



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAPENGURIA**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 7 OF 2015**  
**IN THE MATTER OF THE ESTATE OF PARAIWA KISOO KIPSABET (DECEASED)**  
**BETWEEN**  
**FRANCIS WASIKE CHWERERE .....APPELLANT**  
**AND**  
**MICHAEL KISOO NGESEMWO.....RESPONDENT**  
**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Background and Brief Facts**

1. **Francis Wasike Chwerere**(hereinafter “*the petitioner*”) petitioned for a grant of letters of administration intestate to the estate of the deceased on 14<sup>th</sup> October 2015 which grant was made to him on 26<sup>th</sup> January 2016. On 28<sup>th</sup> June 2016, **Michael Kisoo Ngesemwo**, (hereinafter “*the objector*”) filed a summons dated 28<sup>th</sup> June 2016 seeking for orders *inter alia* that the said grant made to the petitioner be revoked and/or annulled based on the grounds *inter alia* THAT:

**i. The temporary grant was obtained fraudulently by the making of a false statement or by concealment from the court of material facts of the case.**

**ii. The temporary grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant.**

2. The summons was supported by an affidavit sworn by the objector on 28<sup>th</sup> June 2016 and a further affidavit sworn on 24<sup>th</sup> February 2016. The petitioner responded to the summons by way of a replying affidavit sworn on 6<sup>th</sup> June 2016 and a further affidavit sworn on 21<sup>st</sup> February 2017.

3. The summons proceeded by way of both *viva voce* and affidavit evidence together with written submissions which are on record.

**The Objector’s case**

4. The objector testified as “OW1” and stated that the deceased was his step-brother. He produced the deceased’s death certificate as “*PExhibit 1*”. OW1 further stated that by the time of his death, the deceased had a wife called Setea Sesaina Mbalaiwa who had since died on 2<sup>nd</sup> September 2015 and produced her death certificate as “*PExhibit 2*”. OW1 further stated that the deceased did not have any children and had a parcel of land known as **West Pokot/Siyoi ‘A’/651** (hereinafter “*the suit property*”) and he produced a certificate of search for the suit property as *Pexhibit 3*. OW1 further stated that he was about 13 years old when the deceased asked that he goes to live with him together with his mother and assist them once they got old. OW1 added that he also lived with one Grace, the deceased’s sister, as a ‘sister’ and that he lived with the deceased as his ‘brother’ and continued to live on the said suit property to date. OW1 stated that the deceased had other siblings, all whom had since died and that one of the said siblings was **Kaseso Kisoo Kipsabet**. OW1 testified that it was the said Kaseso Kisoo who was the father of the petitioner and that he had his own land and had since died. OW1 stated that indeed together with the petitioner, they petitioned for a grant of letters of administration intestate for Kaseso Kisoo’s estate in *Succession Cause No. 66 of 2011*

which was made to them on 24<sup>th</sup> May 2012 and confirmed on 18<sup>th</sup> April 2013. OW1 produced the grant and certificate of confirmation of grant as “*PExhibit 8a and 8b*” adding that the petitioner was the beneficiary of Kaseso’s estate and inherited parcel no. 2450 which is in the name of the petitioner. OW1 produced the property green card as “*PExhibit 9*” and stated that he indeed purchased a plot from the parcel no. 2450 which was known as parcel no. 2452 from one Peter Akol who had bought it from Kaseso before. OW1 produced the sale agreement as “*PExhibit 10*”

5. OW1 stated further that he petitioned for a grant of letters of administration intestate to the deceased’s estate in *Succession Cause No. 19 of 2015* which was made to him on 23<sup>rd</sup> February 2016 and he produced the said grant as “*PExhibit 4*”. OW1 stated that he later came to learn that the petitioner had obtained the title to the suit property for which he produced the certificate of search as “*PExhibit 5*” but then after placing a caution on the title, the same was cancelled and he produced the suit property green card as “*PExhibit 6*” to demonstrate the same. OW1 stated that from the petition for grant filed by the petitioner, he was listed as a beneficiary but that the signatures given against his name on *Form No. P&A 38* and *Form P&A 5* were not his. OW1 produced the petition for grant filed by the petitioner as “*PExhibit 7(a) to (g)*”

6. It was OW1’s testimony that the said Kaseso Kisoo was the petitioner’s father and that OW1 was his uncle, and so was the deceased. OW1 stated that the petitioner was not entitled to inherit the estate and that the petitioner had his own land parcel no. 2450 which he had inherited from his father Kaseso.

