the estate of the Deceased.

11. The Applicant produced as an exhibit his Birth Certificate which bore the names of the Deceased as his father.

12. The Applicant confirmed that he is ready and willing to undergo a DNA test in order to prove his claim that he is a son to the Deceased. He prays that the Grant issued to the Respondent be revoked.

13. **PW 2 LILLIAN WAKIYA MWAURA** is the mother to the Applicant. She relied on her witness statement dated **3rd July 2018**. **PW2** testified that she met and be friended the Deceased in **April 1978** after which they cohabited as man and wife. **PW2** stated that at the time she had three other children from her previous marriage to one **Professor Kabiru Kinyanjui**. That her relationship with the Deceased resulted in the birth of a son **Peter Mwaure Kariuki** who was born on **3rd January 1980**. She stated that the Deceased acknowledged the Applicant as his son and provided him and her three other children with fatherly care and attention, paying for upkeep school fees, holidays, etc.

14. **PW2** told the court that she is the **2nd** wife of the Deceased as the Deceased paid dowry to her late mother **Priscilla Waithera Mwaure** in **1980** and that the Deceased participated as a son-in-law in all her family events. **PW2** testified that she cohabited with the Deceased for a period of **27 years**.

15. The witness states that she was fully aware that the Deceased had a first wife **Mary Kanyi Kimani** with whom he had sired children. She states that upon completion of his secondary education the Deceased registered the Applicant to train as a pilot and paid for all the fees until he (the **Deceased**) fell ill in **May 2006** and finally died at **Nairobi Hospital** on **28th July 2006**.

16. **PW2** therefore asserts that her son the Applicant being the biological son of the deceased and a defendant is entitled to inherit from the estate of the Deceased.

17. **PW2** told the court that being a lawyer she did render professional legal advice to the Deceased and that she did also assist the Deceased to acquire properties and assets. She states that the Petition filed by the Respondent failed to disclose several properties owned by the Deceased. In her witness statement **PW2** lists the following as the assets which the Respondent failed to disclose in her petition for letters of Administration:-

“3.1.1 L.R. No. 209/6229, and building erected thereon known as Agip House and registered under the Company which he owns all the shares known as MBAGI LIMITED, which was bought with my participation in sourcing the 10% deposit.

3.1.2 Kiambu Municipality Block 111/34, 35, 37, 38, 143, 144, 145 and 116 which are plots owned through Mumwe Investments Ltd, a company which he owned all the shares, and held the properties on his behalf.

3.1.3 Kiambu Municipality Block 111/228 and 229 which are land parcels measuring 13.70 hectares and 12.62 hectares respectively owned through the aforesaid Mumwe Investments Ltd.

3.1.4 Kiambu Municipality Block 111/69 which is public utility land owned through the said Mumwe Investment Ltd

3.1.5 Rosslyn L.R. No. 21/1/186 and the building erected thereon which is a house registered under the aforesaid MBAGI LTD, a company which he owns all the shares.

3.1.6 Rosslyn L.R. Nos 21/1/187, 21/1/188, 21/1/189, 21/1/190, 21/1/191, 21/1/192 and 21/1/50/9 registered under the earlier mentioned MBAGI LTD.

3.1.7 Uthiru L.R. Nos 68817, 68818, 68819, 68820, 68821, 68822 registered under MBAGI LTD.

3.1.8 Kilifi LR MN/111/4160 registered under the name EDWARD KARIUKI KIMANI.

3.1.9 Kileleshwa L.R. No. 209/6891 registered under the names GRACE N. KIMANI and EDITH N. KIMANI.

3.1.10 Jamhuri L.R. No. 209/6989 registered under the name ELIZABETH WANJIRU KARIUKI.

3.1.11 Maela Ndabibi Block 2/19 (Tarabete) which is a land Parcel measuring 23.4 Hectares registered under the name EDWARD KARIUKI KIMANI.

3.1.12 Dagoretti/Uthiru/452/11 registered under the name EDWARD KARIUKI KIMANI.

3.1.13 Dagoretti/Uthiru/853 measuring 0.1000 hectares and registered under the earlier mentioned company which he owned all the shares known as MUMWE INVESTMENTS LTD.

3.1.14 Muguga/Gitaru/1058 and Muguga/Gitaru/1065 both registered under the name PAUL KIMANI.

3.1.15 Muguga/Gitaru/1067 registered under the name EDWARD KARIUKI KIMANI.

3.1.16 Kabete/Kanyariri/4 registered under the name EDWARD KARIUKI KIMANI holding in trustee of KIMANI KARIUKI.

3.1.17 Nyandarua/South Kinangop/741 measuring 9.3 hectares and registered under the name EDWARD KARIUKI KIMANI.

3.1.18 Plot No. 43 situated in Kiambu County.

3.1.19 Plot No. 42 and 44 both in Juja owned through the said MBAGI LTD.

3.1.20 Plot No. 49 Naivasha.

3.1.21 Four shoe Ltd. 38. Juja East in Juja

3.1.22 Shares in Geminia Insurance

3.1.23 A plot at Muthangari, next to Braebarn School, Lavington in the name of Rauka Limited, which I helped source.

18. **PW2** urged the court to revoke the Grant issued to the Respondent as the same had been obtained fraudulently and by failure to disclose material information.

