



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 46 OF 2016

IN THE MATTER OF THE ESTATE OF CATHERINE NDUKU MALINDA (DECEASED)

RULING

1. The deceased, **Catherine Nduku Malinda**, passed away on 30th September, 2015 and an application for a grant of Probate of will to her estate was made by her daughters **Beatrice Tracey Wavinya Malinda** and **Consolata Ndinda Malinda-Abe**. On 30th January, 2017 this court issued Grant of Probate of Written Will to the said applicants as the executors of the deceased's will. However, on 6th February, 2018, **Catherine Katanga Malinda** (the Protestor) filed an affidavit of protest against confirmation of Grant.

The Protestor's Case

2. According to the Protestor, she is a daughter-in-law of **Catherine Nduku Malinda**, deceased, who died on 30th September 2015. She was also a widow to the late **Martin Kitisya Malinda (Martin)**, a son to the deceased, who died on 17th March, 2013 survived by one wife, the Protestor. She annexed a copy of the death certificate.

3. According to the Protestor, together with her late husband, they had 2 children, **Sarah Wavinya Malinda** and **Timothy Wathome Malinda** and she annexed copies of their Identity Cards and their Birth Certificates.

4. The Protestor deposed that **Martin** was the last born son to the deceased and that her father-in-law, **John David Munyao Malinda**, died on 18th March 1989, leaving a will dated 3rd September 1985 a copy of which she annexed. In the said will, her father-in-law bequeathed his son, **Martin**, property as follows:

- a) All that property known as KYAWANGO/413 inclusive of all buildings and improvements erected and being thereon absolutely; and
- b) One fifth (1/5) of his father's estate.

5. According to the Protestor, a certificate of confirmation of Grant in respect of **John David Munyao Malinda** was issued to **Catherine Nduku Malinda** and **Thomas Nzioki Malinda** on 20th February 1992, a copy of which was annexed. According to the Protestor, on 25th April 1996, Kaplan & Stratton Advocates wrote a letter to the late **Martin** to the effect that pursuant to the will of **John David Munyao Malinda**, the property known as Mwala/Kyawango/413 had been transferred in his name. It her averment that her mother-in-law gave **Martin** power of attorney to deal with property known as LR No. 1/153 Wood Avenue and LR No. 209/1529/2 Jabavu Lane and **Martin** would consult his mother whenever he wanted to deal with any property and attached copies of the letters evidencing that indeed **Martin** never concealed anything from my mother-in-law.

6. The Protestor however lamented that despite her father-in-law bequeathing property to my husband **Martin**, the same has never been transferred to him. In the meantime, **Catherine Nduku Malinda** died on 30th September 2015 and was survived by:

- a) **Ndinda Consolata**-Daughter;
- b) **Coletta Ndunge Muguongo**- Daughter;
- c) **Tracy Wavinya**-Daughter;
- d) **Pauline Makau**- Daughter-in-law; and
- e) **Catherine Katanga Muinde**-Daughter-in-law

7. It was deposed that the late **Catherine Nduku Malinda** left properties of estimated gross value of KShs 177,652,330.00. Apparently, her said mother-in-law, purportedly wrote a will dated 13th December 2012 completely disinheriting his late son, **Martin Kitisya Malinda**, who is the Protestor's husband. To the Protestor, everything concerning the administration of the Estate of Catherine Nduku Malinda was being done in secret and she was completely excluded in the running of the affairs of the estate of her mother-in-law. The Protestor became aware of the current existing succession cause being Machakos P& A No. 46 of 2016 on 1st November 2017 through her Advocates who had attended court in Nairobi ELC Case No. 1544 of 2013 where the estate of **Martin** has been sued as the 2nd Defendant. On 1st November 2017, the Advocates for the Plaintiff in Nairobi ELC No. 1544 of 2013, informed court that a Succession Cause had been filed in Machakos being Machakos Succession Cause No. 46 of 2016. The Protestor then instructed her Advocates to make a follow-up and ascertain the averments made by the Plaintiffs Advocates and it was confirmed that indeed a Grant of probate had been issued to the Administrators on 31st January 2017 and that the Grant of Probate was due for confirmation on 1st February 2018.

8. According to the Protestor, the late **Martin Katisya Malinda** used to work in a senior position in Rank Xerox Company Limited. Around 1991, **Martin Kitisya Malinda** was asked to leave his senior position at Rank Xerox to take over the management of his late father's estate and he agreed to do so without any formal agreement since this was family business. The Protestor averred that **Martin** run the family business for more than 20 years including increasing the estate by turning a house that they had lived in for over 20 years into upmarket apartments that would see her mother in law earn an income from the real estate project in the up market Kilimani - wood avenue. She added that for more than a decade **Martin** ran the family business including partly relocating to Machakos leaving the Protestor to take up the role of running the Nairobi home. The responsibilities were exceptional given that their daughter **Sarah Wavinya** was sickly and needed constant medical attention including hospitalization from time to time.

9. In the meantime, **Martin** with the help of a developer and KCB put up apartments with the agreement that they would occupy one of the apartments and the rest would earn an income to take care of the mother-in-law's ever increasing medical bills and running the Mwala homestead. Despite **Martin**'s engineering technology input and supervising the construction to completion of most of the family businesses, the Protestor lamented that she has not benefited from the proceeds and neither does she have a house. According to her, the family demands forced her to leave a well-paying job at the US Embassy to take care of her ailing mother-in-law who had just gotten a heart pacemaker through surgery. She added that she hosted her mother-in-law every time she was in Nairobi whether it was for medical, social or business and that the heart pacemaker surgery that her mother-in-law underwent required medical attention and that meant the Protestor was to be around her most of the time since the mother-in-law could not control her bowel movements hence the Protestor had to take up the challenge of keeping her dignified and comfortable given that her daughters were not within reach or available.

10. After her mother-in-law's demise, despite her name being mentioned as one of the beneficiaries, the Protestor was not included in the reading of her will and only got to learn that there was a case in Machakos through her husband's lawyer who was following a case that involved her mother in law's estate/shares in a joint family investment. By the time her sisters in law had already gazetted the will and shared the estate without including the Protestor or her children.

11. The protestor averred that since her husband's death, her children and herself have been locked out of the only home they knew for over 20 years (Mwala Kibau), a home which her father-in-law repeatedly said was her husband's inheritance as per the Kamba tradition belongs to the last born son and which he affirmed in his will dated 3rd September 1985. However, the Protestor had their own home which they had refurbished to be self-contained including wardrobes, tiled washrooms, bed and beddings, curtains etc. but for the last 5 years they have been locked out of the home by her sisters-in-laws who have blocked every access to her getting finances even from the joined family funds including distributors and haulers a Machakos building that has by now accumulated more than 4 million in rent that goes into bank but neither the Protestor or the children have earned a cent.

12. The Protestor stated that from the documents filed, she has been completely disinherited as the family of **Martin Kitisya Malinda**, the son to the deceased, was completely left out of the will since paragraph 14 of the will clear states that **Martin Malinda** will get nothing from the estate of **Catherine Nduku Malinda** because **Martin**:

- a. Sold land known as L.R No. 209/1529/2 Jabavu lane, Nairobi;
- b. Received Kshs 4,000,000 from Africa Reit Ltd on 15th October 2008; and
- c. Entered into an agreement with **Patrick Karanja Njenga** for assignment of B6 on LR No. 1/153 and received Kshs 1,500,000 and he was not able to account for the same.

13. The Protestor however denied that **Martin** received Kshs 4,000,000 from Africa Reit while LR No. 209/1519/2 was sold with the consent of her mother-in-law-after thorough consultations to take care of her Medications and annexed correspondences to support her position. She averred that **Martin** was given the Power of Attorney by his mother, **Catherine Nduku Malinda**, to do all things relating to her property including property known as L.R No. 1/153 which was being held by the **Martin** by virtue of this power of Attorney dated 13th May 1997 and she attached the said instrument.

14. According to the Protestor, on 15th October 2008, **Martin** entered into an agreement with Africa Reit Ltd, in exercise of his powers under the Power of Attorney, to provide the property to Africa Reit Ltd for designing and supervising of the development of Apartments on the property. It was a term of the agreement that **Martin** would immediately, upon execution or not later than 1st of December 2008 or on a later agreed date, transfer the property to Africa Reit Ltd. Pursuant thereto, on 18th February 2009, **Martin**, in exercise of his powers under the power of attorney, transferred the property by way of a Conveyance to Africa Reit Ltd and the conveyance was annexed. However, the power of Attorney was later revoked on 20th August, 2010 and **Consolata Malinda** was appointed as Attorney by **Catherine Nduku Malinda** and a copy of the revocation of the Power of Attorney was annexed. Therefore, neither the property known as L.R. No. 1/153 nor the Apartment No. B6 was transferred to **Martin**.

15. It was contended that when **Martin** died on 17th March 2013, he left a will where one **Patrick Karanja** Objected to confirmation of the grant of probate stating that property Known as apartment No. B6 on property No. 1544/2013 Wood Avenue was in dispute and should not be part of **Martin's** assets. The matter was heard and determined where the court stated that the property known as apartment No. B6 on property No. 1544/2013 Wood Avenue had been included due to the power of Attorney which **Martin** had and which after revocation, the property be excluded as part of **Martin's** assets. According to the Protestor, in his Ruling in Nairobi P&A No. 2106 of 2013, **Re: Martin Katisya Malinda, Muchelule, J** was categorical that LR No. 1/153 was not part of the free property of **Martin** because the power of Attorney was revoked on 20th August 2010, and as a result, taken away from **Martin**. A copy of the said ruling was annexed.

16. The Protested insisted that the Grant of Probate were taken without her knowledge and the Respondents, who have all along have been attending the Machakos P&A No. 46 of 2016 are acting in bad faith by concealing material facts. Further, the Respondents have started to intermeddle with the estate of the deceased. For instance, she has been evicted from her Mwala Rural Home by her Sisters –in-law who have even started selling some of the properties belonging to her late Mother-in-law without having the Grant confirmed. She insisted that she is a beneficiary of the estate of the deceased, together with her children, **Sarah Wavinya Malinda** and **Timothy Wathome Malinda** and that the will annexed in the Grant of probate is a forgery and should be revoked since it does not present the true picture as it should be.

17. The Protestor therefore prayed that:

- a) This court declines to Confirm the grant issued to the Respondents as it will completely disinherit the named children of the deceased and herself.
- b) This court issues an order directing that the three other beneficiaries, who are children of the deceased, and herself be added as beneficiaries of the estate of **Catherine Nduku Malinda** (Deceased)
- c) This Court revokes the will annexed and declares that **Catherine Nduku Malinda** died intestate and the normal procedures of filing a Succession Cause under Intestacy to follow.

18. After perusing the Administrators' response to the protest, the Protestor filed a supplementary affidavit in which she reiterated her position and clarified that appearance of the name **Catherine Nduku Malinda** on the swearing part was a typo and the correct name is **Catherine Katanga Malinda** as she personally swore the affidavit as captured in the first paragraph thereof. It was her position that she is a dependant of the estate of the deceased, a fact which is well captured in the will of the deceased and also in accordance with the provisions of section 29 of the **Law of Succession Act** and being a dependant she is entitled to inherit from her estate pursuant to section 26 of the Act which provides for dependants not adequately provided for by will or on intestacy. In her case, she has been completely disinherited despite being included as a beneficiary of the estate of the deceased.

19. The Protestor averred that **Consolata**, the 2nd administrator lived in the Netherlands with her husband and children and she is the one who accommodated her and her children any time they visited the deceased. On the other hand, the 1st Administrator/Respondent, **Beatrice Tracey Wavinya Malinda**, ("**Beatrice**") lives in Germany, and she never had time for the deceased even when she was on her deathbed. It was therefore contended that both **Consolata** and **Beatrice** lived abroad and rarely visited the deceased and it was the Protestor who took care of the deceased during a time when she had a tough time balancing taking care of her, work and her young family. It was her deposition that her husband was practically in Machakos most of the time running the family business which included a Petrol station and was the one running the family business, Distributors and Haulers where he was a Board member. This forced the Protestor to leave her well-paying job at the US Embassy to take care of the deceased.

20. It was averred that the deceased attended different hospitals including Nairobi hospital, Mater hospital and Nairobi Women's hospital and during all this time, the Protestor personally took care of her including feeding her while **Consolata** and **Beatrice** were still abroad.

21. The Protestor therefore averred that it is misleading to state that she never depended on the deceased, a fact which **Consolata** has admitted in paragraph 23 of her Affidavit where she admits that the Protestor lived in her mother's house in Jabavu and Wood Avenue.

