



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 85 OF 2006

IN THE MATTER OF THE ESTATE OF EUSTACE KAGAU KANGERWE (DECEASED)

JUDGMENT

1. The deceased herein died on 22nd January 2005. Representation to his estate was sought in a petition lodged herein on 17th January 2006, by Ann Njoka Kagau, in her alleged capacity as widow of the deceased. He was expressed to have been survived by the petitioner, and thirteen (13) children, being Moffat Nyaga Kagau, Dickson Njeru Kagau, Joseph Njagi Kagau, Johnny Nyaga Kagau, Jonah Nderi Kagau, Humphrey Njiru Kagau, Patrick Jonah Nderi, Oscar Muriithi Kagau, Rosaline Gichugu, Rose Betty Gichugu, Catherine Muthoni, Pamela Njoki and Florence Marigu. He was expressed to have died possessed of Embu Municipality/39, 42, 67, 298, 331, 706, 771, 840, 860 and 1112/331, Gaturi/Kithimu/539, 2702, 5091, 5092, 5093, 5094, 5096 and 6002, Gaturi/Nemburi/2889, Gaturi/Weru/1487, 1693, 3796 and 3799, Kagaari/Kigaa/3128, Kivangua Market Plot No. 14, Mbeere/Mbita/1617, Mbeti/Gachuriri/78, Mbeti/Kiamuringa/125, Ngandori/Kangaru/T23 and T24, Nganduri/Kirigi/2323, 2532, 3226, 3514 and 6757, Ngandori/Manyatta/T281, Nthawa/Siakago/291 and Weru/Kiamuringa/125. He was also said to have had shares in ten (1) companies and firms, and to have operated forty three (43) bank accounts. He was also said to have owned five (5) motor vehicles. A grant of letters of administration intestate was accordingly made to the petitioner on 16th March 2006. The administrator lodged a summons for the confirmation of her grant on 3rd October 2006. She proposed to have the estate devolve wholly upon her. The application is still pending.

2. On 17th October 2006 a summons was lodged herein for revocation of the said grant. The application is dated 16th October 2006. It is brought at the instance of Philis Wanjue Kagau. She swore an affidavit in support on 16th October 2006. She alleges that the grant was obtained fraudulently by reliance on false statements. She alleges that the fact that she was also widow of the deceased was not disclosed. She alleged that she had cohabited with the deceased since 1966, contracted a customary law marriage with him in 1981, and eventually adopted his middle name as part of her name. She alleges that she had four children with the deceased, being Irene Wawira, Judy Wanjira, Faith Rachel Wambeti and Immaculate Mercy Njura. She claims that she lived with the deceased up to the point of death, and she is the one who rushed him to hospital. She further states that the deceased also had a third wife, who is also deceased. Her name is given as Grace Wakina, who had two children with the deceased, being Peterson Ndwiga and Lenson Gichovi. The sons of the two sons of Grace Wakina are themselves dead, but were survived by named widows who were not listed as survivors in the petition. She also alleges that vehicles owned by a company operated by the deceased, called Kagau Enterprise Company Limited, had been concealed. She asserts that the final hospital bill arising from the deceased's hospitalization at Nairobi Hospital remains unsettled. She further states the administrator collects the revenue of the estate but has not taken any steps to settle the bill. She claims that the deceased had given her Embu Municipality/1112/62, which has rental income which she utilizes for her upkeep and that of her school going child.