19. The Respondent **Mary Kanyi Kimani** testified as **DW1**. She relied on her witness statement dated **27th February 2012**. **DW1** told the court that she and the Deceased got married on **17th July 1947** at the **ACK Church** and that they celebrated their **50th Anniversary** of

marriage on **19th July 1997** at **St Joseph's Kanyariri Church**. That their union was blessed with **nine (9)** children of which **three (3)** have passed away, thus only **six (6)** of their children are still alive.

20. **DW1** categorically denies the claim that the Deceased married **Lillian Wakiya Mwaura** and cohabited with her as a second wife. She also denies all knowledge of any son born to the Deceased out of wedlock. **PW1** asserts that Deceased was faithful to her and they lived with the Deceased at various different places until the time of his death when they were residing at **Mumwe Farm in Kiambu County**.

21. **DW1** states that the said **Lillian Wakiya Mwaura** was to her knowledge married to one **KABIRU KINYANJUI** and therefore cannot claim to have been married to the Deceased at the same time. She states that she knew **PW2** as an Advocate whom the Deceased instructed to assist him in various contracts and/or purchases. **DW2** alleges that **PW2** is now using information, which she obtained confidentially in her role as an Advocate to try and insinuate herself and her son into the estate of the Deceased as beneficiaries.

22. **DW4** confirmed that after the demise of the Deceased she sought and obtained letters of Administration in respect of his estate on **11th June 2008**. That said Grant was duly confirmed on **8th November 2010**.

23. **DW1** vehemently denies having obtained the Grant issued to her through fraud or misrepresentation. The witness insists that there was full disclosure of all the assets comprising the estate of the Deceased. She asserts that the Objector and his mother are total strangers to the estate of the Deceased.

24. Finally **DW1** states that the Deceased was laid to rest on at the family home in **Kiambu**. That neither the Objector nor his mother were involved in the burial or in the funeral arrangements and they made no protest about their exclusion at the material time. According to **DW1** this objection is nothing more but an attempt by the Objector and his mother **Lillian Mwaura** to exploit her knowledge of the affairs of the Deceased which knowledge she obtained in her capacity as an Advocate acting for the Deceased. She urges the court to dismiss the objection in it's entirety with costs.

25. Upon conclusion of the hearing parties were merited to file their final submissions. The Objector filed written submissions dated **9th December 2019** whilst the Respondent relied upon her written submissions dated **17th January 2020**.

ANALYSIS AND DETERMINATION

26. I have carefully considered his summons for revocation of Grant, the Reply filed by the Respondent, the evidence adduced in court, the written submissions filed by both parties as well as the relevant law. The only issue for determination is whether there exists valid grounds to revoke the confirmed Grant issued to the Respondent on **8th November 2010**.

27. In any matter the burden is on the party alleging the existence of a fact or a set of facts to prove the same. This is referred to as the burden of proof and is encapsulated in **Section 107** of the **Evidence Act Cap 80 Laws of Kenya** which provides:-

“1). Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

28. It is common ground that the Deceased whose estate forms the Subject of this Succession Cause **Edward Kariuki Kimani** passed away at the age of **81 years** on **24th July 2006**. A copy of the Death Certificate Serial No. **921994** is annexed to the Petition for letters of Administration dated **31st January 2008**.

29. It is also conceded by both parties that the Deceased died Intestate. That letters of Administration Intestate were issued to the Respondent **Mary Kanyi Kimani** on **11th June 2008** which Grant was later confirmed on **8th November 2010**. (Copies annexed at pages **24** and **25** of Objectors list of Documents dated **2nd May 2019**).

30. **PW2 Lillian Wakiya Mwaura** testified that the Objector was born as the result of an intimate relationship which she had with the Deceased which relationship commenced in **April 1978** and further claims that the Deceased married her as a second wife under customary law. **DW2** claims that the Deceased married her under **Kikuyu Customary Law** by paying dowry to her late mother **Priscilla Waithera Mwaura** in **1980**.

31. The witness has not availed to this court any documentary and/or photographic evidence of this dowry ceremony. She has not called any witness to confirm that they attended the said ceremony. In the case of **GITUANJA –V- GITUANJA [1983]KLR 573**, the **Court of Appeal** held that:-

“The existence of a customary marriage is a matter of fact which is proved by evidence.”