22. However, after the demise of her husband, **Consolata** outrightly told her that she would get nothing from the deceased's estate and she will make sure that comes to pass. She disclosed that she had tried reaching out to **Consolata** through their best man and also through family meetings to ask if she could help with her children's fee in the US but **Consolata** has declined and she annexed copies of the family minutes. According to the Protestor, her children's fee in the US was from contributions from well-wisher's after **Consolata** refused to support yet she was collecting rent from Wood Avenue and paying herself a sitting salary. She lamented that **Consolata** has made every effort to keep her children and herself from benefitting from the deceased's will to the extent of reading the will and filing the Succession Cause in Machakos Law Courts without her knowledge.

23. The Protestor however denied that **Martin**, her husband appropriated funds to himself or sold any of his mother's assets. While admitting that her father-in-law, **John David Munyao Malinda**, bequeathed his son, **Martin**, her husband, all that property known as Kyawango/413 inclusive of all buildings and improvements erected and being thereon absolutely and one fifth (1/5) of his father's estate, she stated that the same have never been transferred to **Martin** or herself. She however denied that **Martin** received 60 acres from her father-in-law's estate and clarified that she was ejected from her Kyawango home by her sisters-in-law and she no longer live there despite having a permanent residence there.

24. According to the Protestor, the deceased did not give **Martin** General Power of Attorney but gave **Martin** specific power of Attorney to deal with a specific property, being LR No. 1/153 Wood Avenue and LR No. 209/1529/2 Jabavu Lane and that **Martin** would consult his mother whenever he wanted to deal with any property and she annexed copies of the letters as proof that **Martin** has never concealed anything from her mother-in-law. She therefore denied that **Martin** received Kshs 4,000,000 from Africa Reit and averred that property known as LR No. 209/1519/2 was sold with the consent of the deceased after thorough consultations to take care of her Medications and she relied on correspondences as proof that **Martin** never secretly sold the property.

25. According to the Protestor, **Martin** was given the Power of Attorney by his mother, **Catherine Nduku Malinda**, to do all things relating to the property known as L.R No. 1/153 which was being held by the **Martin** by virtue of this power of Attorney dated 13th May 1997. On 15th October 2008, **Martin** entered into an agreement with Africa Reit Ltd, in exercise of his powers under the Power of Attorney, to provide the property to Africa Reit Ltd for designing and supervising of the development of Apartments on the property. It was a term of the agreement that **Martin** would immediately, upon execution or not later than 1st of December 2008 or on a later agreed date, transfer the property to Africa Reit Ltd. On 18th February 2009, **Martin**, in exercise of his powers under a power of attorney, transferred the property by way of a Conveyance to Africa Reit Ltd as evidence in the annexed copy of the Conveyance. However, the power of Attorney was later revoked on 20th August 2010 and **Consolata** was appointed as Attorney by the deceased. Therefore, neither the property known as L.R. No. 1/153 nor the Apartment No. B6 was transferred to **Martin**.

26. According to the Protestor, when the deceased was sick, and she required treatment, **Martin** was instructed by her, through the Power of Attorney to dispose of off some properties to cater for the treatment expenses. This was because **Martin** and herself were the only persons available to take care of the deceased as **Beatrice** and **Consolata** lived abroad and only called us to reinforce the African Customary Traditions that **Martin** being the last born son, and the Protestor being the daughter-in-law were the one who were supposed to take care of their mother. She however asserted that at no point in time did **Martin** demolish house known as LR No. 1/153 Wood Avenue and disclosed that this apartment is subject of litigation in P&A No. 2106 of 2013. She deposed that **Martin** with the help of a developer and KCB put up apartments with the agreement that they would occupy one of the apartments and the rest would earn an income to take care of the deceased's ever-increasing medical bills and running the Mwala homestead. Despite **Martin's** engineering technology input and supervising the construction to completion of most of the family businesses, she has not benefited from the proceeds, and neither does she have a house. According to her, her children used to stay with their grandmother, deceased under one roof in Hurlingham and they loved each other.

27. Since **Consolata** has admitted that the house in Mwala was built by her father-in-law, it was her position that according to the Kamba Customs and traditions, the last born son is the one who is supposed to inherit the house and **Martin** being the last born son, was entitled to inherit the house but **Consolata** has completely barred them from setting foot in that house. She insulted that since her husband's death, herself and her children have been locked out of the only home we knew for over 20 years (Mwala Kibau), the home which her father-in-law repeatedly said was her husband's inheritance as per the Kamba tradition belongs to the last born son and which he affirmed in his will dated 3rd September 1985.

28. It was her case that the thanksgiving service was held at **Peter Makau Malinda's** home was because **Consolata** barred her children and herself from accessing their home in Mwala. On the same day, after the service, the Priest wanted to go and bless the house, but they were denied access. While she opened the already padlocked house and allowed the priest to go in, she stood at the door to make sure they could not go in. This is despite the fact that it was the first time the children had returned since the funeral and they had to stand outside as the priest went in to bless the home. She clarified that the letter dated 27th May 2013 makes reference to the estate of **Martin Kitisya Malinda** and not her mother-in-law.

29. According to the Protestor, the Will has not fulfilled the requirements of a valid will as it has completely disinherited **Martin** and should be revoked and the estate of the deceased be declared to be intestate. It was her case that the deceased, **Catherine Nduku Malinda**, left properties of estimated gross value of Kshs 177,652,330.00 and since the deceased purportedly wrote a will dated 13th December 2012 completely disinheriting his late son, **Martin Kitisya Malinda**, who is her husband, she is a beneficiary of the estate of the deceased, together with her stated children, **Sarah Wavinya Malinda** and **Timothy Wathome Malinda** hence the will annexed in the Grant of probate should be revoked since it does not present the true picture as it should be.

The Administrators' Case

30. In response to the protest, the Administrators relied on the replying affidavit sworn by **Consolata Ndinda Malinda**, the 2nd Administrator herein on 21st May, 2018. According to her, together with her sister, the 1st Administrator/Respondent herein, they are named as the Executors of the Estate of their mother, **Catherine Nduku Malinda** (the "Deceased"), in her Will dated 13th December, 2012 (the "Will").

31. In her affidavit, the deponent gave notice that she would object to the protest on the grounds that:

- i. The Protest as drawn is defective as it indicates that it is sworn by **Catherine Nduku Malinda**, who is her late mother;
- ii. The Protest discloses no reasonable cause of action and/or charges of misconduct against the administrators;
- iii. The Protest is scandalous, frivolous and vexatious; and
- iv. The Protest is otherwise an abuse of the process of this Court.

32. According to the deponent, the Protestor was her brother, **Martin's** wife and was not being maintained their late mother at the time of her death or immediately prior to her death. Similarly, the Protestor was not mentioned in the deceased's Will as a beneficiary and in any event, **Martin** was lawfully excluded from the Will by reason of the funds that he had appropriated to himself in the sale of the deceased's assets by using the Power of Attorney without the deceased's consent. Further, their late father in his Will dated 3rd September 1985 bequeathed Kyawango/413 and One fifth (1/5) of his estate to **Martin** which have been duly transferred to him. She annexed a copy of a letter sent from Kaplan & Stratton Advocates evidencing the transfer of Kyawango/413. In addition, their father held shares in Asset Managers Ltd, Distributors & Haulers (P) Ltd, Kenya Commercial Bank, Barclays Bank Kenya, STD Bank and National Industrial Credit Bank which formed part of his estate one fifth which **Martin** acquired.

33. It was averred that upon **Martin** and the Protestor's marriage, their father transferred Kyawango/441 (approximately 60 acres) to

Martin as a gift *inter vivos* for him to build a home but **Martin** sold this property during his life and as such never built a home either in Kyawango or in my parents' homestead in Mwala.

34. On 13th May, 1997, the deceased granted **Martin** a Power of Attorney to deal with her properties which Power of Attorney she revoked on 20th August, 2010 upon realising that he had misused it and abused the limited authority granted to him therein. For instance, **Martin**, without any authority from the deceased sold and benefitted absolutely from the sale proceeds of their mother's property known as L.R. No. 209/1529/2 Jabavu Lane, Nairobi which had four maisonettes; received Kshs 4,000,000 from Africa Reit Ltd. on 15th October 2008; and entered into an agreement with **Patrick Karanja Njenga** for assignment of B6 on L.R. No. 1/153 Wood Avenue, Nairobi and received KES. 1,500,000 as deposit and further payment of Kshs. 1,969,825/- which he was not able to account for. According to the deponent, in 1997, **Martin** sold the property known as L.R. No. 209/1529/2 Jabavu Lane, Nairobi without the deceased's knowledge or consent and she annexed a copy of a letter from their late mother to Kaplan & Stratton Advocates dated 6th August 1999 in which she expressed her interest to place a caveat on L. R. No. 209/1/153 Wood Avenue, Nairobi and carry out a search on L.R. No. 209/1529/2 Jabavu Lane, Nairobi as she feared that it had been sold without her knowledge. She also annexed copies of letters between **Martin** and his advocates Wanjira & Company Advocates who acted for him in the sale of L.R. No. 209/1592/2 Jabavu Lane, Nairobi.

35. It was deposed that upon the sale of L.R. No. 209/1529/2 Jabavu Lane, Nairobi by **Martin**, no funds were deposited into the family company account or applied for the deceased's use or medical care. Instead the proceeds of Kshs. 7,437,703.50/= was remitted into his personal account and their late mother had to borrow money for her upkeep for foodstuff and household expenses which debts the deponent settled. She annexed a copy of a letter from Wanjira & Company Advocates dated 27th October 1997 indicating that the money was deposited in **Martin's** account.

36. It was averred that when the deceased's health was deteriorating and she required a pacemaker, **Martin** claimed that there was not enough money for one, despite him receiving funds from the sale of the deceased's properties. It is therefore averred that it false and misleading for the Protestor to state that **Martin** provided medical upkeep for the deceased. The deponent disclosed that in 2008, **Martin** received Kshs 4,000,000.00 from Africa Reit Limited vide a Property Development Agreement which the deceased was never informed or aware of and she annexed a copy of the Property Development Agreement and a statement of account from Africa Reit Limited evidencing payment made directly to **Martin**. It was revealed that in 1997 **Martin** attempted to sell L.R. No. 1/153 Wood Avenue, Nairobi for KES. 22,000,000/- without the deceased's knowledge and she annexed a copy of a letter from **Martin** to the proposed purchaser's advocate whereby he indicated that he wanted the sale to be completed 'in a short a time as possible'. Though the intended sale of L. R. No. 1/153 Wood Avenue, Nairobi in 1997 did not take place, in 2008 **Martin** went on and demolished the house on L.R. No. 1/153 Wood Avenue and constructed apartments (the "**Apartments**") without the deceased's knowledge. **Martin** then attempted to have four of the apartments transferred in his name without our late mother's knowledge and/or approval. When this failed, **Martin** thereafter entered into an agreement for the sale of one of the Apartments, known as Apartment B.6, which the deceased was also unaware of and received Kshs 1,500,000 as deposit and further payment of Kshs. 1,969,825/- which he was not able to account for. The deponent annexed copies of letters between Kaplan & Stratton Advocates, **Martin** and Alex Karanja & Company Advocates evidencing **Martin's** attempt to transfer the Apartment into his name and copies of receipts evidencing payment to **Martin**. Further upon **Martin's** death, the other party to the sale agreement over Apartment No. B.6, **Patrick Karanja**, objected to the Apartment forming **Martin's** estate, giving rise to P&A No. 2106 of 2013.

37. According to the deponent, it is apparent that **Martin** blatantly misused the Power of Attorney by managing the deceased's properties without accounting to or obtaining her consent at any stage, thereby going beyond his mandate under the Power of Attorney. Further, upon **Martin's** death, the deceased claimed from **Martin's** estate the proceeds of the sale of her properties and a copy of the letter from Kyalo & Company Advocates was annexed.

38. In the deponent's view, the Protester has not made it clear how the deponent and her sisters have blocked her from claiming funds and that the Distributors & Haulers (P) Ltd Machakos building she refers to is in debt of Kshs. 19,148,664 and to date this has not been fully settled. This debt is as a result of lack of filing statutory returns whilst **Martin** was running the company. Further, monthly rent received from the tenant was used by **Martin** as he wished and the deponent annexed a copy of letter from KRA (Kenya Revenue Authority).

39. In the deponent's view, it is fraudulent for the Protester to claim a share in the deceased's estate. To her, the money **Martin** received from the sale of the deceased's properties was used for maintaining the lavish lifestyle of the Protester and their children who travelled regularly and payment of their children's school fees. It was asserted that **Martin** and the Protester lived rent-free in the deceased's houses firstly at L.R. No. 209/1592/2 Jabavu Lane, Nairobi from 1988 up to 1997 when he sold the property without the deceased's knowledge and secondly at L. R. No. 1/153 Wood Avenue Nairobi up to 2008 when he attempted to have four of the apartments erected on L.R. No. 1/153, Wood Avenue, Nairobi transferred in his name without the deceased's knowledge and/or approval.

