REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 97 OF 2011

IN THE MATTER OF THE ESTATE OF ANDREA SONGORO CHEPNGOM (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION OR ANNULMENT OF GRANT

BETWEEN

SAMMY KIPRONO KOECH.....APPLICANT

AND

SUSAN CHEMAIYO CHEPNGOM.....RESPONDENT

RULING

[1] The dispute herein is between the applicant and his aunt, the Respondent. The indubitable facts are that mother of the applicant was the one of the two daughters of the deceased, **Andrea Songoro Chepngom,** who died intestate on **20 April 1995**. The deceased was married to two wives, namely, **Maria Chebutich** and **Dina Chepkurgat**, who are both deceased. The applicant's mother, **Susana Cheruto**, is also deceased. Thus, the only surviving beneficiaries of the estate of the deceased are the applicant, the respondent and the respondent's step brother, **Paul Kipsang Koech.**

[2] Thus, the respondent filed this Petition for Grant of Letters of Administration Intestate on **18 April 2011** in respect of the estate of the deceased that comprised of only one asset, namely Plot No. **MOGOBICH/CHEPTILILIK/BLOCK 1/86 (KIPSEBWO).** The respondent disclosed that they were three beneficiaries and that her brother Paul and nephew, the applicant, had given their consent to her being appointed as the administrator of the estate. She also disclosed that the applicant was a grandson to the deceased; which information was in tune with the chief's letter filed along with the Petition on **18 April 2011**.

[3] The Petition was duly processed and advertised in the Kenya Gazette of **20 May 2011** and, there being no objection to the grant being issued, the same was issued to the respondent on **24 June 2011**. The said grant was confirmed on **13 February 2012** and the four acres shared out equally between the deceased's the two houses. Accordingly, the applicant and the respondent, as members of the 1st House, received one acre each; while **Paul Kipsang Koech,** as a member of the 2nd House, received two acres of the suit property.

[4] Thereafter, the respondent commenced the process of subdivision; and it appears this is the point when their dispute began. The record shows that the first indication of discord was in **September 2012** when the respondent filed an application dated **6 September 2012**, seeking restraining orders against the applicant on the ground that he was interfering with the process of subdivision. That application was heard ex parte on **24 September 2012** and allowed on **22 October 2012**. The orders granted were to the effect that:

> **[a]** The 3rd Beneficiary, **Sammy Kiprono Koech**, was restrained from interfering with the process of sub-division and survey of the parcel of land known as MOGOBICH/CHEPTILILIK/BLOCK 1/86;
>
> **[b]** The Officer in Charge of Police at the nearest police station was to provide the surveyor with security during the survey and sub-division exercise; and,

[c] That application was to meet the costs of the police escort.

[5] There then followed a flurry of applications, mostly by the applicant, challenging the right of the respondent to inherit one acre of the

estate; his contention being that that portion of the estate ought to have gone to him instead. Hence, he filed applications as follows:

[a] The Summons for revocation of grant dated **6 November 2012;**

[b] The Notice of Motion for review dated **9 January 2013**;

[c] The Summons for dated **22 July 2013** for temporary injunction;

[d] The Notice of Motion dated **24 September 2014** for revocation of grant; and,

[e] The Notice of Motion application dated **6 February 2017** for inhibition in respect of the suit property, known as land number MOGOBICH/CHEPTILILIK/BLOCK 1/86.

[6] Hence, it is understandable that the respondent was exasperated by the multiplicity of applications emanating from the applicant through various advocates. Thus, in his written submissions dated **28 October 2019,** counsel for the respondent prayed that the two applications for revocation of grant be disposed of simultaneously. The first application for revocation is the one dated **6 November 2012**. A careful scrutiny of the record shows that it was never respondent to by the respondent and that it was lying dormant and unprosecuted when the applicant filed the 2nd application for revocation dated **24 September 2014.** The record further shows that it is to the latter application that a response was filed by the respondent on **22 June 2016**.