3. She has attached several documents to her affidavit to reinforce her assertions. There is a joint affidavit

allegedly sworn by Eustace Kagau Kangwere and a Philis Wanjue Dishon on 6th July 1987 alleging that they had contracted a customary law marriage in 1981. She has also attached copy of her national identification card, where her name appears as Philis Wanjue Kagau. There are also copies of birth certificates of her children. That of Silas Kathuri indicates that he was born in 1966 to Phyllis Wanjue Kiragu and Eustace Kagau Kangwere, issued on 20th September 1982. That of Eiline Wawira indicates that she was born 30th September 1970 to Phyllis Wanjue Kiragu and Eustace Kagau Kangwere, issued on 20th September 1982. That of Judith Wanjira indicates that the child was born on 16th May 1973, to Phyllis Wanjue Kiragu and Eustace Kagau Kangwere, issued on 20th September 1982. That of Faith Rachael Wambeti indicates that she was born on 31st January 1983 to Phyllis Wanjue Kindoro and Eustace Kagau Kangwere, issued on 22nd February 2006. That relating to Imaculate Mercy Njura states that she was born on 28th September 1988, to Phyllis Wanjue Kindoro and Eustace Kagau Kangwere, issued on 11th February 1994. She also attaches copies of the logbooks of the vehicles allegedly belonging to the deceased, and documents on rental income accruing to the estate.

4. There is a response to that application by Moffat Nyaga, through an affidavit sworn on 26th October 2006. He responds mainly to the allegations made in the affidavit in support of the application relating to the deceased's motor vehicles.

5. Joseph Njagi Kagau swore an affidavit on 26th October 2006 in response to the application. He states that the administrator had been married under statute and the deceased had no capacity in the circumstances to marry someone else. He avers to have been close confidant of his father, who never mentioned anything to him about a marriage to the applicant. He states that the applicant worked at the Top Life Bar between 1966 and 1977. She was then employed by the deceased in 1978 as a clerk at the Embu Suppliers and worked there in that capacity up to the date of the deceased's death. He says that she was later to become a business confidant of the deceased, due to the nature of her duties, and she was able to have access to confidential family business information. He alleges that by the time she was employed by the deceased she already had three children with other men. He asserts that the birth certificates attached to the applicant's affidavit were all forgeries. He claims that the applicant took advantage of the deceased's failing health to manipulate him and commit acts of fraud. He points out some assets that he states changed hands from the deceased to the applicant in suspicious circumstances; these include Embu Municipality/703 Plot No. 100, Embu Municipality/912, Nganduri/Kirigi/293 and Nganduri/Weru/1004. He states that the deceased collapsed at his place of work, and the applicant, who happened to be at the scene, took him to hospital. He alleges that whenever the applicant took the deceased to hospital she would insist on hospital records reflecting her as next of kin. He concedes that there is an outstanding bill at the Nairobi Hospital. He contests the allegation that Embu Municipality/1112/62 had been given to the applicant by the deceased, insisting that it was an asset belonging to the estate.

6. There is another affidavit sworn on 7th November 2006 by Rose Wawira Njue. She complains that her name was not disclosed in the administrator's petition despite being a daughter in law of the deceased. She states that her late son was one of the sons of the administrator, and not a child of the Grace Wakina as averred by the applicant. She states that they had cohabited as man and wife since 1991, before they solemnized the same in church in 2002. Her husband died in 2003. They got two children, whose names are stated in the affidavit. She asserts that the administrator had deliberately concealed her name from the list of beneficiaries. She evinces support for the application for revocation of the grant.

7. The administrator filed her own reply to the application on 13th November 2006, through an affidavit sworn on an unknown date in 2006. She asserts that she was the only wife of the deceased, having been married at the CMS Church at Kigali in Embu on 24th July 1945. She states that the affidavit of marriage allegedly sworn jointly by the applicant and the deceased was a forgery. She argues that as she and the deceased had contracted a statutory monogamous marriage there was no capacity to contract other marriages during the currency of that marriage. She avers that even if the parties were to contract a customary law marriage, her consent as first wife was still mandatory. She contests the allegation that the deceased and the applicant had children together, charging that the paternity of those children was well known. She dismisses the attached certificates of birth as forgeries. She argues that if her husband had

adopted those children, it was imperative that the same ought to have done legally and procedurally.