40. The deponent averred that it is false and misleading for the Protestor to state that she was forced to leave her job at the USAID to care of the deceased. The Protestor, she averred had resigned on her volition from her job at USAID to start and manage a domestic servants' business which she ran whilst still living at the deceased's property at L. R. No. 1/153 Wood Avenue, Nairobi and whereby her employees would regularly visit the house for interviews and trainings. According to her, the two administrators were solely responsible for caring of the deceased in her Mwala Kibau homestead, together with her niece **Carol Nduku Makau** up until April 2013 and later employed **Agnes Mbula Mbithi** in May 2013 who took care of the deceased until her passing. She stated that the deceased would visit Nairobi for regular medical check-ups and if need be, would stay at **Martin** and the Protestor's home in Hurlingham Close, Nairobi due to Kamba tradition but had made it clear many times that she would much rather prefer staying at the deponent's house during her Nairobi visits. According to her, during the deceased's visits to Nairobi she would be at the Protestors house by 6am daily and she would leave the Protestors house after putting the deceased to bed. However, the Protester did not visit the deceased when she was hospitalized and made her children to believe that the deceased and the deponent's sisters were evil. She therefore asserted that the Protester is being frivolous, vexatious and scandalous in stating that the Respondents were not within reach or available most of the time, while they gave her primary care and attention. To the contrary, the Protester rarely visited the deceased at Mwala Kibau nor brought her children to visit the deceased who was their grandmother. It was denied that the Protestor had been locked out of the house in Mwala Kibau and had in fact never lived in Mwala Kibau. The Protester and her family lived in Nairobi from 1988 to 2008 at the deceased's properties and later in Hurlingham Close, Nairobi. It was deposed that the home the Protestor is referring to be hers in Mwala Kibau was in fact built by their late father and mother in the early 70s and the Protestor and **Martin** never lived in that house. The deceased allowed the Protester and her family to stay in her house in Mwala Kibau when they

rarely visited her. Further the deceased would supply the Protestor with beddings as she did not bring any belongings to the deceased's house contrary to her allegations. She therefore denied that the Protester and **Martin** maintained the deceased's house at Mwala Kibau in fact after their stay repairs had to be conducted including a refurbishment to the wardrobes, tiles and walls.

41. It was disclosed that following her late brother's demise, a thanksgiving Service was held in Mwala at her late brother **Peter Makau Malinda's** home (November 2016) which was attended by close family and friends and the Protestor was present at the memorial together with her children and openly ignored the deponent at the ceremony. On 1st January 2018, the Protestor went to the deceased's home at Mwala Kibau walked around the farm taking pictures contrary to her allegations that she did not have access to Mwala Kibau. It was therefore deposed that it is frivolous, vexatious and scandalous for the Protester to claim that the Respondents acted in bad faith and have been concealing material facts as there is no proof of her allegations. The deponent's position was that they have not done anything in secret regarding the administration of the deceased's Estate.

42. According to the deponent, the reading of the Will was conducted at Kaplan & Stratton offices and was attended by both extended family and concerned parties hence the Protester is feigning ignorance by alleging that she was not aware of the reading of the Will. Similarly, the Protestor was aware of the present succession case by reason of the deceased's estate claiming from **Martin's** estate and exchanging letters between both advocates copies whereof were annexed.

43. According to the deponent, the Respondents as Executors of our late mother's estate have followed due procedure in filing the Petition of Grant and Probate and the Notice of Petition was filed in the Kenya Gazette on 29th November, 2016 and she annexed a copy of the notice. The deponent denied that her sisters and herself have not intermeddled with the estate of the deceased and neither have they sold off any property as of yet.

44. Based on advice from her counsel, she averred that a Will is a personal document and that an Executor to a Will derives their power from the Will and should not be obstructed in carrying out their powers and functions under the Will. She stated that the Protestor contradicts herself by claiming that she is a beneficiary of the deceased's estate as per the Will dated 13th December 2012 and then further claiming that the same Will is a forgery. Based on the same advice, she stated that that the Will has fulfilled all the requirements of a valid will as per the **Law of Succession Act**, Cap 160, Laws of Kenya.

45. In a supplementary affidavit, the deponent reiterated the foregoing and stated that the Protestor and **Martin** chose to live in her mother's houses in Jabavu and Wood Avenue not because they were not without means but they wanted to live an easy life and not have to contend with paying rent. According to her, **Martin** chose to leave his place of employment on his own free will and was running the family business as a sole proprietor not answerable to anyone and as a result misappropriated funds from the family business. It was her evidence that **Martin** and the Protestor lived a lavish life style to the extent of travelling to Turkey to watch Formula One, to China and USA out of the income of the deceased's estate.

46. She denied that the Protestor was ejected from Kyawango and contended that in fact **Martin** sold off the Kyawango properties that he had received from their late father. She clarified that the Protester and **Martin** rarely visited the deceased in Mwala home which had been bequeathed to the deceased in their father's Will. The deceased's house at the said home, according to her, was locked for security reasons as there was nobody residing at the house. During the thanksgiving service only the Priest, the deceased's grandson **Patrick Musyoki Makau** and the deceased's care giver **Agnes Mbula** entered the house while the rest of the attendees including herself did not do so.

47. The deponent averred that the deceased was re-fitted with a new pace-marker battery in 2008 and that prior to 2008 she was in good health and she was very independent and would manage her affairs and her farm. It was her deposition that the 1st Administrator would visit the deceased once or twice a year while my herself and her family would visit every year while they were away. The said visits were in Mwala as she was in good health and living independently and not at the Protestor's house as she claims. In 2009, however, the deceased started to show signs of ill-health and would travel to Nairobi every three months for medical check-ups. In 1993, her family relocated from Netherlands and since she was in the country, she accompanied my mother to all her medical check-ups and annexed a letter from the deceased's doctor confirming the same. Whereas, in 2008, the deceased resided briefly at the Protestor's house, from 2009 up to her demise every time she was in Nairobi for medical check-ups she would reside with the deponent as she felt that she was not well taken care of by the Protestor. During that period, the deponent together with **Agnes Mbula** whom she had employed to assist in taking care of the deceased were her primary care givers.

48. She averred that in 2015 she was with the deceased when she was admitted at Lions Eye Hospital for eye cataract surgery and later took her to the ENT Clinic to have a hearing piece fitted in one of her ears. From 2008 up to the demise of my mother the 1st Administrator and herself paid in full for her medical expenses and she annexed copies of some of the receipts. On the night the deceased died, she developed breathing problems, and the deponent called her doctor at about 11.00pm and was advised on what to do but the deceased died in her arms. The Protestor was nowhere that night and her claims of looking after the deceased up to her last days are false and a fabrication.

49. It was averred that the family company Distributors and Haulers Limited paid the Protestor's children's school fees. After the deceased discovered that **Martin** was running down the family company, an Annual General Meeting was called and it was at the Annual General Meeting which was held in January 2012 that it was resolved to relieve **Martin** of his directorship and appoint the 1st Administrator as a director. To date the company is reeling in debt that was occasioned by **Martin's** abuse of office.

50. In her view, it is in the best interest of justice that the Protest be dismissed with costs to the Respondents and that it would further be in the best interest of justice for this Court to confirm the Grant and for this matter to not be further delayed.

51. The Administrators also relied on the affidavit sworn by one **Agnes Mbula Mbithi** who deposed that she was employed by **Consolata Ndinda Malinda-Abe**, the Second Administrator herein, to take care of her then ailing mother, **Catherine Nduku Malinda**, now deceased. According to her, she took care of the Deceased as her caregiver from May 2013 up to the time of her demise in September 2015 during which time her duties included cooking and washing clothes for the Deceased, ensuring that the Deceased took her prescriptions, bathing the

Deceased and ensuring that she was comfortable at all times day and night. To effectively discharge her duties, she resided with the Deceased at her home in Mwala and she would prepare and accompany the Deceased to all her medical check-ups in Nairobi from time to time after which they would return to the deceased's Mwala home.

52. According to her, the Second Administrator accompanied her mother to all her check-ups and she could not recall **Catherine Katanga Malinda**, the Protestor herein, being present during the Deceased's medical check-ups or squeezing in time to see the Deceased before she made the trip back to Mwala. In the event that the Deceased had to prolong her stay in Nairobi, due to medical check-ups, she would reside with her son **Martin** and the Protestor at their home in Hurlingham Close, Nairobi, though she did not enjoy doing so but felt compelled to do so due to Kamba traditions. During such prolonged stay in Nairobi, the Second Administrator and herself would be at the Protestor's house by 6am daily and they would leave the Protestor's house after putting the Deceased to bed. She however did not see the Protestor care for the Deceased whilst she was present. Similarly, the Protestor rarely visited the Deceased at Mwala Kibau nor brought her children to visit her.

53. The protest was canvassed by way of viva voce evidence.

The Protestor's Evidence

54. The protestor herein in her witness statement filed herein substantially reproduced the contents of the affidavit of protest. In her testimony before the court, the Protestor stated that she had a good relationship with the deceased with whom she lived in the same house together with her brother in law. When he got the pace setter fitted, **Martin** took over the running of the family business after the death of her father in law. Since she had to leave her job, they were solely dependent on the deceased's estate. After the death of her husband, she was locked out of the house and the 1st Respondent made sure she did not access her home by putting up a gate and instructing the gatekeeper to keep them away. It was only through other proceedings involving her husband that she became aware of these proceedings.

55. In cross-examination by **Mr Oyoo**, learned counsel for the administrators, the Protestor clarified that she was **Catherine Katanga Malinda** or **Mwiti** and that the affidavit of protest is erroneous in terms of her name. She stated that **Martin** was the deceased's last born son and that the other sons of the deceased were similarly deceased. She admitted that among them, only one had a wife who however did not protest. She stated that her husband died in 2018 and though she had commenced succession proceedings, she had not valued his estate but admitted that the estate had some money value in the Estate which was part of the deceased's estate.

56. According to her she had not seen the deceased's Will and was not aware of its contents though she had known about it. She admitted that **Martin** was left some properties by her father in law, **John Munyao Malinda** but was not aware if the same had been transferred. According to her **Martin** left his job at Ranze Rocks where he was working as an Engineer in order to run the family business. Accordingly, he was entitled to a driver and a car. She admitted that it was a well paying job since he was taking care of them well.

57. It was her wish to be included in the distribution of the Estate since she was a wife of a beneficiary to the deceased's estate and since her late husband was included in her father in law's will. Referred to the deceased's will she stated that she was unaware if any property was excluded therein.

58. The Protestor admitted that **Martin** was given Power of Attorney by the deceased but she was not aware that he ran down the company although she was aware the same was revoked. She admitted that the Estate supported their livelihood. According to her the house in Mwala was matrimonial home and that the longest period she stayed there was one week. At the time of her testimony she was putting up with a friend. On 18th March, 2019 when she went to visit **Martin**'s grave during the anniversary, access was denied her. It was her evidence that she had gone to church on 17th March, 2019 and the following day decided to go to the grave. Though her father in law was deceased, the only anniversary she went for was her husband's.

59. It was her evidence that **Martin** paid the deceased's medical bills from the proceeds of the company. It was however her testimony that she had to leave her job in order to take care of the deceased who was staying in Mwala while she was staying in Nairobi. According to her whenever the deceased went to Nairobi to see a doctor she would take care of her. It was her evidence that she left her job in order to take care of her children. She admitted that she was staying in the deceased's house but denied that the deceased stopped going to her house due to mistreatment. She however insisted that she was not aware of the Will and was never informed of it.

60. The Protestor stated that while she had no problem with **Tracy Malinda**, she had a problem with **Consolata Ndinda Malinda** since she was the one who made allegations against her upon her return from Holland. According to her, in 1986 the deceased had no problem and that the pace setter was placed in 2009. She denied any knowledge of the executors of the deceased's will and insisted that she had not sold any property of the deceased. According to her, she was not sure if the Will was her mother in law's since she was not aware of its existence. She however insisted that she was, together with her children, a beneficiary and that she participated in the improvement of the Estate by supporting her husband.

61. Referred to the Will she confirmed that it disclosed the reason why **Martin** was disinherited but denied that he was properly disinherited. According to her, unless her application is allowed, her children would not have a home though she conceded that just like the Respondents, they too are adults. She denied that her children and those of the Respondents do not talk. The Protestor stated that on the day of the burial of **Martin**, her children were going away the same day but stated that it was nor mandatory under the Kamba traditions to spend a night on the day of the burial. The protestor stated that she was not aware that the company made profits.