[7] Hence, for the avoidance of doubt, this ruling is in respect of the Summons for Revocation of Grant dated **24 September 2014**. It was filed by the applicant pursuant to **Section 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya** and **Rule 44(1)** of the **Probate and Administration Rules** for orders that:

[a] The Grant of Letters of Administration Intestate and the Certificate of Confirmation in respect thereof be revoked and annulled;

[b] All the entries entered pursuant to the Grant of Letters of Administration and the Certificate of Confirmation be cancelled by an order of this Court;

[c] Costs be provided for. It was canvassed by way of both *viva voce* evidence and written submissions

[8] The application, which was filed through the law firm of **M/s Manani, Lilan, Mwetich & Company Advocates**, was premised on the grounds that:

[a] the proceedings to obtain the grant and the subsequent confirmation were defective in substance, in that the applicant, one of the sons of the deceased, was not involved in the proceedings; and that he was therefore deprived of his interest and entitlement as a son/dependant/beneficiary of the estate of the deceased;

[b] the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of facts that are material to the case, namely that the applicant was the son of the deceased;

[c] the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant;

[d] by virtue of the false information, the respondent proceeded to subdivide the applicant's land and further obtained title to the same without the involvement of the applicant;

[e] Susan Chemaiyo Chepngom, although a dependant of the deceased, has no interest in the estate whatsoever, and more specifically land parcel No. MOGOBICH/CHEPTILILIK/BLOCK 1/86 (KIPSEBWO) measuring 4.0 acres.

[9] The application was supported by the affidavit of the applicant, sworn on **24 September 2014** wherein he averred that the deceased died on 20 April 1995; and that he was married to two wives, namely **Maria Cherono (Chebotich)** and **Dina Chepkurgat chepngom**; and that his first wife, **Maria Chebotich**, predeceased him, having died in **1992**; while the second wife, **Dina Chepkurgat** died in **2007**. It was therefore the assertion of the applicant that, it was misleading for the respondent to state, in the Petition for Grant that he is a grandson of the deceased, since the true position is that he is a son. He further averred that, after the demise of the deceased, it was made known that the wish of the deceased was for the suit property to be shared equally between the two houses in accordance with Nandi customs.

[10] The applicant further averred that, as the respondent was opposed to his being given two acres, the matter was referred to the Nandi Land Disputes Tribunal, which upheld the deceased's wishes. He annexed to his affidavit copies of the proceedings and decision of the tribunal; and accused the respondent of ignoring that decision and applying secretly for grant and thereafter moving to subdivide the suit property without his knowledge. He thus, asserted that the respondent has no interest in the estate; and is therefore not a proper in law to administer the deceased's estate.

[11] In response to the application, the respondent conceded, in her Replying Affidavit filed on **22 June 2015**, that the deceased died intestate on **20 April 1995**; and that she filed this cause on **27 April 2011** and was issued with Grant of Letters of Administration Intestate on **24 June 2011**, which was confirmed on **13 February 2012**. According to the respondent, the suit land was shared equally between the two houses; and that, in turn, the two acres that was allotted to the first house was shared equally between her and the applicant, being the son of her deceased and only sister, **Susana Cheruto Matei**. The respondent further asserted that the applicant was all along in agreement with her appointment as the administrator of the estate of the deceased. She also pointed out that the applicant was in attendance on **13 February**

2012 for confirmation of grant and had no issue to raise to the proposal for distribution; and that it was only later that he changed his mind and started hindering the process of subdivision by the surveyors.

[12] Thus, the respondent denied that any attempt was made to evict the applicant from his entitlement of one acre and that this is a matter in which the estate has been fully distributed and titles issued to the three beneficiaries; and that if there is any unresolved disputes then the same can be handled in **Eldoret E&L Case No. 74 of 2014** which is ongoing between the same parties.

[13] The court record shows that the parties agreed on **2 March 2015** to have the application canvassed by way of *viva voce* evidence; and that the applicant would be deemed the plaintiff, and the petitioner the respondent. To that end, directions were given for the parties to file and exchange their affidavits/witness statements in readiness for the hearing. Accordingly, the applicant filed a fresh Supporting Affidavit on **19 July 2019** along with the statements of his three witnesses, **Samuel Kibiego Maiyo, Jacob Kimaiyo Ruto** and **Michael Ngetich**. Likewise, the respondent filed another affidavit, sworn on **19 July 2018** along with two additional affidavits sworn by her step-brother, **Paul Kipsang Koech**; and a neighbour, **Joel Kipngetich Arap Rugut**.

