



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 436 OF 2008

IN THE MATTER OF THE ESTATE OF JOSEPH MUOKI NDIVO (DECEASED)

JUDGMENT

1. The applicant herein, Irene Nthenya Mutune, has moved court by way of an application dated 14th January 2013, brought under the provisions of sections 47 and 76 (b) of the Law of Succession Act, Cap 160, Laws of Kenya, and Rules 44 and 73 of the Probate and Administration Rules, seeking that the letters of administration intestate issued to the administrators herein, Teresia Kalee Ndivo and Teresia Kanini Ndivo, and confirmed on the 15th February 2011, be revoked and that fresh letters of administration intestate be issued to her. The administrators on their part opposed the application.

2. Directions on the disposal of the application were taken and the hearing of the application proceeded by way of *viva voce* evidence.

3. It was the applicant's evidence that the deceased was her husband. She stated that they met in 1997 when the deceased was visiting his former classmates at the Rift Valley College of Technology. She testified that they got married under Kamba customary law in 2000. She stated that she met the first administrators for the first time in 1997, when she was introduced to them by the deceased. She stated that the 1st administrator, together with the deceased, visited her parents' home where they met her parents, her uncles, aunt and her grandfather for introductions. She further stated that on 14th January 2000, the deceased and his mother together with his uncle, Peter Ndungwa, visited their home again and brought three goats, one which was slaughtered, its blood spilled and a piece of meat given to the couple to share. She testified that after the ceremony the elders drunk the Kamba local brew and declared them husband and wife. She stated that as per the Kamba tradition the deceased and his parents spent the night at her home and fed her relatives the next day. She described it as a feast for her marriage to the deceased. She stated that Mary Mwendwa, a sister to the deceased, and Aquilina Mwelu attended the ceremony, and participated in cooking for her family on the second day of the visit. She stated that after the ceremony, the deceased took her to his parents' home in Nyahururu, where she lived while she continued with her studies, which were catered for by the deceased. She testified that on the 16th January 2001, they were blessed with a daughter named Karen Muoki. She stated that by then she was living with the 2nd administrator who took care of her. She later on had two other children with the deceased, the second born called Eric Muoki and third born named Brian Muoki. She produced birth certificates that showed that the children were born to her and the deceased. She testified that she did not know how the deceased died. She stated that sometime in April 2004, the deceased informed her that he was going to his farm in Nyahururu, where he had planted wheat. She said that he had always done so during the planting seasons, and that he would stay there for a week or so. She stated that he would sleep at his mother's house during that period and that they would always communicate. She stated that he failed to call her after one day, and when she called his mother, the 1st administrator, she was informed that he was not at her house. She put up an announcement on the radio looking for him, but he was not traced prompting her to report his disappearance to the police. She stated that at that time she was staying at Jacaranda Estate in a rental house paid for by the deceased. She stated that the deceased's sister, Mary, started accusing her of having killed the deceased. The applicant testified that with her husband missing she was forced to relocate to her parents' home with the children as she could no longer afford the rent. It was there that the deceased's brother, Tony, went and took a title deed, a photo album and other documents from her. She stated that she was later on arrested and taken to Machakos police station where she met the deceased's sisters who informed her that the deceased's body had been recovered in December 2004. She stated that she was later taken to identify the deceased body. She was told that the body had been recovered at Menengai Crater, and it was said that he had committed suicide. The remains of the deceased were later buried at Nyahururu. She stated that she was not recognized as a wife of the deceased in his obituary, and that she did not attend the funeral as she had been warned by the deceased's family not to. She stated that she had not remarried and was staying with her children. She stated that she was not informed of the succession cause herein and that the letters of administration intestate herein were obtained fraudulently as the administrators did not list her and her children as survivors of the deceased in the petition. She prayed that the grant be revoked.

4. In cross-examination, the applicant confirmed that dowry was paid to her parents. She also confirmed that she was the last one to see the deceased before his death. She stated that she was taken to the police station by the deceased's sister, Mary. She confirmed that she did not know where the deceased's body was found, and that what she knew about the finding was what she was told by Mary. She stated that she filed a case in court to stop the burial but the same was not determined in her favour. She stated that she did not testify at the inquest carried out with regard to the death of the deceased.