7. During cross-examination, it was OW1’s testimony that his father was one Kiptum Ngesemo, who was a brother to the deceased and that he himself was not a biological son of the deceased but rather “**a distant cousin**”. OW1 further reiterated that he bought rather than inherited a portion of plot. 2450 for Kshs, 2,500/- and did not know whether the agreement talked of Kshs. 1,500/-.

8. OW1 stated that in as much as the signatures in the instant petition for grant were not his, he did not object to the petition. OW1 denied attending any meeting of the family to agree on the administration of the estate of the deceased as the deceased had neither wife nor child. During re-examination he stated that there was a meeting after the deceased died at which the family wanted the petitioner to inherit something he objected to as his wife was still alive. OW1 stated that his father, Kiptum Ngesemo had since died and that he had not inherited from him.

9. In giving further testimony, OW1 stated that at no time was he ever summoned by the Assistant Chief of Chepkot sub-location as alleged in the letter dated 28<sup>th</sup> November 2018 and marked “*DExhibit 8*”. OW1 denied the occurrence of such a meeting of the family to discuss and agree on the petitioner being the administrator of the estate. OW1 further stated that the petitioner was not in his right sense of mind.

10. **Jacob Kimaru Kitiyo** testified as OW2 and stated that he knew the objector and the petitioner as children of Kaseso Kisoo and they were neighbours. OW2 stated that the deceased had a wife but no children and that the wife had since died. OW2 added that the objector was living with the deceased and his wife and that the petitioner came while the deceased was old and stated that he was a child of Kaseso Kisoo but then stated that Kaseso Kisoo had no children. OW2 also stated that Kaseso Kisoo and the deceased were brothers. OW2 testified that he was one of the elders who distributed land amongst the deceased’s family where the land of Kaseso Kisoo was given to the petitioner, Ngeiywa Kisoo (the deceased’s brother) and the objector. OW2 stated that the deceased’s land was to be given to the objector as he was the one who took care of them and even paid their debts. OW2 stated that the petitioner was not entitled to inherit land of Kaseso Kisoo. It was OW2’s testimony that he did not know the mother of the petitioner but knew that his father was Kaseso. During cross-examination, OW2 stated that by the time the petitioner came to the deceased’s home, the objector was living with Kaseso. It was also OW2’s testimony that the petitioner was present when the suit property was being subdivided and there were no quarrels or objections thereon.

11. **Willy Biwot Kipkeiyo** testified as OW3 and stated that he was the senior assistant chief of Kapsurum sub-location and knew both the petitioner and the objector as they resided in the same place with him. OW3 stated that he knew them together with the deceased before he was even employed and that the deceased had a wife but had no children. OW3 testified that together with his wife, the deceased was also living with the objector adding that the deceased and the objector are cousins. OW3 stated that the objector was around 13 years old when he was taken in by the deceased and that he knew of the deceased’s brother Kaseso who had a son, the petitioner. OW3 stated that the petitioner inherited the land of Kaseso after joining his father, together with his wife and children where he started residing. According to OW3, the objector lived in the suit property and he never saw the petitioner living there. OW3 added that the objector did not inherit any land from Kaseso and that it was the objector who took care of both the deceased and Kaseso when they were elderly and sick. OW3 denied that the petitioner ever took care of the deceased and Kaseso and stated that the suit property would better be inherited by the objector in that the petitioner had his inheritance in the land of Kaseso. During cross-examination OW3 stated that he could not recall and was not involved

when the objector joined the deceased. OW3 added that Kaseso acknowledged the petitioner as his son. OW3 added that the objector was never given land by the deceased. \_

12. **William Kiptui Pokor** testified as OW4 and stated that the deceased had married his sister and that they never had any children. OW4 stated that at some point, the deceased went for a boy (the objector) “**from his brother**” and that they lived with him until they died. OW4 stated that when his sister, the deceased’s wife fell ill, it was the objector who helped with treatment and when she died, she was buried in the suit property. OW4 stated that the objector should inherit the suit property adding that he did not know the petitioner. OW4 also stated that he did not know the year the objector was adopted but that he lived with the deceased and his sister(the deceased’s wife) as their son.