62. Asked about the position of the other widow, the mother to her nephew, she stated she was not protesting since she already had shares in the company. She was however not aware that the deceased revoked the Power of Attorney given to her husband due to the mismanagement of the company.

63. In re-examination, she stated that since the death of her husband they had not been receiving dividends and that the last time she did so

was in 2013. In her evidence, she did not spend the night at Mwala because her children were going back to school. She reiterated that she left her job because she wanted to take care of the deceased and her children as her husband was involved in the family business.

64. The Protestor called **Muia Malinda** as her witness and he testified as Objector's Witness No. 1 (OW1). He disclosed in his statement that he was a nephew to the deceased, **Catherine Nduku Malinda**. Between 2009 to 2014, he provided accounting & audit services to the Distributors & Haulers (P) Ltd, a company owned by the deceased's family which was under management of the late **Martin** Malinda, son of the deceased and who is also a shareholder. He disclosed that he was very close to the family of the deceased and I knew what was going on in the family. According to him, the late **Martin** would inform them whenever he took his late mother to hospital and they would subsequently visit her until the time she was discharged. In the hospital, he would always find **Martin** and his wife **Catherine Katanga**. He however never saw **Beatrice Tracey Wavinya** and **Consolata Ndinda Malinda** accompany the deceased to hospital or pay any hospital bills for her, since they were married off in the 1980s and left home. Apart from that he would visit the deceased in the many family get together occasions they had at her Mwala Home and they would have occasional family conversations.

65. It was his evidence that the money for paying the hospital bills was paid by the late **Martin Malinda**, including other upkeep for the deceased such as: hiring of domestic servants, Servicing and hiring drivers for the mother's car and paying her monthly salary among others. According to him, in many holidays and long weekends **Martin** always invited them for family get togetherness they always found the deceased happy and well taken care of.

66. He stated that in 2008, the late **Martin Malinda** hired one **Caroline Nduku Makau** to take care of the deceased, **Catherine Nduku Malinda**. It was his opinion that taking into account the vast nature of the deceased's estate, it is only reasonable and in the best interest of justice that the widow of **Martin**, who is now deceased and a son to **Catherine Nduku Malinda**, benefits from the estate as she took care of her when she was alive. It is also in accordance with our African succession traditions and customs that the widow of the late **Martin Malinda** who is the mother of Malinda family descendants benefit from the subject estate so as to have her children inherit what is rightfully their ancestral land, home and property.

67. In his oral testimony, he clarified that the deceased was his aunt who was married by his father's brother, **John Malinda**. He stated that he carried accounts for Distributors and hauliers Petroleum Ltd which was being managed by **Martin**. According to him, **Martin** and his sisters were like his siblings, and the family with which he had a good relationship used to get along very well. It was his evidence that **Martin**, being the last born was loved very much by the deceased and that he used to take care of the deceased and hired a driver and a nurse for the deceased.

68. In cross-examination by **Mr Oyoo**, the witness insisted that he was close to the family and though he had never seen the deceased's Will he was aware of its contents. He confirmed that he was the company's auditor appointed in 2010 though he had to do the work for 2009, the same year he opened his firm. According to him between 2009 and 2014 the company was profitable and the default in the payment of taxes took place before his appointment. In 2014 he was relieved of his duties due to the politics in the family which led to vicious wars between **Martin** and his sisters. According to him, the family had a cordial relationship before **Consolata** came into the picture in 2010. It was his evidence that **Martin** used to pay the deceased's bills from the company accounts.

69. He confirmed that the pace setter was placed between 2008 and 2009 and before then the deceased had a nurse since she was unable to take care of herself. It was his evidence that the salaries for the said nurse and the driver were being paid from the company.

70. According to him, when a son inherits the Estate, his widow is entitled to the Estate. When he used to visit the family, he stated that the deceased was happy and was well taken care of both at Mwala and in Nairobi. He confirmed that **Consolata** had a big problem with **Martin** and when she returned she alleged that **Martin** was running down the Company and family affairs.

71. In re-examination by **Miss Kyani**, OW1 stated that he became aware of these proceedings through the Protestor. In his evidence it was **Consolata** and not the deceased who complained about the running of the company.

72. OW3, **Patrick Musyoki Makau**, a nephew to the Protestor/Applicant herein, **Catherine Katanga Malinda**, stated in his statement which he adopted as his evidence that on 18th March, 2019, the Protestor informed him that she would be visiting her rural home in Mwala and she wanted him to accompany her to the various places that she would be visiting. The Protestor explained that Sunday 17th March 2019 was the 6th Anniversary of her husband's death and that she planned to visit his grave at their rural home in Mwala. She also informed OW3 that she had scheduled a meeting with the Area Chief in order to get a letter in support of the request for release of her late husband's NSSF dues which she said had not been claimed.

73. On 17th March 2019 upon her arrival at Mwala Market, the Protestor called him and he accompanied her together with her friend whom she introduced as **Mumbi** who had accompanied her to the Chief's office. After the meeting with the Chief, they drove to the rural homestead at Mwala so that to visit the Protestor's late husband's grave but on reaching the homestead, they found that a new gate had been installed and it was padlocked. He got out of the car to see if the pedestrian gate was open so he could go in to get the keys and open the gate but found it also locked and therefore Protestor decided to hoot. When she did so, a young unfamiliar man emerged and enquired who they were and the purpose of their visit. Upon the witness explaining their identities and the purpose of their visit, the young man walked back to the home and after about 10 minutes, came back without keys and started signaling us to reverse shouting that he had been instructed by **Consolata** to tell them to leave and that the said **Consolata** had instructed him that no one should be allowed without informing them.

74. OW3 stated that they left and thirty minutes later, he received a threatening message from 2nd Administrator's son, **Balmoi** asking him to watch his mouth.

75. In cross-examination by **Miss Odhiambo**, he stated that save for that day, he was not aware if the Protestor had visited the husband's grave before. According to him, the last time he was at that home was during the deceased's funeral since he was her personal driver by which time there was no gate. He did not know when the gate was installed. It was his evidence that he did not know the reasons why they

were denied access to the home.

The Administrators' Evidence

76. **Consolata Ndinda**, Administrators' Witness No. 1 (PW1) also relied on her witness statement filed herein in which she reiterated the contents of her affidavit in reply to the protest and stated that the deceased passed on, on 30th September 2015 leaving behind a Will dated 13th December 2012 ("the Will") in which herself and her sister **Beatrice Tracey Wavinya Malinda**, the 1st Administrator/Respondent herein were named as the Executors. Both of them applied for Grant of Probate of the deceased's estate by a Petition dated 12th August 2016 and on 30th January, 2017, they were issued with the Grant of Probate. They then took out Summons for the Confirmation of Grant on 29th June 2017. To that Summons, the Protestor herein filed an Objection on 30th January 2018 on among other grounds that her late husband, **Martin Malinda**, had been disinherited in the Will.

77. According to PW1, the deceased lawfully made her Will, which Will has not been challenged for invalidity. The deceased had the freedom to bequeath her property as she deemed fit under the Will. She was however, aware that the deceased excluded her son **Martin Malinda** ("**Martin**") who is the Protestor's late husband from her Will because he had without the deceased's knowledge sold off some of her assets and failed to account for the sale proceeds. Following the sale of some of the deceased's properties by **Martin**, the deceased cut him off during her lifetime and even after his demise, the deceased claimed from **Martin's** estate the proceeds of the sale of her properties.

78. It was her evidence that **Martin** ran the family company Distributors & Haulers (P) Limited Machakos (D&H) on his own and he was not answerable to anyone and that the shareholders were not privy to information regarding D&H. As a result, he misappropriated funds from D&H and to date D&H is in debt to the tune of Kshs. 19,148,664 which has not been fully settled. Unknown to D&H shareholders, **Martin** engaged an audit/accounting and company secretarial firm Malinda & Associates to manage the affairs of D&H. The firm belonged to their cousin **Muia Malinda** and together with **Martin**, their cousin concealed D&H's debts from the other shareholders and as auditor of D&H the said cousin failed to ensure that D&H paid its taxes in a timely manner and he never at any one time during the Annual General Meetings gave an honest picture about the financials of D&H. In fact, in his capacity as Auditor, he cousin allowed D&H to pay monthly loan remittances to AAR Credit, which **Martin** had taken for his own personal use. D&H would collect monthly rent of up to Kshs 462,500.00 from Naivas Supermarket, a tenant, and all rental proceeds were used by **Martin** for his own personal upkeep.

79. When in 2010 the deceased discovered that **Martin** was running down D&H, in January 2012, an Annual General Meeting was called and it was at the Annual General Meeting that it was resolved to relieve **Martin** of his directorship and appoint the 1st Administrator as a director. Likewise, at an Annual General Meeting held on 19th July 2014 it was resolved that **Muia** should be relieved of his duties. According to **Consolata**, the money **Martin** received from the sale of the deceased's properties and from D&H was solely used for paying their children's school fees as well as maintaining the lavish lifestyle of the Protestor and that of their children who travelled regularly. According to her, the home the Protestor is referring to be hers in Mwala Kibau was in fact a room that was built by their late father and the deceased in the early 70s and the Protestor and **Martin** never lived in that house. The room was furnished by the deceased and herself. The said room is connected to the kitchen outside her father's house and was meant for the boys. **Martin** had never built his house in Mwala.

80. According to her the Protestor rarely visited the deceased at Mwala Kibau nor brought her children to visit the deceased who was their grandmother. She disclosed that the protestor has only been to Mwala on the following occasions:

- a. During the father's funeral in April 1989.
- b. The few times that the deceased hosted Christmas celebrations.
- c. In August 2015 she attended a function at Pauline Makau's.
- d. In November 2016 during Thanksgiving service (held at the late brother's home).
- e. 1st January 2018 where she walked around the farm and took photos and left.
- f. On 18th March 2019 when she allegedly came to see **Martin's** grave.

81. It was contended that the Protestor's allegation that she had been locked out of Mwala was false and that after the demise of the deceased, due to security reasons, **Consolata** put up a fence and a gate at Mwala. However, the fencing of the home started before the deceased passed away in order to keep away the intruders. On the day that the Protestor visited Mwala the security guard requested her to call her and inform her that she was at Mwala as is the procedure with all visitors that go there but the protestor did not call and instead decided to leave. According to PW1, there is no reason why she would block the Protestor from visiting her husband's grave. She stated that the Protestor stopped communicating with her and her sisters and their children long before **Martin's** death.

82. PW1 denied the Protestor's claim that she was in Mwala with the deceased a week prior to her demise. According to PW1, her sister **Colleta** was in Mwala on September 17th to 24th 2015 and she joined her on 22nd September and they left for Nairobi on 24th September and the Protestor was nowhere in sight.

83. It was her position that she and the 1st Administrator/Respondent have not done anything in secret regarding the administration of the deceased's estate. The reading of the Will was conducted at Kaplan & Stratton offices and was attended by all members of the family including the extended family. The Protestor is feigning ignorance by alleging that she was not aware of the reading of the Will. The Protestor was aware of the present succession case by reason of the deceased's estate claiming from **Martin's** estate and exchanging letters between both advocates. She asserted that they had followed due procedure in filing the Petition of Grant and Probate and the Notice of

Petition was filed in the Kenya Gazette on 29th November, 2016. She further denied that they have intermeddled with the estate of the deceased's and neither have they sold off any property as of yet. The Protester has yet again not brought forth any proof of her allegations. It was her evidence that after the deceased discovered that the Protestor's husband was running down D& H and that he had sold some of her properties the Protestor stopped associating with the deceased.

84. In cross-examination, PW1 stated that she used to stay in Nairobi when the deceased was alive but in 2011-2012, she used to spend 2-3 days in Mwala and when the deceased became unwell, she would go there even for a week in 2013. It was her evidence that before 2010, the deceased used to complain to them verbally. She disclosed that **Martin** complained against the deceased before the Law Society of Kenya in respect of the Wood Avenue property.

85. In re-examination, PW1 stated that in 1988, the deceased was fine and did not need any help but started requiring help on 2012/2013.

86. PW2, **Colletta Ndunge Malinda**, the deceased's daughter, also relied on her statement in which she stated that daughter to the Deceased. According to her, the deceased was fitted with a pace-maker in 1988. Prior to 2008, she was in good health and she was very independent and would manage her personal affairs, cook, clean and farm. She was not in any way incapacitated as portrayed by the Protestor in these proceedings.

87. The deceased started showing signs of ill-health around 2009 and as such, she would travel to Nairobi every three months for medical check-ups. However, she was still independent since after her check-ups she would travel back to her residence in Mwala within Machakos County. She recalled in 2009 after the deceased was discharged from the hospital, she stayed briefly at the Protestor's rented house in Hurlingham. This was because the deceased's house on Wood Avenue, where the Protestor and her family had lived for over 10 years, had been demolished. After her brief stay there, the deceased categorically refused to stay there again as she felt she was not well taken care of. She made it very clear that on the days that she would travel to Nairobi for check-ups, she would either reside at the 2nd Administrator's home in Kilimani or travel back to Mwala.