5. Her first witness was Peter Ndungwa, a retired senior Chief, who testified that the deceased was his nephew. He stated that the 1st

administrator was his brother's wife. He confirmed that the deceased was married to the applicant and that he had attended the dowry negotiations on behalf of the father to the deceased. He confirmed that they went to the applicant's parents' home in Machakos County. He stated that he accompanied by the 1st and 2nd administrators, Mary Mwendwa, a sister of the deceased, and Aquilina Mwelu, an aunt of the deceased. He stated that they took seven (7) goats, maize and beans and prepared a lot of food for her family. He confirmed that at that stage part of the dowry was paid. He narrated that at the *ntheo* ceremony, they gave three (3) goats, one male and two females. They sat down and interviewed those getting married, then slaughtered the goat and spilled the blood. The liver and the *kikonde* meat were roasted and a piece was given to the couple to share. He stated that the same amounted to a traditional marriage between the two. He confirmed that the event took place on the 14th and 15th of January 2000. He stated that on the 15th January 2000, they fed the villagers and paid part of the dowry. He stated that they gave out goats, which in their culture were referred to as *ngasya*. He explained that there were two ceremonies conducted back-to-back. They took seven (7) goats, three (3) goats of which were for the *ntheo* ceremony conducted on 14th January 2000, and four (4) goats the *ngasya* ceremony celebrated on 15th January 2000. The dowry included five (5) bags of maize and three (3) bags of beans. He further stated that they gave a blanket and one bedsheet to the applicant's mother and the deceased's mother. He stated that the deceased left with his wife on the 15th January 2000. He stated that the two ceremonies were carried out in accordance with the Kamba customary law and that the couple cohabited in Nairobi thereafter. He stated that the deceased was a mechanic and a farmer, and that he had a farm at Nyahururu, where he planted wheat. He confirmed that the couple was blessed with three children; one girl and two boys. He stated that the deceased disappeared and his body was found. That upon his death, his sister chased the Applicant out of their Nairobi home and she went back to their home. In cross-examination he confirmed that the deceased was married to the applicant. He confirmed that Mary Mwendwa was part of the traditional ceremonies, while one Kiio Nguthi did not attend the ceremonies. He confirmed that the administrators chased the applicant away from her Nairobi home. He stated that he did not attend the deceased's funeral because the administrators did not allow him to view the deceased's body. He reiterated in re-examination that the clan boycotted the funeral because they were denied the opportunity to identify the body after it was found following the disappearance.

6. The applicant called her father as next witness. Joseph Muinde testified that the deceased was his son-in-law, married to his daughter, the applicant. He stated that the deceased and his daughter were married on the 14th and 15th January 2000 through Kamba customary law. He confirmed having received dowry from the deceased's family. He stated that the deceased lived with the applicant and were blessed with three children. He testified that at the death of the deceased the applicant went back to his home, and that she had not remarried. In cross-examination, he confirmed that the deceased was married to the applicant through the Kamba customary law in ceremonies which took place on the 14th and 15th January 2000.

7. Nicholas Muinde, the applicant's uncle, testified that he had attended the traditional marriage ceremonies between the deceased and the applicant held on the 14th and 15th January 2000. He stated that he had participated in the introduction ceremony, and confirmed that the *ntheo* was performed in accordance with the Kamba customary law. He stated that the deceased's family paid part dowry for the applicant, and that the applicant was then handed over to the deceased as his wife. He corroborated the evidence given by the second witness, and stated that the events of the 14th and 15th of January were carried out in accordance to the Kamba customary law. He stated that the administrators had warned them not to attend the deceased's funeral despite the applicant having had three children with him. In cross-examination, he stated that the applicant was chased from the deceased's home by the administrators, and that they did not allow her to attend the funeral.