32. Even if as **PW2** alleges the photographic evidence of the ceremony were destroyed due to a fire at her home, and even despite the fact that the mother of **PW2** to whom said dowry was paid is now deceased, there still ought to have been witnesses who are available to appear in court and confirm that the alleged dowry ceremony actually took place. Dowry ceremonies in African communities are not secret events. They are celebratory occasions conducted publicly and often involve friends, relatives and the entire community. At the very least, there would have been relatives of **PW2** who were involved in the ceremony available to testify.

34. In the case of ELIUD MAINA –VS- M WANJIRU GACHANGI [2013] eKLR the **Court of Appeal** stated as follow:-

“Even if we allow room for evolution and development of customary law, it does not appear to us that ‘ngurario’ under Kikuyu Customary Law has today transformed into a casual ceremony performed by a delegation of just two people.”

35. It is pertinent to note that the Chiefs letter dated **16th August 2008**, made no mention of **Lillian Wakiinya Mwaura** as a wife of the Deceased. If the Deceased had truly married **PW2** under **Kikuyu Customary Law** then his local chief of **Kiambu** settled area would have been aware of this fact.

36. Moreover **PW2** has admitted that she was once married to one **Professor Kabiru Kinyanjui**, who fathered her first **three (3)** children. However, **PW2** maintains a loud silence on how and when the marriage to the good Professor ended. It is not clear if the two divorced and if so when. No Decree absolute has been exhibited in court. Without proof of the dissolution of the first marriage it is quite probable that **PW2** did not have capacity to enter into a marital union with the Deceased.

37. In light of the dearth of evidence from **PW2** to prove the existence of a customary marriage with the Deceased I find that it has not been proved on a balance of probability that the Deceased married **Lillian Wakiinya Mwaura** as his second wife. This is probably the reason why **PW2** stakes no claim to the estate of the Deceased.

38. The Objector claims to be a biological son of the Deceased and therefore a beneficiary to the estate. The Objector claims that he was excluded in the succession proceedings that his consent was neither sought and/or obtained by the Respondent before the Grant was confirmed. He contends that the failure by the Respondent to include him in this Succession Cause amounted to material non-disclosure on which grounds the Grant ought to be revoked.

39. The fact that this court has found no evidence of a marital union between the Deceased and the Objectors mother does not exclude the claim of the Objector as a son to the Deceased.

40. **Section 76** of the **Laws of Succession Act Cap 160, Laws of Kenya** provides for the grounds upon which a Grant may be revoked as follows:-

“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.”

41. In order to prove his claim the Objector needs to satisfy the court that he was in fact a biological child of the deceased. **Section 3(2) of the Law of Succession Act** provides as follows:-

“(2.)References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.” (own emphasis)

42. The Objector has exhibited as proof that the Deceased is his father. His birth certificate Serial No. **449466** (annexed at **page 26** of the Objectors list of documents). The Birth Certificate indicates that the Objector whose name is given as ‘**Mwaura**’ was born on **3rd January 1980** at the **Nairobi Hospital**. The name of the father is indicated as **Edward Kariuki Kimani** (the **Deceased**). The question then is whether a copy of Birth Certificate is sufficient proof of paternity.

43. I note that the Birth Certificate exhibited is a copy. No original copy was availed to the court produced. The copy is not certified and no witness has been called from the office of the **Registrar of Births** to confirm that this is copy of the genuine document and that the

document was issued from their offices.

44. In this case the Birth Certificate issued by the Objector was issued on **23rd December 1998** when the Objector was already **18 years** old. The Deceased died in **July 2006**. It is submitted that the name of the Deceased was included as the child's father with his consent and involvement. This is not necessarily the case.

45. **Section 12 of the Births and Deaths Registration Act Cap 149 Laws of Kenya** provides thus:-

“No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or in accordance with some recognized custom.”

46. There is no document signed by the Deceased consenting to the use of his name in the Birth Certificate. Given that no marriage is shown to have existed between the Deceased and the Objector's mother, it cannot be presumed that the Objector is the biological son of the Deceased on the basis of an uncertified copy of the Birth Certificate.

47. In the matter of **KAMAU MUIGAI (Deceased) [2018] ECLR Hon Justice Musyoka** facing a similar situation held as follows:-

“Regarding the second applicant there is a birth certificate on record that places the name of the late son of the deceased on record as her father. The family claims that she was not related to them as she was not introduced as such. The certificate was obtained before the alleged father died. I am however alive to the fact that a certificate of birth is not adequate proof of paternity.....”(own emphasis)

48. Further in the **MATTER OF THE ESTATE OF PETER MURAYA CHEGE alias MURAYA CHEGE [2019] eCLR Hon Justice A.K. Ndungu** held that:-

“11. In this time and age of considerable scientific discovery, development and achievement, where a dispute arises as to the paternity of an individual, there is no better way to settle that issue with finality than through a dependable DNA test.