### **The Petitioner’s case**

13. The petitioner, **Francis Wasike Chwerere** testified as PW1 though the court noted that he had a communication and memory problem and thus was stood down before giving any probative testimony.

14. **Titus Kuto Kipungur** testified as PW2 and stated that he knew the petitioner as his step uncle but later said he was his cousin. PW2 stated that he also knew the objector as his step cousin in that the objector’s father and his grandfather were brothers. However, during cross-examination, PW2 stated that the objector was his uncle and that the fathers of the objector and the petitioner were brothers. PW2 stated that the petitioner was the son of Kaseso adding that the deceased never had a child. PW2 stated that the objector lived with one Wilson Chepkwony who was a teacher and family relative and later with Kaseso until he died. PW2 added that Kaseso gave the objector four acres of land while living with him. PW2 testified that the objector currently lives in the suit property and has a house there adding that the objector developed interest in the suit property as the deceased had no child.

15. PW2 stated that he lived in the same village with the deceased and that the deceased and his wife lived alone and no one took care of them. PW2 stated that Kaseso lived with both the objector and the petitioner with the objector joining the family of Kaseso in 1981. PW2 further stated that in 1981 he was 6 years old though I note that that cannot be accurate because he said that he was born in 1978 meaning he was 3 years old at the time. PW2 added that he got that information about the objector moving into the family of Kaseso from his mother. PW2 stated that the petitioner was born and has land in Kaseso’s land. PW2 stated that there is no one in the suit property and that the objector lives in the land of Kaseso. I note that this contradicts his earlier testimony that the objector lives and has a house in the suit property.

16. **Christina Cheptumo Morur** testified as PW3 and stated that the petitioner was a son of her maternal uncle, Kaseso Kisoo. PW3 added that she knew the objector as his father and her grandfather were “**brothers in the clan**” and that the deceased was her mother’s younger brother. PW3 stated that the deceased had no children and that his wife died in 2015 and thus it was decided at a meeting by the family that they should each get a share of the estate. The family further decided that the petitioner should administer the estate. PW3 stated that the objector “**is not one of us**” and as such he was not entitled to any share of the estate as he had a family which owns land in Elgeyo Marakwet and has his share of land there. PW3 further denied that the objector used to live with the deceased adding that the objector was given land by Kaseso. PW3 stated that indeed the objector came to their home in 1978 and wanted to go to school, and the same was done until he did his KCPE. PW3 added that after KCPE he went to live with Kaseso and has lived there ever since. It was PW3’s testimony that the petitioner and his family came to the family long before 1978 when the objector came to the home. During cross-examination, PW3 stated that it was true that Kaseso gave the petitioner a parcel of land and that the petitioner lives on that same parcel. PW3 further stated that Kaseso gave land to the objector. PW3 stated that though she did not have documentation, it was within her knowledge that the objector’s home is in Kamoi in Elgeyo Marakwet.

17. **David Pepela Wasike** testified as DW1 and stated that he was the petitioner’s son. DW1 stated that the petitioner was aged and thus his hearing was impaired and he could not recognize people including DW1. DW1 produced the petitioner’s mental assessment report as “*DExhibit3*” and a power of attorney as “*DExhibit4*” to speak on behalf of the petitioner. DW1 stated that it was the petitioner who wrote his own statement on 18<sup>th</sup> August 2017. DW1 stated that he knew the deceased as the last born of the petitioner’s father’s father adding that the objector was a distant relative of the deceased in that the father of the deceased and the father of the objector were cousins from the paternal side. DW1 stated that the deceased died on 12<sup>th</sup> December 1996 and that anyone claiming the deceased died before 21<sup>st</sup> October 2004 would be lying. He produced the deceased’s death certificate as “*DExhibit 5*” adding that it was the petitioner who looked after the deceased. DW1 stated the deceased was buried in the suit property. DW1 stated that the objector’s home is in Kamoi, Marakwet and that while the objector was studying in West Pokot, he stayed with one Wilson Chepkwony who was a headmaster adding that this was in 1979 when DW1 was in class 4 and witnessed it all. DW1 stated that at one point, the objector went to stay with Grace Cheptoo, the deceased’s sister and later with