8. The administrators on their part called one witness, Mary Ndivo Mwendwa. She testified that the deceased was her younger brother. She stated that the deceased was cohabiting with the applicant. She explained that when the deceased disappeared it was the applicant who called them and informed them about it. They launched a search for him for six months, but the applicant never accompanied them in the search. She stated that they were later called and informed that the deceased's body had been found hanging on a tree in Menengai Crater. She stated that the applicant was called to identify the body, but she refused, forcing them to go for her at her parents' home. She confirmed that the deceased and the applicant used to stay in Nairobi at Fedha Estate. She stated that the applicant was brought in by the police to identify the body of the deceased and that she stated that it was not her husband's body. She testified that the body was later identified by a dentist to be that of the deceased. She stated that the applicant filed a burial dispute, however the same was dismissed and the witness and her family were granted permission to bury the remains of the deceased. She denied that the 1st administrator participated in the marriage rites between the deceased and the applicant. She asserted that the applicant was not a wife to the deceased as the two had not met all the family members. She conceded that she had been party to a visit to the applicant's parents, with her mother and her uncle, but said that the visit was just for introductions. She denied that there existed a traditional marriage between the two. She identified the applicant as a fiancée to the deceased. She stated that the applicant did not attend the funeral as she feared being accused of causing the death of the deceased. She stated that there was an inquest into the death of the deceased however the same was not concluded. She said that she could not deny that the children belonged to the deceased. In cross-examination, she confirmed that she attended a ceremony at the applicant's home. She stated that the deceased and the applicant lived as a boyfriend and girlfriend. She confirmed that the deceased and the applicant were blessed with three children, and that they were living together until his death in 2004. She further confirmed that the deceased was a farmer and businessman, and that he owned property in Nyahururu. She stated that she used to take care of the applicant at her home and was supporting her children, and denied chasing her away. She stated that she could not confirm that the property of the estate had since been registered in the names of the administrators. She also confirmed that she received a sum of Kshs. 600,000.00 on behalf of the 1st administrator from the proceeds of the sale of Nakuru/Olungei/542. She stated that the same had been given to the deceased as part of his inheritance. She confirmed that the applicant and her children were entitled to the deceased's property.

9. At the conclusion of the oral hearing, the parties were directed to file written submissions. There has been compliance for both parties herein filed submissions in support of their respective cases.

10. From the pleadings and the evidence, the following issues emerge for determination: whether the applicant was a wife of the deceased and whether the grant issued herein ought to be revoked.

11. The applicant alleges that she was married under customary law, and she led evidence to support that assertion. The question that I have to ask is, was there a valid customary marriage and were all the essentials of a Kamba customary marriage met?

12. In Ernest Kinyanjui Kimani vs. Muiri Gikanga & Another (1965) EA 735, the Court of Appeal stated that: -

‘The parties in this case are Africans and therefore the Court will take Judicial notice of such African customary laws as may be applicable...The difficulty remains how are these customary laws to be established as fact before the Court? In some case the Court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of a previous judicial decision or where the customary law is set out in a book or document or reference...but usually in the High Court or in a Magistrate’s Court, the relevant customary law will, as a matter of practice and of convenience, have to be proved by witnesses called by the party relying on that particular customary law in support of his case.’

The same court in *Hellen Tum vs. Jepkoech Tapkili Metto & Another* [2018] eKLR stated that -

‘One of the most crucial evidence in proof of a customary marriage is the evidence of the customary rites required to establish a customary marriage and proof that these rites were indeed fulfilled...’

13. The essentials of a Kamba customary law marriage were summarized in *Munyao Ndolo & 3 Others vs. Mary Nduku Mutisya* [2018] eKLR, where the court said -

‘It is clear from the evidence of all the witnesses that the most essential step in a Kamba custom marriage is the ntheo. That once the ntheo ceremony has been performed, there exists a valid Kamba custom marriage.

49. I have looked at several judicial proceedings where witnesses gave evidence on the issue of marriage under Kamba custom law. I will sample a few.

50. In *Re Andrew Manunzyu Musyoka (deceased)* [2005] eKLR, Steven Mututu Mutisya (DW2) testified as an expert on Kamba custom law. He said that a marriage is contracted when goats of “Ntheo” are paid to the girl’s parents and that even if dowry is not paid “Ntheo” has to be paid and concludes a marriage.