8. The applicant filed an affidavit on 17th November 2008, sworn on 16th November 2006. She avers that the fact of the statutory marriage between the deceased and the administrator was no bar to her and her children from inheriting from the estate of the deceased. She asserts that the relevant Embu customary law rites of marriage were fully complied with in the case of the union between her and the deceased. She concedes that her first three children were not sired by the deceased, but he accepted them into his home as his own. The deceased is also to have allowed the applicant to use his name when applying for the children's birth certificates and identity cards. He is also said to have paid for their education, and that they depended on him until his death. She states that her last two children were sired by the deceased, and therefore he was their biological father, and they equally depended upon him up to the date of his death. She claims that her children donated blood for the deceased when he was hospitalized. She avers that the vehicles stated in her affidavit in support had been registered in the name of a limited liability in which the deceased was the principal shareholder, but the company had collapsed and the deceased took charge of the vehicles. She asserts that when she married the deceased in 1966 he had few properties and that the bulk of the estate was acquired jointly with her. She denies that the deceased collapsed at work, saying that he fell sick at her house and she took him to hospital. She denies ever working as a bar maid, nor as a clerk for the deceased. She avers that she kept the deceased's identity card and used it to obtain the death certificate.

9. An order was obtained by consent on 23rd April 2008 for conduct of a deoxyribonucleic acid (DNA) on Faith Rachel Wambeti and Immaculate Mercy Njura to determine whether the two were biological children of the deceased. The remains of the deceased were to be exhumed for that purpose. The body of the deceased was exhumed as per the consent order. There is an affidavit on record sworn by the pathologist who obtained samples from the two children, as well as from the body of the deceased. The said affidavit was sworn on 18th March 2009, by Emily Adhiambo Rogena. She states that she was unable to produce a DNA profile from the deceased for comparison with those of Faith Rachel Wambeti and Immaculate Mercy Njura, and blamed it on the nature of the chemical used to embalm the body of the deceased before burial. A copy of the report of the pathologist, dated 27th January 2008, was placed on record by an affidavit of Elijah N. Ireri, sworn on 24th March 2009, and filed herein on 21st April 2009.

10. The parties filed further affidavits in 2010 with leave of court. There is an affidavit sworn by the applicant on 12th August 2010 filed herein on even date. It seeks to place before court documents to show that the Commissioner of Oaths before whom she had sworn the joint affidavit of marriage in 1987 with the deceased was dead, and also to show that her identity card was genuine. There is also an affidavit by the advocate, Huron Muricho Junias Utuku, who allegedly drew a lease agreement between applicant and another over Embu Municipality/1112/67.

11. On the administrator's side were sworn several affidavits. There is one by Harriet Kanini, sworn on 13th August 2010. The purport of her evidence is that up to 1977 the applicant was not married and had had three children. She talks of having fought with the applicant several times over her boyfriend, Bjorn Estwick. The second affidavit is by Josphat Njiru Mwindu Kirima, sworn on 13th August 2010. He claims to know the applicant by virtue of her having been classmates with his wife. He proceeds to give alleged details of the applicant's background – her schooling, history of her births, and her employment history up to 1976. Bernard Mbogo swore an affidavit on 13th August 2010, alleging to have been working at the deceased's shop at Embu, where the applicant had been employed since 1999. He alleges that she was never married to the deceased. Josphat Mutua's affidavit was sworn 13th August 2010. He claims to be a nephew of the deceased. He states that the applicant worked at the deceased's business known as Embu Supplies Limited. He avers that the applicant was not married to the deceased at the time. Jeremiah Njeru Ndwigah swore an affidavit on 13th August 2010, to say that he had employed the applicant as a bar maid at Embu Top Life Bar and Restaurant between 1975-1976, and that she had two children then. Silas Kathuguna swore an affidavit on 13th August 2010, to say he was a driver of the deceased between 1993 up to date of his death, and confirmed that the applicant worked as a manager at the deceased's business. He alleges that it was he and the applicant who rushed the deceased to hospital for his final admission. He

asserts that the applicant was not married to the deceased. Duncan Kiura's affidavit was sworn on 13th August 2010, it purports to state the Embu customs relating to marriage. The last affidavit was sworn by Mathew Kiarago Jackson Munyi on 13th August 2010. He alleges to have been a fiancé of the deceased from the time she was a bar maid. Their relationship allegedly fell apart when he discovered that she had two children that she had not disclosed to him. She had a third child with him. She was still in a relationship with him when she was employed by the deceased as a clerk. He alleges that she has never been married to any one at any time.