88. Though the deceased's health deteriorated in 2013, she still remained in her house in Mwala and her main care givers until her demise were the 2nd Administrator together with **Agnes Mbula**, the deceased's minder. PW2 stated that contrary to the allegations made by the Protestor, she was in Mwala from September 17th to 24th 2015 and the week before the deceased died and she was joined by the 2nd Administrator on September 22nd to 24th 2015. They were both with from September 17th to 24th 2015 and neither of them saw the Protestor in Mwala as she alleges. According to her, she left with her granddaughter for Nairobi on 24th September 2015 and leaving the 2nd Administrator with from September 17th to 24th 2015 who was with her until her unfortunate demise.

89. In her evidence, the marital home the Protestor refers to in her affidavit is an extension of 2 self-contained rooms attached to the deceased's kitchen and it was built by their late father in the early 1970s. These two rooms were later refurbished by the deceased and the 2nd Administrator. According to her, during the Protestor's husband's funeral the coffin was placed in their parents' house as the Protestor and her late husband had not built a house in Mwala. In fact, the Protestor left for Nairobi immediately after burying her husband and did not spend the night in Mwala nor did she spend time with her relatives. To PW2, It is therefore curious for the Protestor to claim that Mwala is her matrimonial home. She disclosed that the Protestor has been in Mwala on countable occasions and rarely visited Mwala except when the deceased hosted Christmas festivities or when she needed something from the deceased. In her evidence, the Protestor did not consider Mwala her matrimonial home as she claims and did not associate herself with Mwala while the deceased was alive. Ever since **Martin's** demise, and for some years prior to that, the Protestor ceased communicating with herself and her sisters and though the deceased requested her family to gather in Mwala for her blessings, the Protestor and her family did not come and chose to alienate herself and yet after my mother's demise, she now claims that it is her matrimonial home.

90. PW1 beseeched the Protestor to let her late mother rest in peace and let her wishes be honoured and prayed this Court to dismiss the Protestor's Objection in its entirety.

91. In cross-examination, PW2 stated that she lived in Nairobi but used to visit the deceased once in a while and any time she visited, the deceased would inform her about those who had visited. She agreed that sometimes the deceased would stay at the Protestor's house in Nairobi. She also admitted that the Protestor and her husband had their own room which was built for the boys separate from the main house when they visited Mwala.

Protestor's Submissions

92. At the close of the case the parties filed written submissions.

93. It was submitted on behalf of the Protestor that the subject application is brought under sections 5, 7, 26, 27, 28 and 29 of the **Law of Succession Act** ("the Act") and Rule 40 (6) of the **Probate & Administration Rules** ("the Rules").

94. According to the Protestor, the Deceased disinherited her son, the Protestor's late Husband and did not provide for the Protestor or her children in her will dated 13th December 2012. On the other hand, the Estate of the late **John David Munyao Malinda** in which the Deceased was an Administrator was not fully distributed and neither the Protestor nor her late husband received the remainder they are rightfully entitled under the will. Under the said Will, the Late **Martin** was bequeathed all that property known as Kyawango/413 inclusive of all buildings and improvements erected and being thereon absolutely; and one fifth (1/5) of his father's estate and a certificate of confirmation of Grant was issued to **Catherine Nduku Malinda** and **Thomas Nzioki Malinda** on 20th February 1992. On 25th April 1996, Kaplan & Stratton Advocates wrote a letter to the late **Martin** to the effect that pursuant to the will the property known as Mwala/Kyawango/413 had been transferred in his name. However, neither the Protestor nor her late husband has received the one fifth of his father's Estate under the residuary Estate Clause of the Will.

95. It was submitted that a residuary clause in a Will disposes of property not expressly dealt with by the other provisions of the Will. Through the residuary clause the deceased brought on board any property that he did not specifically mention in the Will. It was submitted that contrary to the contentions of the 2nd Administrator the late **Martin** was not the personal representative in this Estate and therefore he had no control over the estate of the Deceased. In this respect the protestor relied on the case of **Re Estate of David Kyuli Kaindi (Deceased) [2015] eKLR.**

96. It was submitted that while the 2nd Respondent confirmed that her late father held shares in various companies she did not tender any evidence to confirm when and how the Protestor's late Husband acquired the same as part the 1/5 share he is entitled to. It was therefore submitted that it is just and fair that the residuary Estate of late **John David Munyao Malinda** be identified and isolated from the Estate of the late **Catherine Nduku Malinda** as she held the same in trust and the same be distributed as was envisaged in his will.

97. As regards the validity of the Will of the Late **Catherine Nduku Malinda** made on 13th December 2012, it was submitted that in her testimony the Protestor advanced reasons disputing the reasons given to disinherit her late husband, **Martin Malinda**. It was noted that paragraph 14 of the will states that **Martin Malinda** will get nothing from the estate of **Catherine Nduku Malinda** because **Martin** sold land known as L.R No. 209/1529 Jabavu lane, Nairobi; received KShs 4,000,000 from Africa Reit Ltd on 15th October 2008; and entered into an agreement with **Patrick Karanja Njenga** for assignment of B6 on LR No. 1/153 and received Kshs 1,500,000 and he was not able to account for the same. However, it is not in dispute that the Late **Martin Malinda** was granted a Power of Attorney dated 13th May 1997 by his Late Mother to manage her affairs including the sale of properties. The Protestor's testimony was that neither herself nor her children were aware of any failures by her Late Husband to account under the Power of Attorney and in any event, there were no claims brought to court against the Estate of her Late Husband whose Grant of Probate has already been confirmed.

98. According to the Protestor the reasons advanced by the Deceased when leaving out her Late husband were invalid due to the following reasons:

(a) The Protestor's Husband acted under a valid Power of Attorney. By the Letter dated 14th May 1997 the Deceased firm of Advocates confirmed that they had received instructions to prepare a Power of Attorney appointing **Martin** as her Attorney and agent to sell L.R. No. 1/153 and L.R. No. 209/1529/2.

(b) The relationship between the Protestor's Late Husband and her mother in law was cordial as confirmed through her testimony and her witness **Muia Malinda**.

(c) The Protestor's Late Husband used to work in a senior position in Rank Xerox Company Limited which he left in 1991 when he was requested by the family to leave and take over the management of the family business. The Protestor's late husband agreed to take up the management without any formal agreement since this was family business and he run it for many years.

(d) The Protestor's Late Husband ran the family business for more than 20 years including increasing the estate by turning the Jabavu House where they had lived in for over 20 years into upmarket apartments that would see the Deceased earn an income from the real estate project in the up market Kilimani.

(e) For more than a decade Protestor's Late Husband ran the family business including partly relocating to Machakos leaving the Protestor to take up the role of running the Nairobi home.

(f) The Protestor's Late Husband with the help of a developer and KCB put up apartments with the agreement that the family would occupy one of the Apartments and the rest would earn an income to take care of the Deceased's ever-increasing medical bills and running the Mwala homestead.

(g) Despite the Protestor's Late Husband engineering technology input and supervising the construction to completion of most of the family businesses, the Protestor has not benefited from the proceeds and neither does she have a house.

(h) The family demands forced the Protestor to leave a well-paying job at the US Embassy to take care of the Deceased who had just gotten a heart pacemaker through surgery.

(i) The Protestor hosted her mother-in-law every time she was in Nairobi whether it was for medical, social or business. The heart pacemaker surgery that the mother-in-law underwent required medical attention and that meant having the Protestor around most of the time.

(j) The Protestor took care of the deceased as she had knee issues which affected her movement including difficulty in using the toilet and had to take up the challenge of keeping her dignified and comfortable given that her daughters were not within reach or available.

(k) The Protestor's late husband held the Power of Attorney for over ten years and the deceased never complained until the 2nd Respondent started to be involved in the family Business.

(l) The relationship between the Protestor and her mother in law was a cordial one and she always took care of the deceased when she was unwell.

(m) The Protestor and her late husband lived in the deceased homes both in Nairobi and Kibau Mwala since 1989 and there were never any wrangles between them as confirmed by the Protestor's witness **Muia Malinda**.

99. It was submitted that while the Deceased's reasons for excluding the Protestor's late Husband were in relation to the Power of Attorney the 2nd Administrator goes onto great lengths to demonstrate her unsubstantiated claims that the Protestor's late Husband run down the family business particularly Distributor's & Haulers (P) Ltd which surprisingly he had run for many years without any complaints from his late Mother and the entire family. The Protestor challenged the authenticity of the minutes relied upon by the 2nd Administrator to prove that the Protestor's late Husband ran down the company.

100. It was submitted that whereas section 5 of the Act gives a testator the power to distribute their property as they wish, as correctly held in the case of **Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR** the testator is not entitled to hurt the people they were responsible for during their lifetime.

101. It was therefore submitted that the reasons for excluding the Late **Martin** from the Will are not reasonable as the Deceased would have openly complained while she was alive these being grave allegations. The exclusion clearly hurts the Protestor and her children who relied on the Deceased during her lifetime. In support of her submissions the protestor relied on section 7 of the Act and **Re Estate of Julius Mimano (Deceased) [2019] eKLR**.

102. It was submitted that the Protestor's witness **Muia Malinda** in his testimony confirmed that the misunderstandings in the family started when the 2nd Respondent came into the picture in the year 2011 while the Deceased's Will was made on 13th December 2012 and during this time the Deceased who was of an advanced age and unwell was under the control of the 2nd Respondent and therefore was amenable to manipulation. She relied on **Re Estate of Julius Mimano (Deceased) [2019] eKLR**.

103. It was submitted that from the testimony of both the Protestor and the Respondent it is clear that the Deceased was in a weakened position on account of old age and sickness, having been unwell for many years and particularly when she made her will on 13th December 2012.

104. According to the Protestor she was not aware of the existence of the deceased's Will nor the present proceedings and she only found out about it through her Advocates on record. The will was read in secret in exclusion of the Protestor and her children and she only found out of the present cause through her Advocates on record which compounds the ill intentions of the Administrators against the Protestor and the suspicious circumstances surrounding the Will.

105. It was therefore submitted that the present will must be revoked for being void having been made under suspicious circumstances.

106. According to the Protestor, she is a beneficiary of the Estate of the Deceased by reason of her marriage to the Late **Martin Malinda**, a son of the Deceased. He therefore relied on **Nahashon Karungu Macharia vs Rosemary Kahura Njoroge (2016) eKLR** where the Court held that a daughter-in-law of a predeceased son is a beneficiary of the estate of the latter's deceased parent-in-law.

107. The Protestor's position was that she was a Dependant of the Deceased and that the particulars of dependency enumerated by the Protestor in her testimony were not disputed by the Respondents. The Protestor confirmed that she lived in the deceased's home in Nairobi and Mwala and relied on the family business that her late Husband ran as a source of her livelihood and that of her two children. She based her claim on section 26 of the Act which caters for dependants not adequately provided for by will or on intestacy. She also relied on section 29 thereof which defines dependants and submitted that in making provision for a dependant the court has complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

108. According to the Protestor, in determining the nature and extent of the order to make, having regard to the factors set out in section 28 of the Act, the decision of **Akiwumi JA**, in **John Gitata Mwangi & 3 others v Jonathan Njuguna Mwangi & 4 Others NBI CA Civil Appeal No. 213 of 1997 [1999] eKLR** was on the point.

109. It was the Protestor's that she has demonstrated satisfactorily before this court that she and her children were dependants of the deceased; that her Late Husband left gainful employment to concentrated on running the family business and did not have any other source of income to rely on; and that their present needs are as follows:

- (a) The Protestor and her children will be rendered homeless as they do not have any other home apart from the Mwala Kibau Home.
- (b) That they have not received any dividends from the family business Distributor's and Haulers (P) Ltd as the same was stopped by the 2nd Respondent.
- (c) The deceased and the family business was their only source of livelihood as it catered for all their expenses including school fees.
- (d) Despite the Protestor's late husband engineering technology input and supervising the construction to completion of most of the family businesses, the Protestor has not benefited from the proceeds and neither does she have a house.

110. It was submitted that the Protestor and her children have always considered themselves members of the household of the deceased and that they lived in the deceased's homes in Nairobi and Mwala a fact that the Administrators have also acknowledged. It was therefore her submission that she has also demonstrated that she satisfies the conditions set out under section 28 of the Act; that her relationship with the deceased was a cordial one having lived for most of her married life in her homes both in Nairobi and Mwala; and that she took care of the deceased while she was unwell on various occasions. She therefore relied on the decision of **Koome, J** (as she then was) in Nairobi HCSC 522 of 2001, - **In the Matter of the Estate of Kam Wandaka Alias Geoffrey Kamau Wandaka (Deceased), Evaly Wagitie Kamau & Another vs. Jane Wanjiru Kamau (2006) eKLR** and **In re Estate of Magayu (Deceased) [2018] eKLR**.