51. He said that if a woman leaves the husband’s home with children and one dies the body has to be taken back to the man’s home for burial. Similarly, if the woman dies when at her parents’ home, the body has to be taken back to the husband’s home if “Ntheo” had been paid. A lady can only inherit from her father’s estate if she divorces her spouse by returning “Mbui sya ulee” – where goats are returned to the husband by the woman.

52. In *Re estate of James Simu Nthiwa* [2005] eKLR there was a contestation as to whether the deceased was married. The objector was the deceased’s mother, she averred that he was not married as he had never informed her of it nor had any dowry been paid in accordance with Kamba custom law where goats called “Mbui sya ntheo” are taken to the girl’s parents and one is slaughtered.

53. She also denied that there were any negotiations with the parents of any girl with a view to marriage. She visited him once in 1977 at his place of work and did not see any woman living with the deceased.

54. I have also looked at the views of Judicial Officers with regard to this issue. In *Re Estate of Stephen Kimuyu Ngeki* (1998) eKLR, JW Mwera, J. (as he then was) stated that Akamba custom marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called Mbui Sya Ntheo.’

14. The same requirements were also discussed in *Raymond Kamwanza Ndolo & Another vs. Christopher Kiamba Maingi* [2018] eKLR in the following terms -

‘In *Andrew Manunzyu Musyoka (deceased)* [2005] eKLR, Steven Mututu Mutisya (DW2) testified as an expert on Kamba customary law. He said that a marriage is contracted when goats of “Ntheo” are paid to the girl’s parents and that even if dowry is not paid “Ntheo” has to be paid and concludes a marriage. He said that if a woman leaves the husband’s home with children and one dies the body has to be taken back to the man’s home for burial. Similarly, if the woman dies when at her parents’ home, the body has to be taken back to the husband’s home if “Ntheo” had been paid. A lady can only inherit from her father’s estate if she divorces her spouse by returning “Mbui sya ulee” – where goats are returned to the husband by the woman.’

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J.W Mwera, J. (as he then was) stated that Akamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called Mbui Sya Ntheo.

89. In his book; *Marriage and Divorce*, 1st edn, (1968) 28 Dr. Cotran summarizes the essentials of a valid Kamba customary

marriage as follows: -

- a. Capacity.
- b. Consent.
- c. Slaughter of a Billy goat.
- d. Marriage consideration.
- e. Cohabitation.

90. From the foregoing, I am satisfied that the most important element of a Kamba customary marriage is the payment of 3 goats (mbui sya ntheo) by the groom.'

15. In *In Re Estate of Benson Ngao Wambua - (Deceased)* [2019] eKLR, the court stated that -

'Dealing with the essentials of Kamba customary marriage, Kneller, J (as he then was) in *Anna Munini & Another vs. Margaret Nzambi* [1984] eKLR expressed himself as hereunder:

"The usual steps taken for a marriage between a Kamba man and a Kamba woman according to their customs were not dealt with in much detail in the evidence. Nzambi's father Muli said they included these: - ...the man has to ask the woman to marry him and if she agrees they begin living together. An elder of the man's clan goes to the parents of the girl and says they are married. There are two types of marriage. First, where it is the first time she is married or secondly it is not the first time. Her parents must know if she is to be married on any occasion but the first. She will have returned from the previous marriage to the home of her parents. On the first occasion the parents will not know she is married until the man sends a messenger to tell them their daughter is with him, married to him.

The man's father prepares African liquor. He takes it to the father of the woman. He tells the girl's father his son has married the girl. The fathers then meet when the man's father brings the girl's father 7 goats. The seventh is eaten. The father of the man then pays the agreed dowry. The standard rate is plenty of African liquor prepared by the boy's father, the amount the elders on each side fix as the dowry, say 8 head of cattle, 46 goats, Kshs 5,000 (or Kshs 4,000 or Kshs 3,000) cash.