12. There is another bundle of affidavits placed on record but the applicant in September 2010. One is by the applicant herself, sworn on 20th September 2010. It is in response to bundle of affidavits filed by the administrator. She denies knowing Jeremiah Njeru Ndwigah, but concedes some facts, such as that she once worked at the Top Life Bar, she had children at the time and that she was not married. This was with respect to 1976. She says that Bernard Mbogo was their employee at Embu Supplies. Regarding the affidavit of Josphat Mutua she states that the same was not signed by the alleged deponent, but she nevertheless denies the alleged closeness between the deceased and the deponent. On Silas Kathuguna's affidavit she states that he was a driver, and asserts that she is the one who paid the deposit for the deceased's admission at Nairobi Hospital. She dismisses the affidavit of Josphat Njiru Mwindu Kirima as one founded on hearsay. She says that Mathew Kiarago Jackson Munyi was only a friend of hers, not a fiancé, and the contents of his affidavit were falsehoods. She dismisses Harriet Kanini as a house help of the deceased. Regarding the affidavit of Duncan Kiura, she states that the rites deposed to in that affidavit had been complied with. Her sentiments are echoed by Namu Kathiga, Rose Wawira Njue and Jedida Mutitu Nyaga, who swore affidavits on 17th September 2010. Namu Kathiga alleges to have known her for twenty-five years, and asserts that she was married to the deceased. So does Jedida Mutitu Nyaga. Rose Wawira Njue is a widow of one of the sons of the deceased. She asserts that the applicant was a wife of the deceased. There is on record another affidavit sworn on 13th August 2010 by one P L Ingutia. He was then working with the Civil Registration Department. He confirms that the birth certificates in the names of the applicant's children were genuine.

13. The administrator passed on during the pendency of the application. She was substituted by Moffat Nyaga Kagau and Johnny Nyaga Kagau. A consent order was recorded on 17th December 2014 in that behalf, and a grant of letters of administration intestate in those terms issued out of the registry.

14. The oral hearing of the application commenced on 4th November 2015. The first on the stand was the applicant. Her evidence breathed life to the averments made in her various affidavits. She claimed that she married the deceased in 1981, although they were friends since 1966. She stated that she was not cohabiting with the deceased in 1966, and asserted that she never cohabited with the deceased between 1966 and 1981. She concedes that the deceased was not the biological father of the child born in 1966, nor the next two, but he sired the last two. She conceded that the birth certificates that she obtained indicate the deceased as the biological father of the first three children. She mentioned that it was the deceased who obtained the five children's birth certificates. She stated that she and the deceased married under customary law in 1980, and in 1981 she swore the joint affidavit of marriage with him. She mentioned the persons who were allegedly present at the customary law ceremony, adding that they were all dead. She mentioned that there was only one ceremony. She conceded that the deceased had married the original administrator in church in 1945, but stated that there was nothing wrong with the man going through a customary law ceremony of marriage with another woman, saying that she was aware that the deceased was at the time married to another woman. On her first three children, she stated that she was not aware that the deceased ought to have formally adopted them. She stated that she did not know the person called Jeremiah Njeru Ndwigah, saying that she never worked at the same place with him. She said she joined Embu Supplies as a sales woman and rose to position of manager, and she continued to work in the firm up to the deceased's demise. She denied fiddling with his documents, stating that he signed off some properties to her as gifts, although he did not register any in her name during his lifetime. She said that some of the assets transferred to her name during the deceased's lifetime were Mugonya/Weru/104 and another whose details she could not immediately recall. She said she did not know whether the original administrator had any property transferred to her name by the deceased during his lifetime. She testified that the deceased got sick at her home at Mugonyu, and was attending clinics