111. The Protestor therefore submitted that this Honourable Court should make a reasonable provision for the Protestor under section 26 of the Act. Therefore, this Court was urged to allow the protest under section 26 of the Act and grant her the orders for reasonable provision and any other order this court deems in absolute discretion deems fit towards the realization of that provision.

112. As regards costs, the Protestor cited *Judicial Hints on Civil Procedure*, 2nd Edition (Nairobi) Law Africa 2011, by Rtd Justice Kuloba at page 94 and also cited *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR.*

113. According to the Protestor, the present Application was caused by the conduct of the Respondents who did not notify the Protestor and/or her children of the existence of the will or the present proceedings yet they are part of the Deceased's household. The Court was therefore urged to find that the Protestor deserves compensation in the form of costs incurred in prosecuting the Protest and award her costs.

114. In conclusion the Protestor prayed that this Court finds merit in the Protest dated 31st January, 2018 and allows the prayers therein as prayed. It is only this Honourable Court that has the power to grant the orders of relief to the Protestor as prayed on the authority of *A O O & 6 Others v Attorney General & Anor [2017] eKLR.*

Respondents'/Administrators' Submissions

115. On behalf of the Administrators it was submitted that before this Court is the Protestor's Objection dated 30th January 2018 and filed on 6th February 2018. The Protestor seeks *inter alia* orders declining to confirm the Grant issued to the Respondents; an order directing that the Protestor and her two children be included as beneficiaries in the estate of **Catherine Nduku Malinda** (Deceased); and that the Court revokes the Will dated 13th December 2012 and declares that the Deceased died intestate and for the normal procedures of filing a succession cause under intestacy to follow thereafter.

116. The Respondents submitted that the following issues arise for determination:

- i) Whether the Will dated 13th December 2012 is valid;
- ii) Whether the Protestor is a dependant;
- iii) Whether the Protestor's children are dependants;
- iv) Whether the correct procedure was followed in obtaining the issued grant; and
- v) Whether the Protestor is entitled to the orders sought in these proceedings.

117. Regarding the validity of the Will, the Respondents relied on section 11 of the *Law of Succession Act* and section 5 of the Act which reserves the testamentary freedom of every adult to dispose of his or her property upon death as he or she deems fit. The Respondents submitted that the Will was made in exercise of the Deceased's testamentary freedom and meets all the requirements for validity under section 11 of the Act. Specifically, the Will was signed by the Deceased and attested by two competent witnesses who saw the Deceased execute the Will. More so, the Deceased appended her signature on every single page of the Will and so did the witnesses. On this submission, the Respondents relied on the determination in the case of *Karanja and Another vs. Karanja (2002) 2 KLR 22.*

118. It is submitted that the Protestor has failed to adduce any evidence that would cause this court to question the validity of the Will and reference was made to the case of *Estate of Magayu (Deceased) [2018] eKLR.*

119. It was contended that the allegation that the Deceased's testamentary freedom to will her property was interfered with on account of her age and her health was erroneous, misleading and borne out of pure speculation. First, the Protestor admitted on cross-examination that she did not know when the Will was made neither did she know the particulars of the Will until her Advocates found about it on a routine Court attendance. It is curious how the Protestor would make an about turn and then allege that the Will was made without the exercise of the Deceased's testamentary freedom. Further, the burden of proving that the Will was made without the Deceased being of sound mind rests on the shoulders of whoever alleges, in this case the Protestor and the Respondents relied on the case of *Re Estate of G.K.K (Deceased) [2013] eKLR.*

120. While appreciating that the Deceased was fitted with a pace maker in 1998 and that it was their position that the acquisition of a pace maker did not impair the Deceased's capacity and judgement to make a Will. The Protestor does not provide any evidence to show the nexus between the Deceased's ailment, age and her capacity to make a Will. According to the Respondents, it is not merely enough to state that one was ailing to prove that one lacked mental capacity as was held in the case of *Banks vs. Goodfellow (1870) LR. 5 O.B.549* and *In the Estate of Syevrose Mukulu Machakos HCSC No.198 of 2005* as cited in the *Estate of G.K.K* (supra). The latter case cited with approval the case of *John Kinuthia Githinji vs. Githua Kiarie & Others Civil Appeal No.99 of 1988.*

121. According to the Respondents the claim by the Protestor that the Deceased was amenable to manipulation due to her age and illness was not backed by any evidence and they relied on *Re Estate of Julius Mimano (Deceased) [2019] eKLR.*

122. In the Respondents' submissions, the Will reflects the intention of the Deceased and that the Deceased approved the contents of her Will. The Deceased categorically indicated at paragraph 14 of the Will the reasons why she had not made any provision for **Martin Kitisya Malinda** which reasons include:

- a) He sold and benefitted absolutely from the sale proceeds of the deceased's Property previously known as L.R No. 209/1529/C

Jabavu Lane, Nairobi;

- b) On 15th October 2008 **Martin Kitisya Malinda** as the Deceased's attorney entered into a Property Development Agreement with Africa Reit Limited and acknowledged receipt of the sum of Kshs. 4,000,000/- from Africa Reit Limited;
- c) On 6th May 2010 **Martin** Kitisya Malinda without the Deceased's authority entered into an agreement with Patrick Karanja Njenga for assignment of Apartment No. B6 on LR No. 1/153 and he acknowledged receipt of the sum of Kshs. 1,500,000/- from Patrick Karanja Njenga purportedly being the deposit of the purchase price; and
- d) **Martin** Kitisya Malinda was not able to account for any of the abovementioned sums.

123. It was therefore submitted that it is clear that the Deceased properly exercised her mind in making the Will and went ahead to set out with particular clarity the reasons why **Martin** was not provided for in the Will. The Respondents urged this Court to give effect to the wishes of the Deceased and dismiss the Objection to the Confirmation of Grant.

124. It was submitted that the Deceased's actions prior to her demise similarly confirmed that it was her intention not to provide for **Martin**. For instance, on 20th August 2010, the Deceased revoked the Power of Attorney ("POA") dated 13th May 1997 that she had issued to **Martin** on account that he had misused the POA. Further, on 19th September 2011, the Deceased demanded from **Martin** the sum of kSHS 4,300,000 paid to him by Africa Reit Limited paid as a deposit for the sale of the Deceased's Property known as LR No. 209/1529/2 Jabavu which **Martin** had not accounted for. The Deceased further gave reasons in her Will as to why she has not provided for **Martin**. Further, even after **Martin**'s demise the Deceased on 10th May 2013 made a claim against his estate and maintained her stance against **Martin** from 2012 up to her demise. All these, according to the Respondents, go to show that indeed it was her intention to leave **Martin** out of her Will otherwise she would have revised her Will anytime from 2012.

125. Further, it was noted that that the Deceased, in her Will provided for various family members including her daughters, grandchildren and notably one of her daughter in law **Pauline Musuki Makau**, the wife of her late son **Makau Malinda** and notably her care giver **Carol Nduku**. The 2nd Respondent was not given a substantial share of the estate as is one of the key ingredient of undue influence but is to inherit the residuary estate in equal shares with her two sisters.

126. It was further submitted that the Deceased independently engaged Kaplan & Stratton to revise her Will as is evident from the evidence adduced that prior to 2012 she had a Will which had been drafted by the firm of Kaplan & Stratton. At the time of making the Will the Deceased's main place of residence was in Mwala and she was in no way under control of the 2nd Respondent as alleged by the Protestor in her testimony before Court. The Protestor has not adduced evidence to show how the Deceased was influenced by the 2nd Respondent. In this regard reliance was placed on **Ngengi Muigai and Another vs. Peter Nyoike Muigai and 4 Others [2018] eKLR** which cited with approval the case of **Mwathi vs. Mwathi (1995-1998) 1 EA 229**.

127. On the issue that the Will ought to be declared invalid on the basis that the Deceased did not make provision for **Martin** and that excluding **Martin** was not reasonable and the exclusion hurt the Protestor who relied on the Deceased during her lifetime, it was the Respondents' submission that Deceased had testamentary freedom to dispose of her property as she wanted and relied on **James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 Others [2014] eKLR**, **Curryian Okumu vs. Perez Okumu & 2 Others [2016] eKLR** and **John Wagura Ikiki & 7 Others vs. Lee Gachigia Muthoga [2019] eKLR**

128. According to the Respondents, though it is not a requirement to give reasons for leaving out a family member from a Will.

129. On the allegation that the Protestor was not aware that the Deceased had a Will and allegedly read in secret, it was submitted that there is no requirement in law for a maker of a Will to inform his or her family members of the existence of a Will. Neither is there a requirement in law to read a Will to parties who are not named as beneficiaries under a Will. The Protestor is admittedly not named as a beneficiary in the Will and she is estopped from alleging that the reading of the Will in her absence amounted to fraud.

130. As to whether the Protestor was a dependant, it was submitted that the fact that the Applicant is the Deceased's daughter-in-law is not in contention. However, the Respondents submitted that a daughter in law, is not a dependant of a Deceased based on section 29 of the **Law of Succession Act**.

131. The Respondents also relied on the case of **Re Estate of Munyua Mbeke (Deceased) [2015]** and **Re Estate of Cecilia Wanjiru Kibiche (Deceased) [2016] eKLR** and submitted that the Applicant lacks legal standing to bring an application under Section 26 of the **Law of Succession Act**, for a daughter in law is not a dependant of the Deceased as envisaged by section 29 of the Act.

132. As to whether the Protestor's children are Dependants, the Respondents relied on section 29(b) of the **Law of Succession Act**. While appreciating that section 29(b) cited above classifies grandchildren as dependants, it was submitted that this provision requires grandchildren to prove that they were being maintained by the deceased prior to their death and the Respondents relied on the case **Estate of M'mboroki M'rachi (Deceased) [2018] eKLR**, **Beatrice Ciamutua Rugamba vs. Fredrick Nkari Mutegi & 5 Others [2016] eKLR** and **Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR**.

133. It was submitted for the Respondents that no such application has been brought before this court and since it is trite law that parties are bound by their pleadings, in the absence of an Application by the Protestor to have her children declared dependants of the Deceased's estate, this Honourable Court is without jurisdiction to make such orders. They relied on **Re Estate of Karuri Magu (Deceased) [2016] eKLR** in which the application for dependency failed as no evidence to show that the deceased had taken the grand-children in as his own family.

134. The Respondents submitted that the Protestor has failed to provide any form of evidence to prove the dependency of her children. In

fact, the school fees receipts and bank transfers that are in the Annexures to the Protestor's Witness Statement dated 21st December 2018 all show that the Protestor was the one paying school fees on behalf of her children. By her own admission during the hearing of this case, the Applicant testified that she was the one who paid the school fees from a loan from her Sacco as well as from well-wishers. She has failed to prove the nexus of dependency between the Deceased and her children. The receipts date from 2011 to 2014. It is instructive to note that the Deceased died in 2015. It goes to show that the Deceased was not maintaining the Protestor's children prior to her demise as is the requirement under section 29(b) of the *Law of Succession Act*. The Respondents in this regard relied on **Isabella Gacheri M'ithia vs. Mary Nkatha & another [2017] eKLR**.

135. According to the Respondents, since both of the Protestor's children are adults they cannot be classified as beneficiaries of the estate as they were not being taken care of by the Deceased immediately prior to her demise.

136. Regarding the procedure followed in obtaining the issued grant, it was submitted that the Respondents in their capacity as the executors of the estate followed due procedure in obtaining the issued grant. The Respondents have neither acted in bad faith nor concealed any material facts as is alleged by the Applicant. Further, it is trite that Court proceedings are public records and the allegation that the Petition for Grant of Probate was done secretly is misplaced. There was no obligation on the part of the Respondents to inform the Protestor of the proceedings as she is neither a beneficiary of the estate of the Deceased or an Executor of the said estate.

137. Further, the Respondents were appointed as executors and the reading of the Will was conducted on 13th October 2015 at Kaplan & Stratton offices, the Advocates for the Deceased's estate. This reading of the Will was attended by those named in the Will or their representatives in the case of the grandchildren.

138. It was submitted that the Respondents filed a Petition for Grant of Probate and the Notice of Petition was thereafter duly gazetted in the Kenya Gazette on 29th November 2016 in accordance with the *Law of Succession Act*, CAP 160. The Respondents reiterated that the Respondents have acted in their capacity as executors openly and without concealing anything in the administration of the estate. The Protestor is making unsubstantiated claims that the Respondents have been administering the estate in secret as she has not adduced any evidence in support of these claims.