The others who spoke about them each added further ones but they were by no means unanimous about them. Thus, between them, they listed these. Each party must consent to the marriage. The bride-price or dowry must be paid by the man's father, or, if he is dead, his guardian, in the presence of some elders. The mother of the groom must discuss the proposed marriage of her son with the father of the girl (and, presumably inspect her") If it is a second or third marriage then the man must tell his wife or wives he is marrying again so they may go and see the woman and attend the ceremonies. (Munini and Musangi were adamant that if this were omitted, why then the union was no marriage).

At the end Mr. Mututo brought in Dr Cotran's summary of the essentials of a valid marriage in Kamba customary in Kenya: *I Marriage and Divorce*, 1st edn, (1968) 28 which is: -

- a. Capacity
- b. Consent
- c. Slaughter of a Billy goat
- d. Marriage consideration
- e. Cohabitation

Dr Cotran deals with each, save for cohabitation, in greater detail beforehand (see pp 23 and 24) and I set out some of these details.

At one time the male and female had to be circumcised to marry (p 23). The female may still not marry before she has had her first menstrual period. The man may enter into any number of marriages provided each subsequent one is valid. A woman may not do so while her husband is alive. Consanguinity, affinity, a blood brotherhood relationship or the fact that the intended parties were breast fed by the same woman are bars to marriage among the Wakamba.

Dr Cotran has the same steps in the formation of the marriage as those in the evidence though he has it that the mother of the man visits the mother of the woman to see that she is satisfied, though which mother is meant to be satisfied is not clear. At any rate it is not the man's father she visits, as Ruth Gatongu would have it. Then there are visits with presents of goats and beer made by the man's father or relatives to the woman's father (and during one of those the dowry is fixed) and a return visit by the man's father and some of his elders to see what sort of family his daughter is joining. Later, the girl is collected by her future husband and escorted to his house. He is accompanied by one male and two female relatives. The bride's neck is smeared with ghee by her mother-in-law on arrival. The marriage is not consummated that night but on the next. The bride is visited by her friends on the third day with presents

and they wail with regret because she has left the ranks of the unmarried (and what the husband's reaction to that, if he hears it, is not revealed).

Dr Cotran includes one that was not touched upon in the evidence. One of the Billy goats (which he calls a ram) belonging to the man's father or guardian must be slaughtered by the woman's father and its blood allowed to seep into the ground.

So some of the conditions are in the evidence and some in the book and some in both. It all depends, of course, on what questions the witnesses in this trial and members of the special law panels, made up of persons having special knowledge of the Kamba law, were asked. They were not the same and they were more numerous for the panel.”

16. As earlier stated the burden of proof was upon the applicant to prove that there was a customary marriage between her and the deceased. The applicant stated that the ceremony took place of the 14th and 15th of January 2000. She stated that on 14th January 2000, the deceased and his mother together with his uncle Peter Ndungwa visited their home and took three goats. One which was slaughtered blood spilled and a piece of meat given to the couple to share. She testified that after the ceremony the elders drunk the Kamba local brew and declared them husband and wife. She stated that as per the Kamba tradition the deceased and his family spent the night at her home and fed them on the next day. she described it as a feast for her marriage to the deceased. She stated that Mary Mwendwa and Aquilina Mwelu attended the ceremony and in fact cooked for them on the second. Peter Ndungwa, her witness and an uncle to the deceased, testified that they took seven goats, maize and beans and prepared a lot of food for her family. He confirmed that at that stage part of the dowry was paid. He narrated that for the *ntheo* they gave three goats, one male and two females. They sat down and interviewed those getting married then slaughtered a goat and spilled its blood. it's liver and the *kikonde* meat was roasted and a piece was given to the couple to share. He stated that the same amounted to a traditional marriage between the two. He confirmed that the event took place on the 14th & 15th of January 2000. He stated that on the 15th they fed the villager and paid part of the dowry. He stated that they gave out goats which in their culture is referred to as *ngasya*. He testified that they took seven goats, three goats for the *ntheo*, four goats for *ngasya*, five bags of maize and three bags of beans which were part of the dowry. He further stated that they gave a blanket and one sheet to the applicant's mother and the deceased's mother. He stated that the deceased left with his wife on the 15th January 2000. He stated that the ceremony was carried out in accordance with the Kamba customary law. His evidence was corroborated by that of Nicholas Muinde and Joseph Muinde the applicant's father. The administrators witness also confirmed the visit although she disputed the fact that it was either for *ntheo* or *ngasya*.