from there from time to time. She asserted that the deceased did not collapse at work. What happened was that his legs got swollen and she decided to take him to Nairobi Hospital. She alleged that they left home together for work, and then they left the work station for hospital. They passed by the work station to pick up the driver. She took the deceased to Nairobi Hospital as that was where he used to be treated. She asserted that she was the one who paid the deposit. After his admission she telephoned his son Njeru to inform him of his father's hospitalization. She said that she did not inform the son before they left for the hospital as she was the one who usually took the deceased to hospital. She said that she picked some money at work for his hospitalization. The other family members then came to hospital the following day to see him and they continued to care for him until he died. She said the deceased's national identity card was given to her after the latter was admitted in hospital; she was to take it home. It was allegedly given to her in her capacity as his wife. She used it to obtain copy of the death certificate. She denied exploiting her position as manager of the business to forge documents and change particulars. She said that she did not apply for a letter from the Chief of Ngandori Location, where the deceased hailed from. She said that she had not yet applied for representation to the estate of the deceased, and asserted that the assets in her name did not form part of the deceased's estate. She said she did not know the rites that were performed at her marriage ceremony as she did not attend the elder's meeting.

15. The administrators' case commenced on 23rd February 2016. The first on the stand was Moffat Nyaga Kagau, one of the administrators and sons of the deceased. He was a son of Ann Njoka Kagau, the original administrator, and said that his mother had been married under statute in 1945. He stated that the applicant was an employee of the deceased at the latter's business's called Embu Supplies. He allegedly met her for the first time in 1977 when she joined Embu Supplies. He said that she was not married to the deceased as he had never heard of the marriage although he was the deceased's first born son. He said that their father never told them that he had married the applicant. He said he knew the applicant's children. He asserted that Cyrus Kathuri was not a child of the deceased. He conceded that it was the applicant who took the deceased to hospital, together with the deceased's driver. He claimed that the deceased fell ill at the shop; the two took some money from the shop and took him to hospital. He stated that the family learned that some assets had been given to the applicant as gifts. They came by that information after the deceased's death. He stated that no one else had had property transferred to them by the deceased during his lifetime. He asserted that the applicant had gotten a lot of property from the deceased, the bulk of the estate. He stated that the deceased had another wife, called Grace, who died in 1978. Her children were alleged raised in the house of his mother. She had been allegedly married under Embu customary law. He acknowledged seeing photographs where the deceased attended the wedding of one of the daughters of the applicant, but stated that he posed for those photographs with child not as daughter thereof but as an employer of the applicant the mother of the child in question. He stated that the deceased trusted the applicant, when he became sickly. He alleged that he used to leave blank forms around signed or bearing his signature. He testified that the DNA test was not possible as the pathologist was unable to obtain DNA material from the remains of the deceased.

16. The administrators' next witness was Richard Mbogo Njagi. He described himself as a retired teacher and a farmer. He essentially testified on Embu customs and traditions relating to marriage. He conceded that he had not written any works on Embu customary law.

17. The next on the stand was Joseph Njagi Kagau. He was a son of the deceased by his deceased wife Ann Njoka Kagau. He asserted that she was the only wife that his father had at the time of his death, admitting though that he had had another wife who had predeceased him. He stated that the applicant was not a widow of the deceased. He claimed to have been close to his father, so much so that he would have known if he had married another wife. He knew the applicant as an employee of the deceased. She allegedly started work in 1977, and worked for the deceased till his death. He asserted that her children were not sired by the deceased. He said he was unaware that some of the assets had been transferred to the applicant's name, adding that she might have taken advantage of the deceased old age to have them transferred to her name. He said that the deceased never transferred property to anybody else. He said that when the deceased had his final illness, it was the applicant who took him to hospital, with a driver. He described it as an emergency, suggesting that the deceased just happened to be with or near her when he fell ill. He said that although a DNA test was conducted the same did not confirm the said children to have been sired by the deceased. He stated that he knew his father's other wife, Grace Wakina. She had

lived together with his mother, and their children used to eat together. He stated that the applicant never lived with them.