[14] As **PW1**, the applicant adopted his affidavit sworn on **16 July 2019** as part of his evidence in chief, and told the Court that the deceased was his father; and that the respondent, **Susan Chemaiyo** and **Paul Kipsang Koech** are his siblings. He further testified that deceased left behind two widows, **Maria Chebutich** and **Dina Chepkurgat**, who have since died. He reiterated his stance that the respondent did not include him at all in the entire succession process; and that he only got to know of it when the surveyor went to the property for purposes of subdivision. His main contention was that the grant and its confirmation was fraudulently procured in that, not only is the chief's letter a forgery; but also the consent that was purportedly signed by him. In his view, the 4 acres ought to have been shared equally between him and his step-brother, **Paul Kipsang Koech**. He added that he got to know that the respondent had been given another piece of land belonging to the deceased by **Maria Chebutich**, and therefore that it is only fair that he be given 2 acres of the suit property, including the portion taken by the respondent.

[15] Samuel Kibiego (PW2) testified that the deceased, **Andrea Songoro**, was his neighbour. He adopted his witness statement dated **10 December 2015.** He confirmed that the deceased had two wives; and that he died intestate in 1995. He further testified that, when it came to subdivision of the land left behind by the deceased amongst his dependants, disagreement arose as to who was entitled to a share and in what portion; and therefore that the elders were called in and it was resolved that the deceased's 4 acres of land, parcel no. MOGOTICH/CHEPTILILIK/BLOCK 1/86 be shared equally between the two houses. Hence, according to him, since the applicant is the only son in the first house, he is entitled to 2 acres of the suit land. In cross-examination, he conceded that the applicant is the grandson of the deceased; and that his mother lived in **Chemase** with her husband and that she had other children, apart from the applicant.

[16] The evidence of **Jacob Kimaiyo Ruto (PW3)** was that, as a member of the Nandi Land Disputes Tribunal, he got to handle the land dispute between the applicant and his sister, the respondent. He relied on his witness statement dated **16 July 2019** and stated that the matter was referred to them on **14 August 2009**; and that after hearing the parties, they gave their verdict on **19 August 2009** to the effect that the applicant was entitled to two acres of the suit property. He added that although they advised the parties that whoever was aggrieved had a right of appeal within 14 days, no appeal was filed. Thus, according to him, their decision was final and that any further proceedings on the matter were irregular.

[17] The applicant's last witness was **Michael Ngetich (PW4).** He served as the secretary to the occupants of Kipsebwa Farm. His evidence was that, other than the suit property, the deceased had another piece of land measuring 2 acres, which was being cultivated by his first wife, **Maria Chebutich,** and that during demarcation, the land was registered in the name of the respondent on his advice because otherwise it would have been forfeited; as one of the resolution of the members of Kipsebwa Farm was that nobody could be registered for two different pieces of land. He agreed with the decision of the Nandi District Land Tribunal that the applicant is entitled to 2 acres of MOGOBICH/CHEPTILILIK/BLOCK1/86 since the respondent had earlier been given the other plot by their deceased mother, **Maria Chebutich.**

[18] On her part, the respondent adopted her affidavit sworn on **19 July 2018** as her evidence in chief. She averred that the deceased had two wives, her mother, **Maria Jerono Chepngom**, also known as **Maria Chebutich** and **Dina Jepkurgat Chepngom**. She further stated that she belongs to the first house and that her mother Maria had only two children, namely herself and **Susana Cheruto**, the mother of the applicant; while in the 2nd House there were 5 daughters and one son, **Paul Kipsang Koech.** Thus, she was categorical that, being the 4th born of her sister, **Susana Cheruto**, the applicant is one of the grandsons of the deceased, and therefore not his son, as purported by the applicant.

[19] It was further the assertion of the respondent that the applicant was present in the two family meetings which were called to discuss the need to file this succession cause and added that it was agreed right from the outset that the deceased's 4 acres be shared equally between the wives; and not the children; and that the applicant willingly signed the consent and agreed with the mode of distribution as discussed and agreed in the second meeting. According to her, this explained why the entire process ran smoothly from the beginning to the end; and that it was not until 2012 that the applicant threatened to scuttle the distribution process, prompting her to file an application dated **20 February 2012** seeking for security during the subdivision process. Her application was allowed and security was provided as prayed by her.