17. From the evidence, it is clear that there was a ceremony at the applicant's home and that several rites were carried out. The applicant's witnesses gave a vivid description of the same, there were seven (7) goats that were exchanged, a goat was slaughtered and blood spilled, the elders drunk local brew and the deceased's family cooked for the applicant's family. It is my opinion that these rites fit into the essentials of a Kamba customary law marriage as described in the authorities that I have cited above and the applicant has sufficiently proved that she was married to the deceased under the Kamba customary law.

18. The witness called by the administrators attempted to pour cold water on the significance of the ceremonies. I note that she was a sister of the deceased. I take judicial notice of the fact that she could not possibly have been an elder in the proceedings. Neither can it be taken that she was an expert in Kamba customary law, able to speak authoritatively on matters touching on validity of customary marriages of person of Kamba descent. Her testimony cannot therefore override that of her uncle and of the applicant's father and uncle, who, according to tradition, would be at the forefront in such ceremonies. I find that her testimony did not in any way take away from the evidence led by the applicant on her customary law marriage to the deceased.

19. Even if were to find that there was no valid customary law marriage between the deceased and the applicant, I find that the deceased and the applicant satisfied all the requirements stated in *Hortensiah Wanjiku Yawe vs. The Public Trustee* CACA No. 13 of 1976, upon which a court could presume that the two were married. There is evidence that the two cohabited as man and wife, initially at Nyahururu and later in Nairobi. The administrator's witness confirmed that cohabitation, even as she sought to downgrade their status to that of fiancées and boyfriends/girlfriends. The cohabitation produced three children, whom the administrators' witness acknowledged as children borne by the two cohabitantes. Thirdly, traditional ceremonies were conducted in an effort to formalize the relationship. The relationship between the two had all the hallmarks of a marriage. I need not presume marriage, however, as I have already found for a fact that there was a valid customary law marriage between the two.

20. When determining issues of revocation and annulment of grants, the courts are guided by the provisions of section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides as follows: -

‘A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 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) apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - (ii) to proceed diligently with the administration of the estate; or

(iii) 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 has produced any such inventory or account which is false in any material particular; or

e. The grant has become useless and inoperative through subsequent circumstances.’

21. In *Jesse Karaya Gatimu vs. Mary Wanjiku Githinji* [2014] eKLR, the court was of the view that -

‘The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.’

The Court of Appeal in *Matheka and Another vs. Matheka* (2005) 2 KLR 455 laid down the following guiding principles: -

‘A grant may be revoked either by application by an interested party or by the court on its own motion. Even when the revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.’

The position was affirmed in *Joyce Ngima Njeru & Another vs. Ann Wambeti Njue* [2012] eKLR where it held that -

‘The central core of the ingredients required to be established under section 76 of the L.S.A. is that it is meant to be used as a vehicle to attack and fault the process of either obtaining the Grant or in active use of the Grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merits.’

22. In the instant cause, the grant of letters of administration intestate were issued to the administrators on the basis that they were the only survivors of the deceased. When applying for the same, the administrators listed themselves as the only survivors of the deceased. From the evidence, it is clear that the deceased was married and had three children at the time of his death. The administrators’ witness conceded that the deceased had the three children with the deceased, and described her as a fiancée of the deceased. The witness also confirmed that the children were well known to the family and that the administrators were willing to take care of them. It is, therefore, strange in the circumstances that the administrators herein would turn a blind eye to their interests and not include them in the schedule of the survivors of the deceased.

23. In *Re Estate of Ndinguri Karugia (Deceased)* [2017] eKLR the court held that -

‘The non-disclosure of all beneficiaries of the deceased’s estate amounted to concealment of material facts. The grant of 27th March 2006 confirmed on 17th August 2006 were fraudulently obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. The Applicant narrated in Court the children of the deceased from both the 1st House and 2nd House.

This followed the subsequent letter dated 31st August 2006 annexed to the applicant’s application from the same Chief Michael M. Mbugua of Ngewa location.