20. Where a proper basis is laid such a test should be ordered.”

49. The Objector did **not** in the summons apply for orders that a DNA test be conducted to establish paternity. Furthermore, a **DNA** test would only be ordered where sufficient basis has been laid.

50. The Objector and **PW2** have both testified that the Deceased accepted and recognized the Objector as his son during his lifetime. Once again there is no evidence to prove this claim. The Objector and his witness claim that the Deceased catered for the Objector's school fees at **St Marys School** as well as paying the Objector's fees during his secondary education at an undisclosed school and that the Deceased paid for piloting classes for the Objector again at some undisclosed institution. However, there was no documentary evidence of any such payments made by the Deceased. No invoices addressed to the Deceased have been exhibited and no receipts for payments made by the Deceased to **St. Marys school**, a secondary school or to any college have been availed to the court. In short, there is no evidence to prove that the Deceased met the educational expenses for the Objector.

51. All that the Objector has annexed are photographs in which he, his mother and Deceased appear. Photographs do not amount to evidence of paternity. All that the photographs prove is that the Deceased knew the Objector and his mother – the photographs do not prove in what capacity he knew them.

52. It is pertinent to note that neither the Objector nor his mother participated in the burial arrangements for the Deceased, nor were they mentioned or recognized in the funeral programme (Annexure **‘MKK-4’**). Surely if the Deceased had married **PW2** as a 2nd wife then both she and her son would have been recognized at the funeral.

53. The Deceased died in the year **2006**. By that time, the Objector was aged **26 years**. He was an adult who could take legal action on his own behalf. I find it strange that the Objector did not protest at the time of the Deceased's death – he did not file a suit seeking recognition as a biological son of the Deceased. Instead the Objector waited until the year **2011, five (5) years after** the demise of the Deceased to take legal action.

54. All in all I find the evidence adduced by the Objector to be wanting. The evidence falls short of meeting the threshold of proving that the Deceased was the biological father of the Objector. The evidence falls far short of proving paternity. Given the absence of proof of a marital union between the Deceased and the Objector's mother and in light of the absence of tangible proof that the Deceased provided for the Objector, I find there exists no sufficient basis upon which to order that a DNA test be conducted.

55. The Respondent has denied having any knowledge of a son sired by her late husband out of wedlock. Despite the evidence of the Objector that he met the Respondent twice, the Respondent denied under oath ever meeting the Objector and denies all knowledge of a son born to her husband out of wedlock. Under re-examination the Respondent states categorically that **‘ I do not know a son to my husband known as Peter Mwaura’**. There is no evidence that the Deceased ever recognized the Objector publicly or that he introduced him to his family members as his son. In the circumstances, the failure by the Respondent to include the Objector in this Succession Cause cannot be faulted. The Respondent cannot in the circumstances be deemed to have acted fraudulently nor has it been shown that she concealed a material fact. The Respondent could not have been expected to reveal the existence of a **‘son’** he knew nothing about.

56. Finally, the Objector has alleged that the Respondent failed to disclose the full extent of the estate of the Deceased. He insists that several properties were left out of the list of Assets provided in the Petition for Grant of letters of Administration Intestate. The Objector has claimed that the Deceased owned **Agip House** in the city of **Nairobi**. There is no documentary evidence to prove this allegation. The Respondent insists that she gave a full list of the assets of the Deceased known to her. She denies knowledge of the assets listed by the Objector.

57. The Objector has not provided documentary evidence of the existence of the properties which he alleged were omitted from the list of assets, much less proof that said assets belonged to the Deceased. Indeed under cross-examination the Objector admits that he has not furnished proof of the existence of said properties. Likewise, **PW2** admitted under cross-examination that she did not annex any official searches for the properties she alleges belonged to the Deceased. In her witness statement, the Respondent stated that at the time she filed the initial Petition on **3rd March 2008**, she was only aware of **three (3)** assets or properties belonging to the estate. Later on before confirmation the Respondent became aware of a further **two (2)** assets belonging to the Deceased. She then applied to have the Grant reviewed in order to include the said properties. That application was allowed on **28th September 2008**. The Respondent asserts that there was full disclosure of all the assets known to her.

58. I find no evidence to prove on a balance of probability that the Respondent deliberately concealed assets belonging to the Deceased.

59. Finally, I find no evidence that Grant issued to the Respondent was obtained fraudulently. I find no merit in the summons for Revocation/Annulment of Grant dated **26th October 2011**. The same is hereby dismissed in its entirety. Each party shall bear its own costs.

DATED IN NAIROBI THIS 3RD DAY OF DECEMBER, 2021

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MAUREEN A. ODERO

JUDGE