139. Additionally, the Protestor claims that she has been excluded in the running of the affairs of the estate. The Respondents submitted that the Applicant has no authority to administer the estate as she was not appointed as executor and they relied on **William Musyoka: 'The Law of Succession'** at page 142 and the case of **Stephen Musembi Nguu (Deceased) & 2 others vs. David Mutiso Nthenge [2016] eKLR**.

140. It was therefore submitted that the allegations by the Protestor that the Respondents have no authority to deal with the Deceased's estate and are intermeddlers is therefore without sound legal backing.

141. In response to the Protestor's submissions, it was submitted on behalf of the Respondents that it is common ground that the late **John David Munyao Malinda** was the father to **Martin**, the Protestor's husband. The estate of the said **David Munyao Malinda** has been completely administered. If there was a claim against the estate, the proper forum for adjudication of that claim would be the probate proceedings in respect of the said estate, and not the current cause.

142. Secondly, the Protestor has not in her Affidavit in Protest of the Confirmation of Grant made the claim for the residuary estate of the Deceased. In her Protest dated 30th January 2018, and specifically paragraph 51 thereof, the Protestor does make a prayer for the residuary estate of the late **David Munyao Malinda**. The Protestor has instead raised this issue as an afterthought in her submissions. It is trite law that parties are bound by their pleadings, and submissions are not and cannot take the place of pleadings.

143. Thirdly, the Protestor lacks locus to make a claim for the residuary estate of **David Munyao Malinda**. The Protestor was not a beneficiary of the said estate but her late husband was. The proper party to make such a claim, if at all, is therefore the representative of the estate of the deceased **Martin Kitisya Malinda**. The Protestor has not told this Honourable Court if she acts on behalf of the estate, neither has she evidenced anything to show that she is the representative of the said estate. The Protestor's assertions in this regard must accordingly fail.

144. It was submitted that the Deceased, in exercise of her testamentary freedom, willed away her property as she deemed fit. Such exercise of testamentary freedom by the Deceased cannot be subject to challenge by the Protestor, unless fraud, misrepresentation or coercion is alleged and proven in the making of the Will. No evidence of such vitiating factors has been brought before this Honourable Court. According to the Respondents, the Protestor is making an attempt to discredit the reasons given by the Deceased, and has effectively substituted her own views for those of the Deceased. The Respondents urged this Court to uphold the Deceased's testamentary freedom in the absence of a challenge on the validity of the Will.

145. It was noted that the Protestor admitted on cross-examination that she has never stayed at the Mwala home for more than a week. At best, she occasionally visits the place, the last of such visits being in March 2019 when she attended her late husband's anniversary. Neither herself nor her children currently reside in Mwala. Further, she admitted that her late husband **Martin** had never built a home in Mwala and only stayed in a room provided by his father. It was therefore submitted that from the evidence on record and the Protestor's own conduct, she has never treated Mwala as her matrimonial home.

146. The Protestor has also urged this Honourable Court to find that her relationship with her mother-in-law, the Deceased, was cordial as the basis for making a provision for her and her children. The Protestor called two other witnesses, one **Muia Malinda** and one **Patrick Musyoki**, to testify to this fact. Both **Patrick Musyoki** and **Muia Malinda**, however, confirmed on cross examination that they were told about the relationship between the Protestor and the Deceased and they did not personally witness such cordial relations. The testimony of these two witnesses was at best hearsay and must be disregarded by this Honourable Court.

147. On the other hand, the Respondents gave compelling testimony to dispel any allegations of cordial relations between the Protestor and

the Deceased. The 2nd Respondent herein testified on the mistreatment the Deceased received while at the Protestor's house in Nairobi when she was ailing which eventually informed the Deceased's decision to reside with the 2nd Respondent whilst in Nairobi. Further, this Court was told of the Protestor's scarce visits to Mwala during the Deceased's illness, which testimony remains uncontroverted.

148. Further, **Colletta Ndunge Malinda** testified on the conduct of the Protestor towards the Deceased, including her absence on the week the Deceased passed on contrary to her assertion that she was always at the Deceased's side. Indeed, it is clearly discernible from the Deceased's actions including revoking the Power of Attorney granted to the Protestor's husband and not making any provision for the Protestor or her husband in her Will that the Deceased was not happy about neither was she in cordial relations with the Protestor as alleged. It is of note that the Deceased did make provision for another daughter-in-law, **Pauline Musuki Makau**.

149. The Respondents also tendered evidence to show that the Protestor's husband ran down the family business, Distributors & Hauliers Limited. In fact, as a result of such mismanagement, the Protestor's husband was relieved of his duties as a Director of the Company by the shareholders at the Annual General Meeting. The Protestor's witness, **Mr. Muia Malinda** who was the Accountant for the company, was not spared either. Evidence of the business being on a downward spiral was also tendered, including tax demands by the Kenya Revenue Authority (KRA).

150. The Protestor has also blamed the 2nd Respondent for the decision by the Deceased not to provide for her and her husband. She alleges that when the 2nd Respondent came into the picture, things took a turn for the worse for her and her family who were until then 'living a good life'. It is indeed true that the 2nd Respondent discovered the mismanagement of the family business and sought to have things straightened up much to the chagrin of the Protestor and her husband who were beneficiaries of the plunder of the family fortune by the late **Martin**. It is understandable that the Protestor should hold a grudge against the 2nd Respondent whose only crime was to ensure that the family business was saved from declined and became profitable.

151. In conclusion, it was submitted that the Protestor has come to this Honourable Court with unclean hands and is undeserving of the orders sought. She has failed to prove that the Will is invalid and/or that she and her children were dependants of the Deceased were dependants of the Deceased. The Protest is an attempt to delay the confirmation of Grant and the full administration of the estate and should be dismissed with costs to the Respondents.

Determination

152. I have considered the issues raised in this protest. Broadly, there are two issues for determination before this court. The first issue is whether the Will left by the deceased herein, **Catherine Nduku Malinda**, who passed away on 30th September, 2015, was valid. The second issue is whether the said deceased's decision in the said Will not to provide for his Son, **Martin Kitisya Malinda**, who died on 17th March, 2013, and his family as represented by his wife, the Protestor herein, **Catherine Katanga Malinda**, was justifiable.

153. The deceased herein was the wife of **John David Munyao Malinda**, who passed away on 18th March 1989. Following the death of **John David Munyao Malinda**, grant of representation was issued to **Catherine Nduku Malinda** and **Thomas Nzioki Malinda** on 20th February 1992. It is not in dispute that **John David Munyao Malinda**, bequeathed his son, **Martin**, property known as Kyawango/413 inclusive of all buildings and improvements erected and being thereon absolutely and one fifth (1/5) of his estate.

154. **Catherine Nduku Malinda** apparently left a Will dated 13th December, 2012 in which **Martin Kitisya Malinda** was not bequeathed any property. According to the said Will the reasons given by her for doing so were, firstly, because **Martin** sold and benefitted absolutely from the sale proceeds of the deceased's Property previously known as L.R No. 209/1529/C Jabavu Lane, Nairobi; secondly, on 15th October 2008 **Martin** as the Deceased's attorney entered into a Property Development Agreement with Africa Reit Limited and acknowledged receipt of the sum of Kshs.4,000,000/- from Africa Reit Limited; thirdly, on 6th May 2010 **Martin** without the Deceased's authority entered into an agreement with **Patrick Karanja Njenga** for assignment of Apartment No. B6 on LR No. 1/153 and he acknowledged receipt of the sum of Kshs.1,500,000/- from **Patrick Karanja Njenga** purportedly being the deposit of the purchase price; and lastly, **Martin** was not able to account for any of the abovementioned sums.

155. Section 11 of the **Law of Succession Act** which sets out the formal validity of written wills as follows:

No written will shall be valid unless-

(a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

156. There is no challenge against the Will on the ground that the above provision was not complied with. The general position regarding Will was restated in the case of **Re Estate of G.K.K (Deceased) [2013] eKLR** as hereunder:

“Section 5(3) of the Law of Succession Act creates the presumption that the person who is making a Will is of sound mind. Under Section 5(3)(4) of the Act, the burden of proving otherwise is on the person alleging that the testator was not of testamentary capacity or was of unsound mind at the time of making the Will.”

157. Section 5 of the Act as follows:

(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.

(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.

158. This provision codifies what is generally referred to as testamentary freedom. In **John Gitata Mwangi & 3 Others vs. Jonathan Njuguna Mwangi & 4 Others NBI CA Civil Appeal No. 213 of 1997 [1999] eKLR**, the Court of Appeal stated that a court has no right of interfering with testamentary freedom unless the applicant is able to show that no reasonable provision was made for him in the deceased's will. It was therefore held in **Karanja and Another vs. Karanja (2002) 2 KLR 22** where it was held that:

“where a will is regular on the face of it with an attesting clause and the signature of the testator there is a rebuttable presumption of due execution (omnia esse riteatta)”.

159. There are, however, circumstances which may invalidate an otherwise valid Will. These were enumerated in **Re Estate of Julius Mimano (Deceased) [2019] eKLR** where the Court stated as follows:

“Section 7 covers situations where the testator at the time of making the will is of the requisite testamentary capacity. That would be to say that the testator was of age and of sound mind at the material time, but the circumstances of the making of the will detract from or undermine its validity. Fraud would arise in cases where the making of the will is procured by deceit or similar underhand methods. Coercion would refer to circumstances where a person is literally forced to make a will in a certain way, either under duress or threats to life or limb. The will, though made by the deceased himself, in terms of the same being executed by him, would not reflect his will or wishes or intentions in the circumstances, but those of the person driving him to make it in that particular way. Importunity refers to what is often described as undue influence. In such cases there would be no coercion or force or duress as such, but pressure would be brought on the testator of such nature that he cannot resist. He would bend to the pressure, not so much because he is persuaded or convinced that he should make his will in such manner, but because he would be tempted to rid himself of the pressure by capitulating to it. Mistake would refer to cases where the testator signed the wrote document, such as that meant for someone else believing it to be meant for him.”

160. According to the Protestor, the Deceased's testamentary freedom to will her property was interfered with on account of undue influence by the 2nd Respondent who took advantage of her age and her health. Section 7 of the Act provides as follows:

“A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.”

161. As regards undue influence it was held in **Re Estate of Julius Mimano (Deceased) [2019] eKLR** that:

“The testator must be in a weakened or feeble condition, and therefore easily amenable to manipulation. It also bespeaks undue influence. For a person raising the issue to succeed, it must be established that the testator was in a weakened position on account of old age or disease or intoxication, he made a will while in that condition, and the propounder of the will played the central role in the process of the execution of the will. That role would include being the person in general control of the testator, being the one who took him around, being the person who prepared the will or procured his own advocate to do it, or the person who took him to an advocate of his own choice for that purpose.”

162. In her evidence, the Protestor admitted that she did not know when the Will was made neither did she know the particulars of the Will until her Advocates found about it on a routine Court attendance. That being the position, it is difficult to see how the Protestor came to know that the contents of the Will were influenced by the 2nd Respondent. Her opinion seems to be based on the fact that prior to the return of the 2nd Respondent, the deceased had a cordial relationship with her family. The law is however that the burden of proving that the Will was made without the Deceased being of sound mind rests on the shoulders of whoever alleges, in this case the Protestor.

163. I associate myself with the decision of **Berko, J** in **Bosa & Co. Advocates vs. Vero Nassanga & Others Kampala HCCS No. 315 of 1992 [1994]** where it was held that:

“In deciding upon the capacity of the testator to make a will, it is the soundness of mind, and not the particular state of the

bodily health, that is to be attended to. (Bank vs. Goodfellow [1869-70] 5 LR QB, 459 AT 567...Persuasion is not unlawful but pressure of whatever character if so exerted as to overpower the volition without convincing the Judgement of the testator, will constitute undue influence, though no force is either used or threatened. (Hall vs. Hall L.R 1P & D 481 at 483)... The law is that once it is proved that a Will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges it. That burden is not discharged by showing merely that the beneficiary had the power unduly to overbear the will of the testator; it must be shown that in the particular case, the power has been exercised, and that the execution of the Will obtained thereby. (Craig vs. Lamoneus [1920] AC 349)...Proof of motive and opportunity for the exercise of such influence is required, but the existence of such coupled with the fact that the person who has such motive and opportunity has benefited by the Will to the exclusion of others is not sufficient proof of undue influence. The mere proof of relationship of parent and child, husband and wife, doctor and patient, guardian and ward, brother and sister does not raise a presumption of undue influence sufficient to vitiate a Will. These relationships raise a presumption of undue influence in the case of contract, but in the case of a Will, these relationships are naturally the source and the reason for the testator's bounty and no such presumption is made...There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that persuasion stop short of coercion, and that the volition of the testator, though biased and impressed by the elation in which he stands to the legatee, is not overborne and subjected to the domination of another. (Paite vs. Lawless [1869-75] 2 – 3 LRP & D 462 AT 470)...The influence which will set aside a Will must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire for gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by his coercion; by opportunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force or fear. (Williams Executor's Part 1 Book 2 Chapter 1)..."