In the case of *Albert Imbuga Kisigwa vs. Recho Kawai Kisigwa*, Succession Cause No.158 Of 2000, Mwita J. in a decision rendered on 15th 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.’

24. In *Solomon Mwangi Mwaura vs. Jackson Kuria Mwaura* [2017] eKLR the court held that -

‘The information that must be disclosed in an application for grant in cases of intestacy is provided for under Section 51(2)(g) of the Law of Succession Act. The provision states that:

“An application shall include information as to – in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.”

12. Rule 7(1)(e)(i) of the Probate and Administration Rules supplements Section 51(2)(g) and reads as follows:

“... the application shall be by petition... supported by affidavit... containing so far as they may be within the knowledge of the applicant, the following particulars – in cases of total or partial intestacy the names, addresses mental state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving child, like particulars of such person or persons who would succeed in accordance with Section 39(2) of the Act.”

13. In his Affidavit, the Respondent deponed that his petition for the letters of administration was made with the knowledge and full participation of all the beneficiaries as they wished to pursue a civil case in respect of the assets of the deceased which had been transferred fraudulently. No evidence has been availed in support of this allegation. Indeed, in the event the grant was sought in pursuit of a civil case, the appropriate application would have been for special limited Grant of Letters of Administration.

14. Rule 26 of the Probate and Administration Rules relates to the requirements attached to Grants of letters of administration as regards notifications and consents; and states:

(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.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.

15. The effect of failure to comply with Rule 26 of the Probate and Administration Rules was discussed in *Al-Amin Abdulrehman Hatimy v. Mohamed Abdulrehman Mohamed & another* [2013] eKLR where the court held that the Law of Succession by virtue of Rule 26 requires that any petition for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate. The duty of a litigant is to make a full and fair disclosure of the material facts.

16. In sum the Respondent made an application to the court for Grant of Letters of Administration wherein he indicated that he was the sole heir to the estate of the deceased. He did not disclose to court that the deceased left other beneficiaries who were his siblings. The non-disclosure of all beneficiaries of the deceased's estate amounted to a significant defect in the proceedings leading up to the making of the grant. The non-disclosure of the applicants, whether inadvertent or otherwise, amounted to a concealment of important matter from the court and it had the effect of a misrepresentation of the true state of affair to the court.

25. From the forgoing it is clear that there was no disclosure of the fact that the deceased was survived by a widow and three children. Further, the widow of the deceased, the applicant herein, was not made aware of the filing of the petition and only got to know of the same after confirmation of the grant. It is, therefore, my finding that there was concealment of important information, of the existence of the widow and children, and that, alone, is sufficient ground to revoke the grant.

26. In the end, I hereby dispose of the application dated 14th January 2013 in the following terms-

a. That I hereby declare that the applicant herein was a wife of the deceased having married him under Kamba customary law;

b. That I hereby declare that the survivors of the deceased for the purpose of succession to his estate are Irene Nthenya Mutune, Karen Kithia Muoki, Eric Ndivo Muoki and Brian Mutune Muoki;

c. That I hereby declare that the grant of letters of administration intestate herein made on 16th September 2008 was obtained fraudulently and by concealment of important matter from the court, and I hereby revoke the same;

d. That the orders made on 15th February 2011 confirming the grant herein are hereby accordingly vacated, and the certificate of confirmation of grant issued on the basis of the said orders, bearing even date, is hereby cancelled;

e. That any and all transactions relating to the assets of the subject estate that may have been carried out on the strength of the said certificate are hereby annulled, and any of the assets of the estate transferred or conveyed on the basis thereon shall be restored to the estate;

f. That a grant of letters of administration intestate shall issue accordingly to Irene Nthenya Mutune, who shall move forthwith to have it confirmed;

g. That each party shall bear their own costs; and

h. That any party unhappy with the orders that I have made herein shall be at liberty to challenge them on appeal at the Court of Appeal within twenty-eight (28) days.

DATED AND SIGNED AT KAKAMEGA THIS 24th DAY OF APRIL, 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 10th DAY OF May, 2019

A ONGERI

JUDGE