Kaseso to shorten the distance he walked to school. DW1 stated that Kaseso was the petitioner's father and that he allocated a small portion of land to the objector to put up a house after he was circumcised. DW1 stated that the said portion was plot. No. 2386 but he did not produce any document to show the allocation/transfer. However, DW1 stated that the said plot. 2386 belonged to the objector as shown in the certificate of official search which he produced as "DExhibit 6" adding that the objector had another home in Kamoi apart from the said plot. 2386. DW1 reiterated that the objector never lived with the deceased and that the deceased's wife, Setea Seisina died on 9<sup>th</sup> August 2015 and they did not have children of their own. DW1 further testified that when the deceased died, the family met and decided that the petitioner would lead the succession proceedings adding that the objector was present in the meeting but did not stay for long though he indicated that he concurred with the deliberations. DW1 further stated that in the meeting held at the Chief's office on 28<sup>th</sup> November 2018, the objector was present with his wife and daughter but left before it ended and that is why he did not sign the letter which he produced as "DExhibit8". DW1 stated that after the deceased died, the estate was being taken care of by the petitioner and Grace Cheptoo, the deceased's sister and at the meeting, it was decided that the petitioner was to administer the estate and share it among the beneficiaries namely the children of Grace Cheptoo: Anna Kaseger Kisoo and Torotea Chepkemoi. DW1 added that these were the only surviving beneficiaries of the deceased as they were his sisters.

18. DW1 produced a document demonstrating the family tree as "DExhibit 9" and testified that Kiptum Ngesemwo and Kipsabet Kisoo were brothers. DW1 added that Kiptum was the father of the objector whereas Kipsabet was the father of the deceased. The objector was Kiptum's only child whereas Kipsabet sired six children who included the deceased, Kaseso and Ngeiywa Kisoo. In turn, Kaseso sired the petitioner and Ngeiywa sired David Kiptum. From the family tree in "DExhibit 9", the only people listed as being alive are the petitioner, the objector and David Kiptum.

19. DW1 stated that land parcel no. 2452 belonged to Michael Kisoo which was given to him by Kaseso and denied that the objector bought the same. DW1 produced the search document for the parcel as "DExhibit 10" . DW1 further denied that the deceased bequeathed the suit property to the objector and urged the court to stop the objector from interfering with them regarding the estate as the objector had his own land elsewhere.

20. During cross-examination, DW1 confirmed that the petitioner was given a portion of Kaseso's land, that is parcel no. 2450 which was formerly in the name of Kaseso. DW1 further confirmed that after *succession cause no. 66 of 2011* was completed, the estate in that case was wholly transferred to the petitioner and the objector did not get any portion of the land from Kaseso's estate.

21. DW1 stated that when the instant proceedings were filed, the petitioner's memory was intact and that he signed and filed the requisite papers. DW1 added that from the petition for grant, the only beneficiaries indicated were the petitioner and the objector. From the letter of the chief dated 5<sup>th</sup> October 2015, the court noted that there was whiteout at the end of paragraph 2 which indicated an erasure and the court further noted that DW1 was not being honest about it. From the said letter, only the name of the petitioner was indicated as the beneficiary of the estate and DW1 confirmed that the objector and the deceased's sisters were not included.

22. DW1 further stated that from "PExhibit 6", the petitioner had been registered as the proprietor of the suit property on 24<sup>th</sup> March 2016 though the same was later cancelled as an error. DW1 stated that he could not remember whether or not this registration was done after the grant was confirmed. DW1 further stated that when the petitioner filed the instant proceedings, he did not involve the objector, though he listed him as one of the beneficiaries.