[20] It was further the evidence of the respondent that thereafter, the subdivision process was carried without any hitch; and that the suit property was sub-divided into three portions and registered in the names of three of the deceased's beneficiaries as follows;

[a] MOGOBICH/CHEPTILILIK/BLOCK 1/267 – **Paul Kipsang Koech**

[b] MOGOBICH/CHEPTILILIK/BLOCK 1/268 – **Susan Chemaiyo**

[c] MOGOBICH/CHEPTILILIK/BLOCK 1/269 – **Sammy Kiprono Koech**

[21] The respondent further told the Court that, in the year 2014, the applicant became arrogant and started threatening to evict her; and that it was then that she filed **Eldoret E&L Case NO 74 of 2014**, wherein the applicant entered appearance but failed to file a defence. Consequently, judgment was rendered on **10 December 2015** in her favour permanently restraining the applicant from interfering with the one-acre piece comprising the parcel of land no. MOGOBICH/CHEPTILILIK/BLOCK 1/268. She concluded her evidence by stating that the process of obtaining grant was entirely above board and therefore that annulment will not yield a better outcome in the circumstances.

[22] Paul Kipsang Koech (DW2) corroborated the respondent's testimony. He relied on his affidavit sworn on **19 July 2018** and confirmed that he is the son of the deceased, **Andrea Songoro Chepngom**, by his second wife, **Dina Jepkurgat Chepngom** (now deceased); and that the respondent, **Susana Chemaiyo** and the applicant's mother, **Susana Cheruto**, belong to the 1st House. **DW2** further stated that the applicant is his nephew, the 4th born of his step-sister, **Susana Cheruto** (also deceased), who was married to one **Francis Matei**. It was also his evidence that before this succession cause was filed, a family meeting was held, in which the applicant was in attendance; and that he signed the consent willingly.

[23] At to the mode of distribution, **DW2** testified that it was agreed amongst the beneficiaries that the suit property be shared equally between the two houses; and that in their house, his sisters were in agreement that their share of two acres be registered in his name. He concluded by stating that the respondent, as the administrator, proceeded accordingly with the cooperation and support of all and caused the suit property to be subdivided into three portion and registered in his name and in the names of the applicant, the respondent. He concluded his evidence by stating that the applicant has no justification whatsoever for claiming more than he has been provided with.

[24] The last witness for the respondent was **Joel Kipngetich Arap Rugut (DW3).** He adopted his averments set out in his affidavit sworn on **19 July 2018** and stated that he served as the village elder of Taretmoi Village in which the deceased resided; and that he knows his children well. It was his evidence that the deceased married two wives, namely **Maria Jerono Chepngom** as the 1st wife and **Dina Jepkurgat Chepngom**, the 2nd wife. He further testified that whereas **Maria** had two daughters, **Dina** had 5 daughters and one son, **Paul Kipsang Koech**. It was therefore his evidence that the applicant is the 4th born of **Susana Cheruto,** the respondent's sister and daughter of **Maria Jerono**; and therefore the grandson of the deceased, **Andrea Songoro Chepngom**. He added that the applicant's mother is married to one **Francis Matei**; and that when **Francis Matei** rejected him on the grounds that he was born out of wedlock, the deceased took him in at the age of 2 years and treated him as a son to **Maria**. According to **DW3**, that was the basis upon which the applicant was given the one 1 acre that would otherwise have gone to his mother.

[25] The application for revocation of grant was filed under **Section 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya,** which is explicit that:

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

[26] As has been pointed out herein above, the application was premised on the grounds that:

> **[a]** the proceedings to obtain the grant and the subsequent confirmation were defective in substance, in that the applicant, one of the sons of the deceased, was not involved in the proceedings; and that he was therefore deprived of his interest and entitlement as a son/dependant/beneficiary of the estate of the deceased;
>
> **[b]** the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of facts that are material to the case, namely that the applicant was the son of the deceased;
>
> **[c]** the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant;

[d] by virtue of the false information, the respondent proceeded to subdivide the applicant's land and further obtained title to the same without the involvement of the applicant;

[e] Susana Chemaiyo Chepngom, although a dependant of the deceased, has no interest in the estate whatsoever, and more specifically land parcel No. MOGOBICH/CHEPTILILIK/BLOCK 1/86 (KIPSEBWO) measuring 4.0 acres.