164. The Court went on to state that:

“Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean. And the relationship of marriage is one where it is, generally speaking, impossible to ascertain how matters have stood in that regard. (Craig vs. Lamoneus [1920] AC 349 at 357)...If it is intended to allege undue influence on the part of the beneficiary, such allegation must be pleaded in plain and unambiguous terms. (In Re R. Deceased [1951-52] P 10)...Although undue influence is not impossible in the case of a testator of sound health and understanding, it is far more common in the case of a testator of weak and impaired mental capacity or in failing health. Proof of motive and opportunity for the exercise of such influence is required, but the existence of such coupled with the fact that the person who has such motive and opportunity has benefited by the Will to the exclusion of others is not sufficient proof of undue influence. There must be positive proof of coercion overpowering the volition of the testator. Mere suspicion of the exercise of such power is not enough and besides the person setting up a case of undue influence must give particulars of the acts alleged in the exercise of it with necessary dates which was not done in this case since there was not a fact, a word or event proved which showed that the deceased had subordinated his own will to that of his widow...Unless, therefore, it is just and right to conclude in all cases that a woman staying with her husband who is sick, must be held to possess and exert over her husband such a dominion as to extinguish free will in disposition of his property, there are no materials from which such a conclusion could be drawn. There is nothing on record, which disqualifies the plaintiffs from administering the estate since they are not beneficiaries under the Will so as to engender suspicion. (Barry vs. Bultin 2 MOO PC 1480).”

165. In the same vein, it was held in Ngengi Muigai and Another vs. Peter Nyoike Muigai and 4 Others [2018] eKLR which cited with approval the case of Mwathi vs Mwathi (1995-1998) 1 EA 229 in which it was held that:

“Undue influence occurs when a testator is coerced into making a Will or some part of it that he does not want to make. Undue influence is proved if it can be shown that the testator was induced or coerced into making dispositions that he did not really intend to make.”

166. It was therefore held in the case of John Kinuthia Githinji vs. Githua Kiarie & Others Civil Appeal No.99 of 1988 that:

“in the absence of evidence that the illness had affected her mind so as not to know what she was doing when she signed the Will, the subject Will was valid.”

167. I have considered the allegations made by the Protestor regarding the issue of undue influence and it is my view that the Protestor's position was purely based on suspicion. The facts which the Protestor has relied upon even if true would not place the matter beyond mere persuasion as opposed to undue influence. In the premises, there is no basis upon which I can find that the deceased's Will was invalid.

168. That brings me to the issue whether provision ought to have been made in the Will for the Protestor's husband and by extension herself and her family. Section 26 aforesaid states as follows:-

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

169. It is therefore clear that notwithstanding the testamentary freedom, the court, when properly moved may make an order for reasonable provision for a dependant whom no provision has been made in the Will. However, as was held in James Maina Anyanga vs. Lorna

Yimbiha Ottaro & 4 Others [2014] eKLR:

“Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the Law of Succession Act to make reasonable provision for the dependant.”

170. That was the position in Curryian Okumu vs. Perez Okumu & 2 Others [2016] eKLR.

171. It is however appreciated whereas section 5 of the Act gives a testator the power to distribute their property as they wish, as correctly held in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR:

“This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime.”

172. From the above section it is clear that an application thereunder can be made by or on behalf of a dependant. Therefore, it was incumbent upon the Protector to prove that she was the deceased’s dependant. Section 29 of the *Law of Succession Act* provides as follows:

For the purpose of the Part “dependant” means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

173. Under the said section, it is clear that such proof of maintenance is only required where the applicant falls within the category contemplated in section 29(b) and (c) of the Act and these are the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death and husband. In other words, as held in Beatrice Ciamutua Rugamba vs. Fredrick Nkari Mutegi & 5 Others [2016] eKLR:

“...a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”

174. In the case of R N M vs. R M N [2017] eKLR it was held that:-

“Proof of dependency is thus a condition precedent to the exercise of the discretion in section 29(b) cited hereinabove. In addition, while considering the meaning of a dependant under section 29 of the Act, the court held as follows in the case of Beatrice Ciamutua Rugamba .v. Fredrick Nkari Mutegi & Others, Chuka Succ. Cause No. 12 of 2016 :-

"From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

I note in this regard that the Applicant did in her affidavits admit that the subject children were not the Deceased’s biological children, and did not provide any additional evidence of how the Deceased maintained the children, and the responsibility he undertook with respect to the said children. This Court cannot in the circumstances make any conclusive findings as to the said children’s dependency on the Deceased at this stage, which finding will have to await the confirmation proceedings.”

175. The protector herein was however a daughter in law to the deceased. She did not therefore fall within the ambit of section 29 in order to be considered as a dependant. She may well have been able to put forwards a case had she protested on behalf of the estate of her husband who was a son to the deceased. It is in light of that that I agree with the decision in Nahashon Karungu Macharia vs. Rosemary Kahura Njoroge (2016) eKLR where the Court while holding that a daughter-in-law of a predeceased son is a beneficiary of the estate of the latter deceased parent-in-law stated thus: -

“The Deceased was survived by the said Administrator and another son, Patrick Muthemba Macharia. He was also survived by a daughter-in-law called Rosemary Kahura Njoroge (a widow of another son, now deceased, James Njoroge). There had been yet another son, John Kimani, who died after the Deceased. It is common ground that he died without wife or issue. So, in effect there are only three beneficiaries to the estate of the Deceased – his two surviving sons and the widow of another son, since deceased.”

176. In my view a daughter in law may lay a claim as a beneficiary not in her own right but as a legal representative of a deceased son. In

other words, the legal representatives of a deceased's dependants may properly stake a claim to the estate of a deceased person on behalf of legally recognized dependants. However, that is not the Protestor's claim in these proceedings. My view is reinforced by the decision in the case of **Re Estate of Munyua Mbeke (Deceased) [2015]** where it was held that:

“The clear wording of Section 29 of the Act does not include daughters-in-law of the deceased. Daughters-in-law are not children of the deceased, and therefore they do not fall within the category of the children of the deceased. They therefore cannot mount an application under Section 26 of the Act as the applicant has done in this case.”

177. The same view was expressed in **Re Estate of Cecilia Wanjiru Kibiche (Deceased) [2016] eKLR** where the Court expressed the view that:

“...a daughter-in-law is not listed in section 29(b) of the Act as being among persons who may move the court under section 26 for reasonable provision and who the court may declare to be a dependant.”

178. I therefore agree that the Protestor had no locus standing under section 26 of the ***Law of Succession Act***. That must explain why she decided to bring this matter as a protest rather than under section 26 aforesaid. However, since what she seeks is substantially a claim under said section she cannot circumvent the law by purporting to approach the Court through a side gate simply because she finds the main gate closed on her.

179. As regards the Protestor's children, it is clear that they were grandchildren of the deceased. They therefore fall within section 29(b) of the Act. However, the said provision can only avail them if it is shown that they were being maintained by the deceased immediately prior to her death. However, as rightly submitted by the Respondents, their claim ought to have been brought under section 26 of the Act rather than by way of a protest. That notwithstanding the Protestor did not adduce any evidence that her children were being maintained by the deceased. As was held in the case **Estate of M'mboroki M'rachi (Deceased) [2018] eKLR**:

“Section 29 of the Act provides as to who a dependant is. For the grandchildren of a deceased to be categorised as dependants who are entitled to a share of the estate, it must be shown that they were being maintained by the deceased at the time of his demise.”

180. Similarly, in **Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR** it was held that:

“Under Section 29 of the Act, a grandchild can be a dependent of her grandparent, but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependent on the grandparent immediately before his death.”

181. In **Re Estate of Karuri Magu (Deceased) [2016] eKLR** it was held that:

“There was nothing to show that the said grand-children were maintained by the deceased during his lifetime as his own...In considering the evidence of both sides in totality this court finds that these grand-children were not dependants of the deceased and do not qualify to inherit any interest in the deceased's estate in their own right”

182. In the absence of any tangible evidence that the Protestor's children were being maintained by the deceased prior to her death, there is no material on the basis of which the Protestor's claim can succeed. The Protestor herein, while being cross-examined, disclosed that the longest period she stayed in her house in Mwala which, according to her, was her matrimonial home, was one week. That, on the face of it, is evidence that the Protestor and her children were not closely in touch with the deceased as she claims to have been.

183. Apart from that it was the Respondents' position, a position not challenged by the Protestor that her children were all adults. They could have, on their own made application under section 26 of the Act if they so deemed fit. This was the position taken in **Isabella Gacheri M'ithia vs. Mary Nkatha & another [2017] eKLR** where the court observed that:

“However, I do not doubt that Kennedy is an adult and I will treat him as such. He is, therefore, capable of staking his own claims. His mother is living and so he cannot be claiming under the principle of representation in section 41 of the Law of Succession Act...Proof of dependency in case of a grandchild is necessary and must be proved by the person alleging- in this case the 2nd Protestor. Kennedy is a grandchild of the deceased and must prove dependency under section 29(b) of the Law of Succession Act. Notably, Kennedy who is an adult did not file any statement under oath to state his dependency.”

184. In my view the mere fact that one is a potential beneficiary of the estate of a deceased person does not qualify him or her to be treated as the deceased's dependants. Those who fail to prove that they are dependants cannot therefore lay a stake in a deceased's estate simply because they are related to the deceased since as stated herein above, a person has the freedom to decide how his or her estate will be distributed upon his or her death.

185. Where a person decides to leave out some of his or her potential beneficiaries from those who ought to benefit under his or her Will, unless those left out fall under sections 26 and 29 of the Act, the mere fact that he or she does not disclose the reasons for doing so will not entitle the Court to interfere with his or her will as expressed in the testamentary disposition. I associate myself with the position in the case of **John Wagura Ikiki & 7 others vs. Lee Gachigia Muthoga [2019] eKLR** where the court expressed itself as follows:

“Having found that the will was valid, it therefore follows that the deceased had the freedom to dispose of all his earthly

possessions as he deemed fit. It was within this very exercise of testamentary freedom that the deceased elected to leave out his sons, John Wagura and Joseph Ndungu Ikiki, and in the same breath, bequeathed the lion's share of his estate to his 3rd wife for reasons that were personal to himself. He was under no obligation to give any reasons for so doing. This is indeed the objective of testamentary freedom.”

186. In this case, however, the deceased disclosed in the Will her reasons for not making provision for her deceased son, **Martin**. Those reasons on their face properly entitled the deceased to act in the manner she did. This Court cannot in these proceedings investigate the truth behind those reasons and fault her decision based thereon.

187. The protestor complained that she was not made aware of the existence of the Will and these proceedings were instituted without her knowledge. It is however clear that the deceased died testate. Accordingly, her estate is to be dealt with in accordance with the Will. In those circumstances, the law is as stated in the case of **Stephen Musembi Ngui (Deceased) & 2 others vs. David Mutiso Nthenge [2016] eKLR**, where the Court expressed stated that:

“...unlike in the case of an administrator whose authority derives from a grant of letters of administration, and who has no authority or relation to the deceased’s estate prior to the grant, the title and authority of an executor is derived from the will. The estate and interest in the deceased’s property vests on an executor on the testator’s death, and he can act before grant of probate.”

188. There is no provision in the Act that requires that all potential beneficiaries to an estate be notified of the same in testate succession proceedings unless they are beneficiaries in the Will. Similarly, there is no requirement that the contents of a Will be disclosed to non-beneficiaries thereof.

189. The Protestor complained that **Martin’s** entitlement to the estate of his deceased father has not been transmitted to him or to her. That may be so however as appreciated in the case of **Re Estate of David Kyuli Kaindi (Deceased) [2015] eKLR**:

“The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.”

190. Nothing therefore stops the Protestor from taking the necessary steps to bring those in charge of the estate of **John David Munyao Malinda** to account, including the respondents herein who are the personal representatives of the Estate of **Catherine Nduku Malinda** who was one of the legal representatives of the estate of **John David Munyao Malinda**. That application can however only be determined in the proceedings relating to the estate of **John David Munyao Malinda** and not **Catherine Nduku Malinda**.

191. In the final analysis, I find that this protest is unmerited. It is accordingly dismissed but with no order as to costs.

192. It is so ordered.

Read, signed and delivered in open Court at Machakos this 17th day of February, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muumbi for Mr Oyoo for the Administrators

Mr Oluoch for Mr Musau for the Applicant

CA Geoffrey