23. DW1 further stated that "PExhibit1" was the original death certificate of the deceased which indicated that the deceased died on 20<sup>th</sup> November 1992 and confirmed that "DExhibit 5" was a photocopy

24. DW1 also confirmed that he did not produce the property green card of parcel no. 2326 and that "DExhibit6", the certificate of search, did not show how the land moved from Kaseso to the objector

25. DW1 stated that from the minutes of the family meeting held on 23<sup>rd</sup> August 2015("Dexhibit1"), there was no signature of the petitioner and that the name of the objector was indicated in the minutes and thus they considered him as part of the family and not a stranger. DW1 later stated that the objector was present throughout this meeting

26. DW1 also testified that he did not agree that the objector bought parcel no. 2452 and he was not present in court when the objector produced an alleged sale agreement for the transaction. DW1 stated that in 1979, in as much as he was a minor, he was intelligent enough to notice the goings on around him and that it was not true that he was only told that Mrs. Chepkwony had refused to stay with the objector. DW1 further stated that he himself had never lived with the Chepkwony family. DW1 stated that the objector's daughter, one Clare Chebet

was present during the meeting of 28<sup>th</sup> November 2018 but that her name was not included in the letter. DW1 further confirmed that the signature of the objector was not in the said letter.

27. During re-examination DW1 stated that he did not produce the original death certificate as it had gotten lost and that the copy he produced came from the original. DW1 added that the only reason the objector did not sign the chief's letter is because he stormed out of the meeting before the meeting ended, and that he was not aware of any agreement by which the objector bought any land.

### **Legal Analysis and Determination**

28. I have gone through the pleadings, testimonies and written submissions by both parties on record. First, I find that it is important to address the issue of the two death certificates on record which give different details as to the date of death of the deceased. Section 67 of the *Evidence Act* provides that documents must be proved by primary evidence and is the basis of the “**best evidence rule**” which is that primary evidence is the best evidence and that allowing of secondary evidence is a concession by the law to allow the second best. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. The “**best evidence rule**” is a legal principle that holds an original copy of a document as superior evidence and in as much as secondary evidence may be admitted subject to the conditions provided for under **section 68 of the Evidence Act**, secondary evidence is inferior to primary evidence. The rule further specifies that secondary evidence, such as a copy is not admissible if an original document exists and can be obtained. The weight of an original document is heavier than that of a copy especially in situations where a party attempts to substantiate a non-original document submitted as evidence during a trial (see John M Mativo J *In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased [2016] eKLR*). Certified copies of documents form part of secondary evidence as provided by **section 66 of the Evidence Act**.

29. In the instant case, the objector produced the original death certificate as *PExhibit 1* whereas the Petitioner produced a certified copy of the death certificate as *DExhibit 5* with DW1 stating that the original could not be produced as it was lost. As stated above, original documents have more probative value than copies and as such the original death certificate on record is not only superior but is the best evidence and has more probative value than the copy. To this end, it is my finding that the deceased died on 20<sup>th</sup> November 1992 as per the Certificate of Death No. 0328959 and produced by the objector as “*PExhibit1*”

30. From the record, it is not in dispute that property **West Pokot/Siyoi ‘A’/651** is the only property forming the estate of the deceased. It is also not in dispute that the deceased had no children of his own and that his wife was one Setea Sesaina who has also since died.

31. That being said, it is my considered view that the following are the main issues for determination in the instant matter:-

**a) Whether the objector and the petitioner are beneficiaries and are entitled to a share of the estate.**

**b) Whether the grant made to the petitioner on 26<sup>th</sup> January 2016 and the grant made to the objector on 23<sup>rd</sup> February 2016 ought to be annulled and/or revoked.**

**c) What are the appropriate orders to be issued by the court?**

**d) Who should bear the costs of these proceedings?**

### **Whether the objector and the petitioner are beneficiaries and are entitled to a share of the estate**

32. This is the main issue of contention which I must admit was at some point quite challenging to the court, the parties as well as the witnesses themselves. It would appear that there is no dispute or rather there is consensus that the petitioner was the son of one Kaseso Kisoo and that Kaseso Kisoo was the son of one Kipsabet Kisoo. There is also no dispute that the objector was the son of one Kiptum Ngesemwo. The dispute crops up in respect of the relationship between Kiptum Ngesemwo and Kipsabet Kisoo. The objector stated that Kiptum Ngesemwo was the son of Kipsabet Kisoo, whereas the objector stated that the two were brothers. If the former is correct, that makes the deceased, the objector's uncle. If the latter is correct, that makes the objector and the deceased cousins and in fact, the objector in his own testimony admitted that he is a “distant cousin” of the deceased. With this admission and examining the evidence in totality, the court can only conclude that the deceased and the objector were cousins and hold that the evidence of the petitioner on the family tree, “*DExhibit 9*” to be the correct one.