18. The next on the witness box was Jeremiah Njeru Ndwiga. He alleged that he was the manager of the Embu Toplife Bar where the applicant initially worked a waitress. That was in 1975/1977. She was described as grown up. She left in 1976. She was not married then, and was said to have had two children by then.

19. The administrators' last witness was Dickson Njeru Kagau, a son of the deceased. He described the applicant as an employee of his father and a director of Embu Supplies Limited. She was allegedly a co-director of the company with the deceased. He stated that she was still operating the business but had excluded him from the same. He described her as a minority shareholder who was also the Managing Director. The building on which the business was operated from was allegedly constructed in the 1990s. The business was said to have started as a partnership of the deceased with other men, the applicant was an employee of the partnership. It was later converted into a limited liability company. He and the applicant were admitted as shareholders at the same time. The deceased was said to have been the chairman of the company. He said that he knew the applicant's children, but asserted that they were not sired by the deceased.

20. At the conclusion of the trial, the parties opted to file written submissions. When the matter was mentioned on 5th September 2016, counsel stated that they had filed their written submissions. I have carefully gone through the record before me, but I have not come across any such written submissions filed by the parties.

21. What is for determination is the application for revocation of the grant on record. Applications for revocation of grant are provided for in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. There are three general grounds upon which such applications may be founded. The first is where there are problems with the process of obtaining the grant. This could be on account of the proceedings being defective, or being founded on fraud, misrepresentation or concealment of facts. The second general ground has something to do with problems with the process of administration of the estate. That would have something to do with failure to apply for confirmation of grant within the period allowed in law, lack of diligence in administration, and failure to render accounts as and when required. The last general ground is where the grant has become useless and inoperative through subsequent events. This usually happens, for example, where a sole administrator or executor passes on.

22. In the instant matter, the applicant relies on the first general ground, that there were issues with the process of obtaining the grant. She claims that the process was defective, to the extent that the administrator had concealed certain matter from the court. Her case was that it was not disclosed that she was also a wife of the deceased, and that they too had children. It is on that basis that the applicant invites the court revoke the grant. The administrators on their part state that the applicant was never married to the deceased. The relationship that existed between them was that of an employer and employee. It is further contended that the children that the applicant alleges to have been hers with the deceased were never in fact sired by the deceased. The applicant countered that by stating that although she started off as an employee of the deceased, she ended up being his wife. She mentioned that they had contracted a customary law marriage and produced an affidavit of marriage executed by her and the deceased as evidence of the alleged marriage. On the children, she concedes that the deceased did not sire her first three children, but her last two children were actually fathered by him.

23. The only issue for me to determine in order to dispose of the application is whether the applicant was a widow of the deceased or not. The evidence placed before me is quite hazy. The applicant initially alleged, in her affidavits, that she cohabited with the deceased since 1966, but it turned out that was not so. She settled eventually on 1980/1981 as the year of marriage. She claims that there was a customary law marriage. She called no witnesses. The persons who were said to be privy to the customary ceremony had all allegedly died by the time of the hearing. Her next piece of evidence was the joint affidavit of marriage allegedly sworn by her and the deceased. The advocate who drew the same had also died by the time of the trial. The administrators merely dismissed the affidavit, but did little to discredit it. One way

of challenging its authenticity would have been by way of evidence that the signature on it purported to be that of the deceased was not in fact of the deceased, but a forgery. Without such evidence I would find it hard to ignore it. I am persuaded that indeed the same was executed by the deceased and the applicant. It states that there was a customary marriage between the parties. I shall accordingly hold that there was such a union.