[27] The consequently fall within the provisions of **Sections 76(a), (b) and (c)** above; the common thread being that the respondent failed to disclose that the applicant is a son and not a grandson to the deceased. For this reason, the applicant alleged fraud and forgery of the chief's letter that was filed with the Petition on **18 April 2011**, and the consent, Form P&A 38. Hence, the applicant's grievance is best understood from the purview of **Section 66** of the **Law of Succession Act,** which stipulates thus in terms of the order of preference for purposes of petitions for Grant of Letters of Administration Intestate:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) Surviving spouse or spouses, with or without association of other beneficiaries;

(b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) The Public Trustee; and

(d) Creditors

[28] There appears to be no dispute that that the deceased's first wife, **Maria Chebutich**, predeceased him; and that by the time this Petition was lodged, his second wife, **Dina Chepkurgat**, was also deceased. Thus, the surviving sons and daughters of the deceased were at par for purposes of **Section 66** of the **Law of Succession Act**. Accordingly, by dint of **Rule 7(7)** of the **Probate and Administration Rules**, they were at liberty to choose one or more of them, not exceeding four, to act as the administrators of the estate of the deceased on behalf of the rest; who would then furnish the requisite consent for that purpose; for **Rule 7(7)** aforementioned states that:

"Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—

(a) Renounced his right generally to apply for a grant; or

(b) Consented in writing to the making of the grant to the applicant; or

(c) Been issued with a citation calling upon him either to renounce such right or to apply for a grant.

[29] Further to the foregoing, **Rule 26** of the **Probate and Administration Rules** provides as hereunder in sub-rules (1) and (2):

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

[30] Thus, the key issue for determination is the question whether or not the applicant is indeed a son to the deceased, **Andrea Songoro Chepngom.** In his various affidavits, the applicant averred that he is the biological son of the deceased. Thus, in paragraph 6 of the affidavit sworn in support of the first application for revocation, he averred "**THAT my area chief indicated in his letter that I am the grandson yet I am the son to the deceased…"** The same assertion was made in the applicant's affidavits sworn on **10 July 2012, 24 September 2014, 6 February 2017** and **16 July 2019**. In the affidavit of **16 July 2019**, he averred that he is the 3rd born son of the deceased and the late **Maria Chebutich** who was his first wife; and that he is a brother to **Susana Chemaiyo Chepngom (Kazi)** and **Cheruto Taptuwei**, now deceased.

[31] This assertion was however refuted by the respondent, whose contention was that the applicant is in fact her nephew, the son of her deceased sister, **Susana Cheruto**. Her evidence was supported, not only by the evidence of her step-brother, **Paul Kipsang Koech (DW2)** and the village elder, **Joel Kipngetich Arap Rugut (DW3),** but also by the applicant's own witnesses. For instance, it was the evidence of **Samuel Kibiego Maiyo (PW2)** was that:

"…Sammy's biological mother is called Taptuwei. Taptuwei is the daughter of Andrea Songoro Chepngom. Sammy Kiprono Koech is therefore a grandson of the deceased Andrea Songoro Chepngom. The mother of Sammy lived in Chemase, where she was married. She had children there and a husband. She also has land there…"

[32] PW2 further explained that any reference to the applicant as the son of the deceased is only because the deceased adopted him and lived with him from an early age, in accordance with the customs of the Nandi people because his first wife Maria bore no son. Thus, although the applicant made a vain attempt to confuse the facts and insist that he was a biological son to **Maria Chebutich**, it emerged in his cross-examination by **Mr. Rotich** that he was not being candid. Here is what the applicant had to concede in cross-examination:

> **"I was born on 27/7/1982. The name of my mother is Maria Chebutich Chepngom. She died in 1990. This is the ID card for my mother. She was born in 1922. That means my mother was 60 years old when I was born…It is true that I am not Maria's biological son. Maria is the only mother I know. I do not know my own biological mother…I know Susan Cheruto. She is my deceased stepmother. I know that there was a dispute between me and Susan Cheruto before she died…Andrew Songoro recognized me as his son in his lifetime. I do not know my biological mother. I was raised by Maria as her child."**

[33] Thus, a careful consideration of the evidence reveals that, as a matter of fact, the applicant is a grandson to the deceased; and that he is the 4th born child of the respondent's deceased sister, **Susana Cheruto**, also known as **Taptuwei**. Hence, although it is indubitable that the applicant was brought up by his grandmother, **Maria Chebutich**, for purposes of the **Law of Succession Act**, he remained a grandson, noting the evidence of **DW3** that the customary rites of adoption were never performed in the case of the applicant to formalize the arrangement. That being my view, it follows that his aunt, **Susana Chemaiyo** and **Paul Kiprono Koech** and all their siblings ranked above him for purposes of qualification for appointment as the administrator of the estate of the deceased, **Andrea Songoro Chepngom**. Thus, the applicant is in no place to challenge the appointment of the respondent as an administrator; and therefore his allegations of fraud and concealment have absolutely no foundation since there was no obligation on the part of the respondent to seek or obtain the applicant's consent to the filing of the Petition for Grant.