33. One way or the other, the deceased and the objector enjoy some blood relationship, albeit distant, and I refuse to accept any notion that the objector is a stranger to the deceased's family.

34. It has not been disputed that the said Kaseso Kisoo and the deceased were brothers and this would mean that the petitioner was the deceased's nephew.

35. To this end it is my finding that the petitioner was the deceased's nephew whereas the objector was the deceased's distant cousin. Having come to that conclusion, I must now proceed to determine whether the two can be termed as beneficiaries and therefore entitled to the estate as nephew and distant cousin respectively.

36. Since the deceased is not survived by his spouse and did not have any children, his estate will be administered according to **Section 39(1) of the Law of Succession Act** which provides as follows:

***“39. Where intestate has left no surviving spouse or children***

***(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—***

***(a) father; or if dead***

***(b) mother; or if dead***

***(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none***

***(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none***

***(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”***

37. From the above provision, it can be said that as nephew and cousin of the deceased, both the petitioner and objector can be termed as beneficiaries of the estate. However, the petitioner being a nephew of the deceased, that is being a child of the deceased's brother, takes priority over the objector who is a distant cousin of the deceased when it comes to distribution of the estate. The petitioner has a right to the estate to the exclusion of the objector in order of priority. From the family tree, the other people who are entitled to the estate in equal shares with the petitioner are David Kiptum, a surviving child of the deceased' brother, Ngeiywa Kisoo and all the other surviving children of the deceased's siblings (Anne Kaseger, Torotea Chepkemoi and Grace Cheptoo) who are also deceased. They are the closest living relatives of the deceased being nephews and/or nieces as opposed to the objector who is distant cousin. The relative who has priority over the estate is entitled to inherit. The court need not consider other relatives who are in the nearest degree of consanguinity. The closest surviving relative takes priority. (See L.W Gitari J in *In re Estate of Thegema Maguta (Deceased) [2019] eKLR*).

38. From the above, it is my considered view that in as much as both the objector and the petitioner are beneficiaries of the estate as distant cousin and nephew of the deceased respectively, the objector is not entitled to inherit the estate as he falls below the order of priority compared to the petitioner and the other nephews and/or nieces of the deceased.

**Whether the grant made to the petitioner on 26th January 2016 and the grant made to the objector on 23rd February 2016 ought to be annulled and/or revoked**

39. Section 76 of the Law of Succession Act provides as follows:

***“76. Revocation or annulment of grant***

***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—***

***(a) that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(I) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court may order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

40. In the case of *Lucy Njoki Kamanja v Ezekiel Muenja Ngure [2017] eKLR* it was held that:

“.....This was a material non-disclosure and concealment of something material to the case. By stating, that he was the only survivor, the respondent made a false statement.”

As held – RE: ESTATE OF PHILIP KIPRONO BETT (Deceased [2005] eKLR, non-disclosure of all beneficiaries is therefore a defect that goes to the root of the administration of the estate. Where there is no disclosure, the grant whether or not confirmed cannot stand.”

41. In *re the estate of Alexander Muchemi Kiago (Deceased) [2017] eKLR*, Ougo J held that:

“I find that the petitioners failure to include the objectors in the succession proceedings is tantamount to non-disclosure of material facts and have satisfied the requirement of Section 76(b) as such this court revokes the Grant of letters of Administration granted by this court.....”

42. In *re Estate of Ndinguri Karugia (Deceased) [2017] eKLR*, Muigai J held that:

“From the detailed chronology of the documents that the Respondent lodged for grant of letters of administration intestate, she did not disclose all children and family of the deceased.

The non disclosure of all beneficiaries of the deceased's estate amounted to concealment of material facts. The grant of.....confirmed on..... were fraudulently obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.”

“In the case of ALBERT IMBUGA KISIGWA V RECHO KAVAI KISIGWA, SUCCESSION CAUSE NO.158 OF 2000, Mwita J. in a decision rendered on 15<sup>th</sup> November, 2016, noted thus:

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

Therefore the beneficiaries of the estate of the deceased were excluded contrary to Section 51 (2) (g) of the Law Succession Act and Rule 7(1) Probate & Administration Rules.

Consequently, non-disclosure of all other beneficiaries pre-empted the required written consents to be availed to petition of grant of letters of administration and confirmation of grant.”

43. In *re Estate of Wahome Mwenje Ngonoro Deceased [2016] eKLR* Mativo J held that:

*“It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled.....”*

.....

*“The evidently deliberate failure by the Respondent to involve the applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in my view in bad faith and amounts to concealment of material facts. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant.”*

44. Having found that the petitioner is a nephew of the deceased, his averment in his petition for grant that he was son of the deceased was a false statement intended to mislead the court. Furthermore, it was material non-disclosure for the petitioner not to list all the beneficiaries or people surviving the deceased. He only listed the objector and yet there are other nephews and/or nieces of the deceased who survived him. The petitioner further admitted that he did not involve the objector in filing the instant succession proceedings and thus, it can be deduced that the purported signature of the objector in the petition for the grant was not his. This was fraudulent to say the least. Based on the above, I find and hold that the grant made to the petitioner on 26<sup>th</sup> January 2016 cannot stand. The same be and is hereby revoked.

45. The same can be said of the grant made to the objector on 23<sup>rd</sup> February 2016 in **Succession Cause No. 19 of 2015**. The objector made a false statement in the petition for the grant that he was the deceased's brother when he clearly knew he was not. The objector further failed to list all the beneficiaries of the estate including the petitioner and other nephews and/or nieces who survived the deceased. These are enough reasons to make this court to revoke the grant made to him on 23<sup>rd</sup> February 2016. Accordingly, the grant issued to the Objector on 23<sup>rd</sup> February 2016 be and is hereby revoked.

**What are the appropriate orders to be issued by the court?**

46. Having revoked that the grant made to the petitioner on 26<sup>th</sup> January 2016 and that made to the objector on 23<sup>rd</sup> February 2016, and having further found that the objector is not entitled to inherit the estate of the deceased by reason that the nephews and/or nieces of the deceased rank higher in priority and are the ones entitled to inherit the estate, the final issue is what are the appropriate orders that this court can issue in the circumstances.

47. **Rule 73 of the Probate and Administration rules** enshrines the inherent power of this court. The rule reads:-

*“Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court”.*

48. The substantive Act in **Section 47 of the Law of Succession Act** spells out the jurisdiction of the High Court in the administration of estates in these terms:

*“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient..”*

49. I am cognizant of the fact that the petitioner is currently aged and is not in the right frame of mind to administer the estate. Section 66 of the Law of Succession Act gives the court the final discretion as to whom a grant of letters of administration intestate should be issued to. The power of attorney on record where the petitioner donated power in relation to the instant proceedings to his son David Pepela Wasike has not been challenged, disputed and/or revoked.

**Who should bear the cost of these proceedings?**

50. In the foregoing, I make the following orders THAT:

*i. The summons dated 28<sup>th</sup> June 2016 by the objector is merited and is thus allowed.*

*ii. The Grant issued to FRANCIS WASIKE CHWERERE on 26<sup>th</sup> January 2016 be and is hereby revoked.*

*iii. The Grant issued to MICHAEL KISOO NGESEMWO on 23<sup>rd</sup> February 2016 be and is hereby revoked.*

*iv. A fresh Grant shall issue in the name of DAVID PEPELA WASIKE within 30 days hereof and a summons for confirmation of Grant be filed by him within 90 (ninety) days thereafter listing all the surviving nephews and/or nieces (children of the deceased's brothers and sisters) together with the proposed mode of distribution of the estate amongst them.*

*v. A declaration be and is hereby made that the objector, MICHAEL KISOO NGESEMWO is not entitled to any share of the estate of the deceased, PARAIWA KISOO KIPSABET.*

*vi. The proceedings in relation to Kapenguria High Court Succession Cause No. 19 of 2015 be and are hereby nullified and/or quashed and all pleadings therein be and are hereby struck off the record.*

*vii. The matter to be mentioned after 45 days hereof to confirm compliance.*

51. In light of the intricate family relationships in this case, I order each party to bear its own costs.

52. Orders accordingly.

Judgment delivered, dated and signed in open court at Kapenguria on this 19<sup>th</sup> day of May, 2020.

**RUTH N. SITATI**

**JUDGE**

**In the presence of:**

M/S Sugut for applicant

Mr. Lowasikou for Odongo for respondent

Mr. W. Juma – court assistant