24. The applicant claimed that she had been living with the deceased, and said that actually on the day he was taken ill for the last time it was at their house, and she is the one who took her to hospital. The administrators did not quite counter that evidence. They led no evidence regarding the deceased's living arrangements at the time which would have suggested that he lived elsewhere, or at least cast doubt on the allegation that he did live with her. The only attempt they made was to present the driver who took the deceased to hospital and to suggest that the deceased fell ill at work, and as the applicant was at work with him, she seized upon that opportunity to take him to hospital. The applicant on her part explained that the deceased fell ill at her Embu home, then she drove him to the shop so that they could pick some money for his medical bills and to also pick up a driver to drive them to Nairobi. I find the explanation by the applicant more plausible. The applicant has been described as manager or Managing Director of the business, she no doubt was closer to the deceased in terms of the operations at the business. She would have perhaps been able to have better information as to when exactly the deceased fell ill. It sounds plausible that the driver only got to know of the matter when called upon to drive the pair to Nairobi.

25. There is also the issue of the applicant's status as an employee of the deceased. The initial impression created from the affidavits of the original administrator, the applicant was a clerk in the business up to the date of deceased's death. However, at the oral hearing, she was described variously as a manager at the business. The last witness shed more light on this matter. He said that she was not just an employee in the business, but a shareholder in it. He also said that she was also a director in the business, and not just a simple director, but the Managing Director. The said witness, a son of the deceased, was also had shareholding in the business, the other shareholder being the deceased. Although the witness was a shareholder, he does not appear to have been appointed a director of the company, yet the applicant was made the Managing Director, with the deceased as Chairman of the Board. I find this a little curious. The applicant was not just a mere employee in the business, she was part owner and its executive director. She had no peculiar qualifications that would have pushed her to that position, drawn from her educational background or professional training. She appears to be a primary school dropout, from the material before me, who rose from a bar maid to clerk to sales person to Managing Director. Such a meteoric rise could only be influenced by other factors, such as a special relationship with the principal in the business. All these are pointers that there was more than an employer/employee relationship between the applicant and the deceased. Indeed, the first witness for the administrators stated that the deceased trusted her.

26. Then there is the issue of the assets that the deceased had allegedly transferred to the name of the applicant. She alleges that deceased had transferred the same as gifts to her. The administrators accuse her of taking advantage of the deceased or of even using fraud to have the assets transferred to her. She was accused of manipulation and forgery. These are serious charges. They border on criminality. The administrators did not adduce evidence to support a case of manipulation or fraud or forgery. No evidence was called from the relevant lands office to demonstrate that the said transfers were fraudulent, and that the applicant was party to fraud. No evidence was adduced that the administrators, in whom the estate vests by virtue of section 79 of the Law of Succession Act, made any report to the police authorities with respect to frauds and forgeries committed by the applicant. Indeed, there was no evidence of any prosecution or conviction of the applicant on those grounds. There is also no evidence that the administrator sued the applicant at the land court for nullification of the titles, and no proof of a court decree ordering nullification thereof. That would suggest that the transfers were authentic. It would also suggest that the applicant benefited from the same, not because she was an employee of the deceased, but because she was a spouse of her benefactor.

27. An issue was raised about her children. She initially took the position that all her children had been sired by the deceased, and presented birth certificates to support her case. Subsequently, she shifted her position when she stated that only two of her five children had been sired by the deceased, adding that the

first three were not his biological children. There is material which shows that the birth certificates were genuine, in terms of having been generated from the relevant government office. However, the admission that the deceased did not sire the first three children renders the birth certificates in respect of the three false documents. The information in the three certificates is false to the extent that it purports that the biological father of the three children was the deceased. A birth certificate is supposed to present details on the parentage of a child. The persons stated in the said document as parents of the child ought to be the biological parents thereof of the said child.