[34] It is significant that in the Petition filed herein on **18 April 2011**, the respondent acted equitably by including the name of the applicant as one of the beneficiaries of the deceased. It is noteworthy because he is the only grandson of the deceased whose name was listed as a beneficiary. The respondent explained that this was in acknowledgement of the interest of the applicant's deceased biological mother, **Susana Cheruto**. But more importantly, it was in acknowledgment that the applicant knew no other home, having lived with his grandparents from the age of 2. Hence, in **Christine Wangari Gachenge vs. Elizabeth Wanjiru Evans & 11 Others** [2014] eKLR it was observed that:

> **"Although Section 35 and 38 of the Law of Succession Act is silent on the fate of surviving grandchildren whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law is on section 41. If a child of the intestate has predeceased the intestate then that child's issue alive or *en ventre sa mere* on that date of the intestate's death will take in equal share *per stirpes* contingent on attaining the age of majority. *Per stirpes* means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate's death."**

[35] I therefore entertain no doubt at all that he was treated fairly in so far as the distribution of the deceased's estate was concerned. I note however that, the foregoing notwithstanding, the applicant staked a claim to half share of the suit property, not only on the basis that he is the only son in the house of **Maria**, but also because the respondent had already been given a piece of the deceased's property in his lifetime. I have no hesitation in rejecting the first argument, principally on the basis of **Article 27(4)** of the Constitution, which prohibits direct or indirect discrimination of any kind, including on the basis of gender.

[36] In this connection, **Section 40** of the **Law of Succession Act** is explicit that:

> **(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**
>
> **(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."**

[37] Again, it is noteworthy that the above provision makes no distinction between male and female children of a deceased person. Hence, in **Stephen Gitonga M'murithi vs. Faith Ngira Murithi** (supra) the Court of Appeal the Court of Appeal took the view that:

> **"…Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children irrespective of gender and whether married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each household of a polygamous deceased. Applying the above principles … it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of the section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased…"**

[38] It is evident herein that before this succession cause was filed, there was a family meeting at which it was agreed that the deceased's four acres of land, which was the only asset comprising his estate, be shared equally between the two houses, as opposed to a division amongst all the 8 sons and daughters of the deceased; so that, in each house, the beneficiaries would be free to decide how to share their portion amongst themselves. The applicant conceded as much in his evidence before the court. That being the case, and going by the stipulations in **Sections 35 to 38** of the **Law of Succession Act**, the applicant could only get one acre of the two acres given to their house; the other acre for Maria's house being the entitlement of his aunt, the respondent. This is what the respondent did and as matters stand, the applicant is the registered owner of a piece of the deceased's land, now known as MOGOBICH/CHEPTILILIK/BLOCK 1/269 measuring one acre or thereabouts.

[39] There is considerable merit, however, in the applicant's contention that any gift *intervivos* that the respondent may have received from

the deceased ought to have been taken into account at the time of distribution. This is because it is the law, and it is provided for in **Section 42** of the **Law of Succession Act**. That provision states:

> **"Where—**
>
> **(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**
>
> **(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,**
>
> **that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."**

[40] Hence, the question to pose is whether sufficient proof was provided by the applicant that the respondent was a beneficiary of the deceased's property during his lifetime. In his last affidavit filed on **19 July 2019** in readiness for the hearing, the applicant vaguely averred that the respondent was given **"some land by my late mother. Therefore, it would be just I get the 2 acres as we agreed as a family earlier…"** He did not avail any specific evidence in this regard when he testified herein on **22 July 2019**. In the same vein, **PW4**, who was the secretary for Kipsebwa Farm, did not avail the records to clearly demonstrate that the property on which the respondent currently resides once belonged to the deceased and was given to her by him during his lifetime. In fact, his evidence tends towards proving that the property was Maria's and that because Maria had two plots, she advised her to have the second one registered in the name of the respondent. Hence, as this is not a cause about the estate of Maria, the evidence of **PW4** is of no assistance in proving that the respondent had earlier benefitted from the deceased's estate. Hence, on both scores, the applicant's claim to the entire two acres fails and is hereby dismissed.

[41] In the result, I find no merit in the applicant's application for revocation of grant. The same is hereby dismissed with an order that each party shall bear own costs of the application. Granted the result herein, it follows that the initial revocation application dated **6 November 2012** has been overtaken by events.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF MAY 2020

OLGA SEWE

JUDGE