28. Regarding the other two children, the authenticity of the information thereon on their paternity lay with the conduct of the DNA test ordered by the court. The test was not conducted as the pathologist was unable to extract any useful sample from the remains of the deceased owing to the chemicals used in having the body of the deceased embalmed. It would appear that the parties gave up after that, yet there was still opportunity for a DNA test to be undertaken with samples from some of the children of the deceased with his wives, Ann Njoka Kagau and Grace Wakina, presuming that they were biological children of the deceased. The omission to do that has left the issue hanging so far the paternity of the last two children of the deceased are concerned. The only option open to the court would be to consider whether both these last two and the first three were children that the deceased had taken in as his own, in terms of section 3(2) of the Law of Succession Act.

29. The applicant alleged that the deceased took in the first three and informally adopted them by accepting them as his, and providing for them. The last two of course are alleged to have been sired by him. She did not produce any documents to support these assertions. Such documents as school and medical or treatment records would have sufficed. There were the birth certificates, however. The deceased was said to have procured them. The records from the relevant government offices assessed them as genuine documents from their office. If indeed the certificates were procured by the deceased, then that would be sufficient as evidence that the deceased had embraced these children as his own. There was also the issue of the photographs where the deceased is shown posing with one of the daughters of the deceased, from the group of three, at her wedding. It was conceded by the administrators that the deceased did attend the wedding, but explained that he did so not as father of the bride, but as employer of the mother of the bride. Well, I have already concluded that she was more than an employee of the deceased, and that she tended more towards being a spouse of the deceased. That then would mean he attended that wedding event as father of the bride.

30. The conclusion that I am bound to draw is that the applicant was a widow of the deceased and her children were children of the deceased for the purposes of succession. Consequently, the initial administrator ought to have disclosed them as survivors of the deceased. The non-disclosure would mean that the grant on record was obtained on false information, there was concealment of matter from the court and the proceedings to obtain the grant were therefore defective. It is for such reasons that grants are revoked.

31. I, however, note that the matter has been longstanding. I shall therefore not revoke the grant herein, but I shall direct that the applicant and her children be listed as survivors of the deceased. I shall also direct that the family of the applicant be represented in the administration of the estate. Regarding the assets that should be listed as forming the estate, I shall leave it to the administrators. Any questions on such assets shall be addressed at the confirmation of the grant.

32. The final orders that I shall make in the end are: -

(a) That I declare that the applicant in the application dated 17th October 2006, Philis Wanjue Kagau, is a widow of the deceased, and her children - Irene Wawira, Judy Wanjira, Faith Rachel Wambeti and Immaculate Mercy Njura – are children for the purpose of these proceedings, and so are all the surviving children of the late Grace Wakina and any child or children of the children of Grace Wakina who are themselves dead;

(b) That I direct that the said widow and said children or any child or children of any child or children of the deceased by any of his three wives who are themselves dead shall be listed in

the schedule of the survivors of the deceased as the persons entitled to a share in the estate of the deceased;

(c) That I order that the grant herein on record issued on 17th December 2014 to Moffat Nyaga Kagau and Johnny Nyaga Kagau be amended to include the applicant herein, Philis Wanjue Kagau, as co-administrator;

(d) That I hereby strike out the summons for confirmation of grant on record dated 14th October 2006 and it is hereby directed that the grant of letters of administration intestate as amended above shall be confirmed through an application to be filed by the administrators appointed in (c) above within thirty (30) days of the order herein;

(d) That said application for confirmation shall be filed by the three administrators jointly or severally, and any of them not in agreement shall be at liberty to file affidavits of protest thereto;

(e) That the matter shall be mentioned after thirty (30) days for compliance; and

(g) That I note that the estate comprises of assets situated exclusively within Embu County, consequently, I hereby direct that the cause herein shall be transferred to the High Court of Kenya at Embu for final disposal.

(h) That there shall be no order as to costs.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE