REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
PROBATE & ADMINISTRATION CAUSE NO. 34 0F 2006

IN THE MATTER OF THE ESTATE OF SIMEON KIPKILEL ARAP KIRUI

PHILIP CHEPKWONY…….……...PETITIONER
AND
JOHN KIPKEMBOI KILEL……...1ST BENEFICIARY
ANDREW KIPSANG KILEL……..2ND BENEFICIARY
CORNELIUS KIPNG'ENO KILEL…….....3RD BENEFICIARY
PHILIP KIPLAGAT KILEL……...4TH BENEFICIARY
GODFREY KIPROP MATNA……5TH BENEFICIARY
-VERSUS-
PETER CHERUIYOT KILEL……..1ST RESPONDENT/OBJECTOR
PAUL KIPRONO KILEL……..2ND RESPONDENT/OBJECTOR

JUDGMENT

1. I had summarized the background of this matter in my Ruling delivered herein on 4/04/2025, which background I reproduce as follows:

> ***"2. The background of the matter is that the deceased herein, Simion Kipkilel Arap Kirui, died on 17/10/1999 aged 88 years. From what I can decipher, upon his death, a Petition for Probate of a Will was filed in this Cause on 27/02/2006 by the Petitioner, Philip Chepkwony, as the executor of the Will. It does not appear that any Grant has been issued to date as I have not come across any in the Court file.***
>
> ***3. On 19/10/2007, the 2 Objectors, as sons of the deceased, filed a challenge against the Petition and subsequently, also filed a Cross-Petition for the Grant, as well as an Answer to the Petition. I also note that the main challenge raised in the Objection was on the authenticity of the Will alleged by the Petitioner and also on the Will's clarity. It is also apparent that the main dispute in this Cause is the inheritance and/or distribution of the parcel of land known as Nandi/Kaboi/977 amongst the survivors of the deceased, and which property was owned by the deceased. All the 5 Applicants and the 2 Objectors are children of the deceased and thus siblings.***

4. There is indication that another Succession Cause for the estate of the same deceased was subsequently filed, namely Eldoret High Court P&A No. 261 of 2010, and which appears to have been consolidated with this instant Cause.

5. Be that as it may, by the orders made on 16/07/2018 by Sewe J, it was directed that the Objection be heard by way of a viva voce trial. The trial then commenced on 25/03/2019 when the 1st Objector testified. However, upon the parties' agreement, further hearing was deferred and the matter referred to Court annexed Mediation which however was not successful. The parties therefore returned to Court and the trial resumed on 9/10/2019 when the 2nd Objector and his 2 sisters testified as PW1, PW2 and PW3, respectively, and the Objectors' case closed. Upon the transfer of Sewe J from this station, the matter was taken over by Ogola J who on 25/04/2022 heard the testimony of the Applicant's 1st witness who testified as DW1. He is the 3rd beneficiary named above, Cornelius Kipngeno Kilel. Again, upon the transfer of Ogola J, I took over the case and the Applicants' 2nd witness, Advocate Jones Nyachiro, who was said to have been one of the 2 Advocates who witnessed the Will, began giving his evidence-in-chief testimony as DW2."

2. I may make the clarification that the Petition herein by the said executor, **Philip Chepkwony**, was filed through **Messrs Kalya & Co. Advocates**, while the second Cause with which it was consolidated, namely, **Eldoret High Court Succession Cause No. 261 of 2010**, was filed in person subsequently, by 3 sons of the deceased, namely, the 2nd beneficiary (**Andrew Kipsang Kilel**), the 3rd beneficiary (**Cornelius Kipngeno Kilel**), and **Joseph Kilel**. I also note that unlike this instant Cause, which was based on a written Will, and in which no Grant of Probate appears to have been issued to date, a Grant of Letters of Administration Intestate had been issued to the 3 said brothers on 22/06/2011 as joint Administrators before the two matters were consolidated. On its part, the Objection was filed through **Messrs Nyairo & Co. Advocates**.

3. It may also be necessary to mention that the Objection, in challenging the Will, apart from citing lack of clarity in the Will, also doubted its authenticity and authenticity, and also contended that insofar as same prohibits sub-division of land, it is against justice and impedes the administration of the estate. The Objection also contended that the Will purports to distribute the parcel of land described as **Nandi/Kaboi/977**, which parcel of land does not belong to the deceased, and that the Will is also ambiguous as to how income from land is to be distributed, and the implementation thereof. The Objectors then stated that the original

Will is required for purposes of making a Grant of Probate, unless its absence is sufficiently explained, which has not been done in this case. It was also claimed that the Petitioner did not seek the consent of the beneficiaries before filing the Petition. The Objectors, in the end, therefore prayed that the Will be ignored and the estate be thus distributed among all the beneficiaries under the rules of intestate distribution.

4. I may also mention that after the Objection was filed, the executor of the alleged Will, **Philip Chepkwony** applied to be discharged from the Cause, which Application was allowed on 7/05/2011. Upon withdrawal of the executor therefore, only the Petitioners in **Eldoret High Court P&A No. 261 of 2010**, now renamed as the 2nd beneficiary (**Andrew Kipsang Kilel**), the 3rd beneficiary (**Cornelius Kipngeno Kilel**), and **Joseph Kilel**, remained as Petitioners. Their legal representation was then taken over by **Messrs Martim & Co. Advocates**.

5. Back to the ***viva voce*** trial, in the course of the testimony of **Mr. Jones Nyachiro** (**DW2**), in which he stated that the Will on record bore an error in the misdescription of a parcel of land, an alleged version with corrections made thereon by the deceased, and sought to be relied upon by the beneficiaries could not be traced, and that what was on record was a photocopy. **Ms. Odwa**, Counsel for the Objectors, having objected to production of the photocopy, **Mr. Nyachiro (DW2)** was stood down to enable Counsel for the beneficiaries, **Mr. Martim**, file a formal Application seeking leave to produce the photocopy as secondary evidence.

6. The said Application was eventually filed and canvassed but which I dismissed by way of the said Ruling dated 4/04/2025 having found, ***inter alia***, that no sufficient explanation had been offered for the whereabouts of the original Will, and also that the Application had been filed after an unexplained inordinate delay, and long outside the 14 days given for filing it. **Mr. Nyachiro** then returned and concluded his evidence.

7. At the trial, in total, the Objector called 4 witnesses while the beneficiaries called 2. I will now, in summary, recite the witnesses' testimonies.

<u>Objectors' Witnesses' Testimonies</u>

8. **PW1** was the 1st Objector, **Peter Cheruiyot Kilel**. Led by **Ms. Odwa**, he reiterated that the deceased was his father, who left behind 12 children and a widow, **Veronica Kirui**, who also died subsequently in the April 2000. He produced a copy of the certificate of death and testified further that the deceased left behind the parcel of land known as **Nandi/Kaboi/977**, measuring 64 acres. He also stated that the deceased left a Will which however, he (**PW1**)

only learnt of after this Cause was filed. He testified further that he filed the Objection because the Will did not concern the family parcel of land **Nandi/Kaboi/977**, but was in respect to the separate parcel of land known as **Nandi/Kaboi/477**, which is registered in the name of one **Kili arap Mugun**, and not the deceased. He produced copies of the respective Search Reports and prayed that the Will be disregarded as it has no connection to the family parcel of land, **Nandi/Kaboi/977**. He prayed further that the Petition be dismissed as the executor did not have a right to petition on behalf of the estate, and that the estate should be distributed to all the beneficiaries equally. Under cross-examination by **Mr. Martim**, he stated that he has been living on the parcel of land **Nandi/Kaboi/977** since 1999, which, he stated, has a tea plantation of 15 acres, and he agreed that he has been earning income from the tea plantation. He agreed that he had not produced any accounts to show how much he has been earning from the tea crop, and insisted that he had been living on the parcel of land even before the deceased died. He confirmed knowing the said **Philip Chepkwony**, as a neighbour and confirmed that he (**Philip Chepkwony**) is the person named in the Will as executor. He also confirmed that in the Will, all beneficiaries are indicated to have been bequeathed 9 acres each, except for one **Peter Cheruiyot**, who is indicated to have been bequeathed 6 acres. He also contended that the 2nd Objector, **Paul Kiprono Kilel**, has his own parcel of land not owned by the deceased. In re-examination, he stated that he has been occupying 10 acres of the parcel of land with his children, which 10 acres the deceased had allocated to him.

9. **PW2** was the 2nd Objector, **Paul Kiprono Kilel**. He adopted his Affidavit sworn on 23/10/2007, and he, too, contended that the parcel of land **Nandi/Kaboi/477** is not part of the estate of the deceased as it belongs to a different person, namely, one **Kilel arap Mugun** as indicated in the Search Report. He, too, insisted that the correct parcel of land forming the estate of the deceased is **Nandi/Kaboi/977**. He agreed that in the Will, he (**DW2**) is indicated to have been bequeathed the separate parcel of land known as **Nandi/Kamobo/480** but claimed that such parcel of land was personally purchased by him in the year 1976, and he has a title document for the same, a copy whereof he produced, together with copies of the Search Report and the Application thereto. He, too, stated that the deceased left behind 12 children but protested that the Will only provides for 7 as it left out the daughters, who also deserve to receive a share of the estate. He also pointed out that the Will is dated 7/11/1997 by which date he had already obtained his title document for the said **Nandi/Kamobo/480**, and was residing there. In cross-examination, he stated that he purchased the said **Nandi/Kamobo/480** from one **Reuben Kibii Kosgei**, and denied that the purchase price was contributed to by his brothers. He also stated that he has never seen the

original version of the Will. He also agreed that his sisters have never complained about being left out of the Will, and also agreed that for 10 years, the 1st Objector (**Peter Cheruiyot Kilel**), the 2nd beneficiary (**Andrew Kipsang Kilel**), and the 3rd beneficiary (**Cornelius Kipngeno Kilel**) are the people who have been receiving the proceeds of the tea crop from **Nandi/Kaboi/977** as its caretakers. He denied knowledge of any company known as **Sikifwa**, allegedly incorporated by the family to look after the farm. He thus denied knowledge of any Will made by the deceased (his father) but agreed that the deceased was of sound mind at the time of his death.

10. **PW3** was **Magdalena Chemutai Kirui**, who also testified that she is a daughter of the deceased. She, too confirmed that they are 12 siblings but that the Will only provides for 7 of them. She pointed that she is among those omitted and prayed that she should also be given a share of the estate, just like all her other siblings, whether male and female. In cross-examination, she agreed that she is married but protested that his brothers never involved the sisters in the discussions on distribution of the estate, and completely ignored them. She protested that the brothers should have given them at least 1 acre each or its equivalent in cash. Regarding the separate parcel of land **Nandi/Kamobo/480** owned by the 2nd Objector, she insisted that the 2nd Objector purchased it on his own from his own money, and she thus denied that the deceased (her father) or any of her brothers contributed to the purchase thereof.

11. **PW4** was **Martina Chepkemoi Kirui**. She, too, testified that the deceased was his father, and that they are 12 children, namely, 8 brothers and 3 sisters from one mother. She, too, pointed out that the alleged Will relied on by the Petitioners only contains the names of 7 siblings, and that she is among those omitted. She insisted that she, too, is entitled to a share of the estate which should be shared equally among all the siblings, including the daughters. In re-examination, she, too, denied any knowledge of his brothers having formed a family welfare group to run the farm. She also denied receiving any financial assistance from her brothers in educating her children but confirmed that she has been receiving a share of the tea bonus. She stated further that all siblings have been receiving an annual payment of Kshs 2,000/- since their father's death. She then stated that she would be contented with 2 acres of land or its equivalent in cash.

<u>Petitioners' Witnesses' Testimony</u>

12. **DW1** was the **Cornelius Kipngeno Kilel**, the 3rd Beneficiary. Led by **Mr. Martim**, he adopted his Affidavit sworn on 25/09/2019 filed in this Cause as his evidence-in-chief. He refuted the Objection filed herein, and testified that the 1st Objector (**Peter Cheruiyot Kilel**)

resided on 3 acres of the parcel of land known as **Nandi/Kaboi/977** which, according to him, is the parcel of land referred to in the Will. He also pointed out that the 1st Objector agreed to, and did withdraw his Objection after family meetings. He then stated that the 2nd Objector (**Paul Kiprono Kilel**), after disagreements between his (2nd Objector's) wife and another brother, procured a separate parcel of land measuring 2 acres but subsequently, their father, reasoning that the piece of land was too small, asked the 2nd Objector to procure a bigger plot, upon which the Objector obtained a 10 acres parcel of land but since the 2nd Objector did not have the money, he requested their father to purchase the land for him. According to him, upon their father's request, their other brother, the 2nd beneficiary (**Andrew Kipsang Kilel**), contributed the sum of Kshs 4,000/- but as the purchase price was Kshs 9,000/-, their father contributed the balance of Kshs 5,000/-, and that the parcel of land was then registered in the name of the 2nd Objector. Under cross-examination by **Ms. Odwa**, he insisted that his father's Will should be honoured, although he conceded that it has no provision for the daughters, and refers to the parcel of land described as **Nandi/Kaboi/477** which does not belong to the deceased (his father), and not **Nandi/Kaboi/977** which is the parcel of land owned by the deceased. He also conceded that as Petitioners, he and the other beneficiaries did not disclose in the Petition that they filed herein that there were other survivors other than those they named. According to him, the Will did not provide for his sisters because they were married.

13. **DW2** was the **Advocate Jones Nyachiro**. He stated that he has been in legal practice for 27 years, and that on 7/11/1997 when he was still in the employment by **Messrs Kalya & Co. Advocates**, he, in the course of his duties, prepared the Will for the deceased, in which the deceased appointed the said **Philip Chepkwony** as Trustee. He also testified that the Will referred to the parcel of land known as **Nandi/Kaboi/977** and also **Nandi/Kamobo/480** and the manner in which they were to be distributed. He testified further that he witnessed the Will together with his then colleague Advocate, **Mr. Simon Lilan**, after the deceased signed it, and that the original of the Will was filed in Court. He stated that he left the law firm of **Kalya & Co**. in 2002, and that sometime in 2006, **Kalya & Co**. contacted him and informed that they were unable to trace the original of the Will but showed him a photocopy bearing his signature. He testified further that upon perusing the photocopy, he noticed that the intended parcel of land **Nandi/Kaboi/977** had been erroneously indicated therein as **Nandi/Kaboi/477**. He thus insisted that the correct parcel of land which the deceased intended to bequeath under the Will was **Nandi/Kaboi/977** measuring 25.49 Hectares, which the Will correctly the equivalent thereof as 63 acres. He then sought to produce the said

photocopy version of the Will as an exhibit, in which version he claimed the deceased had corrected the misdescription.

14. It is at this point that **Ms. Odwa** objected to reference to the original alleged "corrected" Will by the witness, which original, as aforesaid, she stated that she had never seen, and which Objection eventually led to the beneficiaries filing the Application for leave to produce a photocopy thereof. As already stated, I dismissed that Application by way of my said Ruling rendered on 4/04/2025, after which the witness returned and concluded his evidence after being cross-examined and re-examined. He however basically simply reiterated the matters he had already stated and the beneficiaries' case was then closed.

15. I may also state that it is during the above intervening period, before **DW3** was cross-examined, that the 1st Objector, **Peter Cheruiyot Kilel**, appeared in Court in person and confirmed withdrawing his Objection. Under these circumstances, only the 2nd Objector now therefore remains as an Objector.

Written Submissions

16. Upon close of the trial, the parties filed Written Submissions. The 2nd Objector filed the Submissions dated 29/10/2025, while the beneficiaries' is dated 28/11/2025.

2nd Objector's Submissions

17. **Ms. Odwa**, the 2nd Objector's Counsel, in challenging the alleged Will dated 17/11/1997, submitted that the deceased, at the time that he is alleged to have executed the Will, was 88 years old, senile, and did not have the mental capacity to execute a Will. She also reiterated that the Will is invalid insofar as the parcels of land purportedly bequeathed therein do not belong to the deceased, and also that the Will did not provide for all the beneficiaries. She asserted that, contrary to the requirements of **Rule 54(3)** of the **Probate & Administration Rules**, no Affidavit was sworn by the representatives of **Messrs Kalya & Co. Advocates**, or any evidence tendered by that law firm confirming that the Will was read over to the deceased and the contents of each clause explained to him, and that he confirmed that he understood the same. She also contended that there is lack of uniformity in the signature of the deceased in the entire Will, that there is discrepancy in the numbering of the pages in the Will as page 3 and 4 both mention pages 3,4,5 and 6. Counsel also reiterated the inclusion of the parcel of land **Nandi/Kaboi/977** yet the property did not belong to the deceased, which error, although the Petitioners downplayed as a mere typographical error, it cannot be so

considering that the alleged error consistently appears in two different pages of the Will. She also pointed out that **DW2**, **Jones Nyachiro Advocate**, who alleged to have witnessed the Will, confirmed that the only version he witnessed was the one with the alleged error, hence shooting down any claim that there could have been a second version signed later by the deceased. Counsel contended that the alleged second version appears to have been "manufactured" upon realization that the original was erroneous, reason why, according to her, **Messrs Kalya & Co**. declined to come to Court to testify on its validity. She reiterated further the inclusion of the parcel of land **Nandi/Kamobo/480** and its bequest to the 2nd Objector yet the property did not belong to the deceased but to the 2nd Objector who had already been registered as owner way back in the year 1976.

18. Counsel also reiterated that the Will had omitted the 2nd Objector and all daughters of the deceased from benefiting from income from the sale of tea, and directed that the 1st Objector do continue residing in an undisclosed parcel of land. He cited the case of **Julius Kinyua Chabari & Another v Mary Mukwamugo Njagi & 4 Others [2016] KEHC 4470 (KLR)**. She then submitted that the Grant issued to the 1st, 2nd and 3rd beneficiaries as Petitioners in **Eldoret High Court Succession Cause No. 261 of 2010** before these two Causes were consolidated, is for revocation given that they fraudulently obtained the same by deliberately failing to disclose to the Court, all beneficiaries and assets of the deceased. She pointed out that the beneficiaries only listed themselves and 4 brothers leaving out the Objectors and all the female children of the deceased. She also cited **Section 76** of the **Law of Succession Act**, and submitted that the beneficiaries did not notify or seek the 2nd Objector's and other siblings' consent as required under **Rule 26** of the **Letters of Administration** and **Section 51(2)**. Counsel further submitted that the beneficiaries did not disclose existence of this already filed instant Cause, **Eldoret High Court Succession Cause No. 34 of 2006**, including the Objection raised herein. She cited several authorities. Regarding administration of the estate, she submitted that it should be treated as intestate since the alleged Will is invalid as she had had argued, and that the Will also now has no executor following discharge of the said **Philip Chepkwony**. She also pointed out that in any event, the beneficiaries themselves had no problem in the estate being administered as intestate since that is how they filed their own separate Petition in **Eldoret High Court Succession Cause No. 261 of 2010**. She then prayed that the 2nd Objector, **Paul Kilel**, be appointed a co-Administrator as it is evident that the Petitioners cannot be trusted to protect the interests of the estate.

<u>Petitioners' Submissions</u>

Eldoret High Court Succession Cause No. 34 of 2006

19. Counsel for the beneficiaries, **Mr. Martim**, on his part, after setting out the bequests given to beneficiaries in the Will, restated the law on Wills as laid out in the **Law of Succession Act**, including the requirements for validity of a Will, and submitted that the Will in this case ought to be honoured as it meets all the requirements recognized in law, such as being signed and witnessed. In response to the allegation that the deceased may not have been in a correct state of mind when he made the Will, Counsel pointed out that under the provisions of **Section 5(4)** of the **Law of Succession Act**, it is the person who alleges such absence of mental capacity who bears the burden of proof, but in this case, the Objectors have not placed any evidence before the Court to discharge that burden. He cited several authorities, and also pointed out that the Objectors did not call any document examiner to testify on the veracity of the signature made on the Will.

20. Regarding the misdescription of the parcel of land appearing in the Will, he cited **Section 22** of the **Law of Succession Act** and **Rule 23** of the **Probate & Administration Rules**, and submitted that it is the intention of the testator which is paramount, and that in this case, the misdescription did not negate the clear and/or discernible intentions of the deceased. He contended that, in this case, the properties intended to be bequeathed are sufficiently identifiable from the description given, and that Courts will always try as much as possible try to construe the intention of a testator. He submitted that in this case, the Court should correct the parcel number to read **Nandi/Kaboi/977**, instead of **Nandi/Kaboi/477**, as the intention of the deceased can be clearly construed. In response to the prayer for revocation of the Grant on ground of non-disclosure, Counsel submitted that names of the Objectors clearly appear in the Will together with the portions and assets bequeathed to them by the deceased, and which Will was in before the Court for verification. He cited several authorities. He then submitted that unless in cases of partial intestacy, representation to the estate of a deceased person is required to be made in respect of the entire estate, and not a portion thereof, as the **Act** does not contemplate separation of an estate simply because there are disputes within the family. He submitted that by virtue of **Section 34** and **66** of the **Law of Succession Act**, it is only in situations of partial intestacy that the estate can be separated so that assets provided for in a Will are distributed in accordance with the Will, and those not so included distributed in accordance with the law of intestacy. He therefore asserted that if there is any asset or inventory that was not included in the Will, the same can be subjected to transmission under the **Law of Succession Act**. In the end, he also submitted that **Section 5** of the **Act** gave the deceased the freedom of testation to dispose of his property as he pleased. He then pointed out that a party aggrieved by such a Will has a remedy under

Section 26 of the **Act**, and as such, the mere fact that a Will leaves out some of the children from benefit should not be a ground for invalidation of the Will.

Determination

21. The issues that call for determination in this matter can be broadly summarised as follows:

i) **Whether the Grant of Letters of Administration issued to the Petitioners in *Eldoret High Court Succession Cause No. 261 of 2010* before these two Causes were consolidated should be revoked for non-disclosure of material facts.**

ii) **Whether the Will dated 7/01/1997 is valid, and thus, whether the estate should be treated as testate or intestate.**

iii) **How should the estate be distributed, and who should be appointed to administer the estate?**

22. In respect to revocation of Grants, **Section 76** of the **Law of Succession Act** provides that:

"76. Revocation or annulment of grant

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

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

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

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

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

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court 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."

23. Clearly, the Objector has approached the Court under sub-sections (a), (b) and/or (c) above.

24. It is settled that the grounds set out in **Section 76** above need to be proved with sufficient evidence as the mandate to revoke a Grant is a discretionary power that must be exercised judiciously and only on sound grounds, not whimsically or capriciously.

25. Regarding the issue of non-disclosure of some of their siblings as also survivors of the deceased, and the absence of consents from them acceding to the filing of their Petition, there is no question that the 1st, 2nd, and 3rd beneficiaries, as the Petitioners in **Eldoret High Court Succession Cause No. 261 of 2010** are guilty. I say so because they only listed themselves and 4 brothers as such survivors leaving out the Objectors and all their 3 sisters. In the circumstances, although the deceased left behind 12 children, only 7 were disclosed by the beneficiaries. No reasonable explanation having been given for this omission, I find that it was done deliberately. On this point, I associate myself fully with the holding of **Hon. Lady Justice Njuguna (as she then was)** which she made in the case of **In re Estate of Eston Nyaga Ndirangu (Deceased) [2021] eKLR** as follows:

"18. Rule 7 of the Probate and Administration Rules 1980 provides that application for grant of representation in relation to an estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition supported by an affidavit. The said affidavit must contain amongst other details, the names, addresses, marital status and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with Section 39(1) of the Act {Rule 17(e)(i)}.

19. Rule 26 provides that 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. Further that in 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.

20. The effect of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than him. The 1st and 2nd respondents having been brothers to the applicant and other beneficiaries, it therefore means that all the remaining beneficiaries ought to have consented to them being given the grant of letters of administration in relation to the estate herein. I have perused the court record and I note that consent to the making of a grant of letters of administration intestate which was filed contemporaneously with the petition was only made by two beneficiaries (being Joyce Ngithi Nyaga and Julius Kinyu) and wherein they were giving the consent to one John Ndii Nyaga, Kennedy Nyaga and Lucy Wanjiku Nyaga (3rd respondent). There is no consent as to the other brothers and sisters having consented to the grant being given to the 1st and 2nd respondent. It is my view therefore that the said grant was obtained pursuant to proceedings which were defective in substance. The respondents ought to have obtained consent from all the other brothers and sisters. In *Antony Karukenya Njeru –vs- Thomas M. Njeru [2014] eKLR*, a grant of letters of administration was revoked as persons with equal priority did not consent to the petitioners therein applying for grant of letters of administration. (See also *In the Matter of the Estate of Muriranja Mboro Njiri, Nairobi H.C. Succ. Cause No. 890 of 2003*).

21. It is my considered view therefore that the failure by the respondents more so the 1st and 2nd respondents to obtain the consents from the other siblings makes the proceedings of obtaining the same to be defective in substance and the said grant ought to be revoked and a new grant issued to the applicants."

26. It is therefore clear that **Rule 26(1)(2)** of the **Probate & Administration Rules** applies where representation is applied for by a person with equal or lesser right to others. In such case, the Petitioner is expected to notify these other persons of the filing of the Petition.

These other persons would then be at liberty to participate in the proceedings or renounce their rights to administration or sign consents in **Forms 38** or **39** acceding to the filing of the Petition. Where such consent or renunciation has not been granted, the Petitioner is required to file an Affidavit confirming that he duly notified these other persons.

27. Having determined that the Petitioners did not disclose all beneficiaries, and/or seek their consents to file the Petion in **Eldoret High Court Succession Cause No. 261 of 2010** yet the latter had equal priority to apply for the Grant, I find that the proceedings to obtain the grant were not properly taken out.

28. Having made the above findings, the question now is whether the transgressions committed by the beneficiaries in the process leading to issuance of the Grant justify revocation of the Grant as the only viable option. This question arises because **Section 76** above is discretionary in that it gives the Court power to determine whether or not to revoke or annul a grant. It is not therefore the position that any breach or violation must always or automatically lead to revocation of a Grant. To this end, **Mwita J** in the case of **Albert Imbuga Kisigwa v Recho Kavai Kisigwa [2016] eKLR**, stated as follows:

> **"13. Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a 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."**

29. I will revert to this question after dealing with the question whether the Will is valid.

30. Regarding the issue of validity of the Will, the position of the law is that validity of a Will depends on the capacity of the testator to make it, and further, a Will must conform to the prescribed legal requirements. There is however a rebuttable presumption under **Section 5** of the **Law of Succession Act** that the person making a Will is of sound mind and therefore has the capacity to make the Will. **Section 5(1) – (4)** provide as follows:

> **"(1) …… any person who is of sound mind and not a minor may dispose of all or any of his free property by Will …….**
>
> **(2) ……..**

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

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

31. Section 7 then provides as follows:

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

32. The above section therefore covers scenarios such as where a testator has the requisite capacity to make a Will but the circumstances surrounding the making of the Will raise doubts regarding its validity. The logic is that a testator must understand the import and effect of the document that he is signing as his Will, and he must also have approved of the contents as reflecting his wishes.

33. On its part, **Section 11** sets out the requirements for a Will to be deemed as valid by providing as follows:

"No written will shall be valid unless:-

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

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

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall

not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

34. In respect to the capacity and state of mind of a testator to make a Will, the Court of Appeal, in the case of **Ngengi Muigai & Another V Peter Nyoike Muigai & 4 Others In the matter of James Ngengi Muigai (Deceased) [2018] eKLR**, stated the following:

"In the recent case of Rosemary B. Koinange (suing as legal representative of the late Dr. Wilfred Koinange and also in her own personal capacity) & 5 Others V Isabella Wanjiku Karanja & 2 Others [2017] eKLR this court examined the issue of mental capacity (to make a will) and stated as follows:

"The essentials of testamentary capacity were laid out in the case of Banks V Goodfellow [1870] LR5QB 549 as cited with approval in the Tanzanian Court of Appeal case of Vaghella V Vaghella [1999] EA 351 thus:

"A testator shall understand the nature of the act and its effects, shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

Construing the issue of capacity, Githinji J. in the case of In Re Estate of Gatuthu Njuguna (Deceased) (1998) e KLR stated:

"As regards the testator's mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case the applicant …. However, paras 903 and 904 of Volume 17 of Halsbury's Laws of England show that, where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity, and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of testator's capacity is one of fact which can be

proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that, if the objector produces evidence which raises suspicion of the testator's capacity at the time of execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person settling up the will to satisfy the court that the testator had the necessary capacity."

35. It is therefore clear that for a Will to be deemed valid, four main requirements must be met, namely, **(i)** it must have been executed with testamentary intent; **(ii)** the testator must have had testamentary capacity; **(iii)** it must have been executed free of fraud, duress, undue influence or mistake; and **(iv)** it must be duly executed.

36. In this case, as aforesaid, the original Petitioner was one **Philip Chepkwony**, the person named in the alleged Will dated 7/11/1997 as the sole executor. As further stated, 3 children of the deceased, now described as 2nd and 3rd beneficiaries, together with a third brother, **Joseph Kilel**, subsequently filed their own separate Petition in **Eldoret High Court Succession Cause No. 261 of 2010**, which Cause was then consolidated with the instant Cause. As also stated, this subsequently filed **Eldoret High Court Succession Cause No. 261 of 2010** was commenced, not on the basis of the existence a Will, but on the basis that the deceased died intestate. As also further recounted, the said executor, **Philip Chepkwony** later successfully applied to withdraw and was discharged from the matter, thus leaving the Will without an executor. The curious turn of events is the fact that the 2nd and 3rd beneficiaries seem to have later abandoned the prosecution of their Petition on the basis of intestacy but embraced the fact that there was indeed a WilI, and therefore changed to proceed on the basis of testate administration. I may also restate that the 1st Objector (**Peter Cheruiyot Kilel**) also subsequently withdrew his Objection thus leaving the 2nd Objector (**Paul Kiprono Kilel**), as the only Objector

37. Another fact that merits restatement in this case is that the version of the Will by which the Petition in this matter was commenced, before this Cause was subsequently consolidated with **Eldoret High Court Succession Cause No. 261 of 2010**, contains what the beneficiaries, (Petitioners in **Eldoret High Court Succession Cause No. 261 of 2010**), through their Counsel, **Mr. Martim**, describe as a "typographical error". The alleged error is

the description of the parcel of number indicated as **Nandi/Kaboi/477** as a subject of the bequest, which, according to the beneficiaries, was inadvertent, as the intended description was **Nandi/Kaboi/977**. It was then contended that there was a second version of the Will in which the testator had corrected the alleged error but whose original could now not be relocated. As already highlighted however, I dismissed the attempt to produce a photocopy of the alleged corrected version of the Will after making the finding that, ***inter alia***, no proper explanation had been offered for the absence of the original, and because of the inordinate delay to make the Application for leave to produce the photocopy. As things stand at the moment therefore, the version of the Will on record is the one with no alleged "corrections", and this matter will be determined on the basis thereof.

38. In challenging the validity of the alleged Will, one of the issues raised by the 2nd Objector, through her Counsel, **Ms. Odwa**, is that the deceased, at the time that he is alleged to have executed the Will, being 88 years old, was senile, and did not therefore have the mental capacity to execute a Will.

39. In response to the above contention, it must be recalled that, as aforesaid, under **Section 5** of the **Law of Succession Act**, there is a rebuttable presumption that the person making a Will is of sound mind, and therefore has the capacity to make the Will.

40. It must also be recalled that the Kenyan litigation system is an adversarial one, where it is left to the litigants to bring out the issues for determination and to present evidence to enable the Court determine the issues in dispute. It is therefore, generally, not the duty of the Court to engage in making inquiries outside its mandate other than to adjudicate upon the matters in dispute which the parties themselves have raised by the pleadings. The burden of calling witnesses and proving each party's case therefore lies at the door step of the parties, and the Court ought not to be involved in the search for evidence or fact-finding. It is not the duty of the Court to conduct investigations and gather evidence so as to assist or aid a party to the dispute to prove his case. The Court will be content with the evidence presented by the parties since it is the duty of litigants to place material in support of their case (**see the Court of Appeal case of Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & Others (2014) eKLR**.

41. To my mind, the 2nd Objector has failed to adduce any evidence to support the allegation that the deceased, at the time that he made the Will, was not possessed of the proper mental and/or physical ability, or capacity to make the Will, or that the Will was a forgery or fraudulent or that the deceased was subjected to undue influence. I observe that under cross-

examination, the 2nd Objector, in fact, conceded that the deceased was of sound mind at the time of his death. The 2nd Objector also did not produce any Report from a forensic document examiner to give an opinion on the authenticity of the signatures or the thumbprint on the Will nor did he present any Report from a Medical practitioner giving an opinion on the state of mind of the deceased. The 2nd Objector, being the party advancing the position that the deceased, as testator, did not possess the requisite mental capacity to make the Will, it is he who therefore stands to fail.

42. The **Evidence Act, Cap 80** is also clear on the aspect of the burden of proof. In this case, it lay squarely on the 2nd Objector. **Sections 107** and **108** of the **Evidence Act** provide as follows:

> **Section 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**
>
> **Section 108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."**

43. It is therefore my finding that there is nothing on record for me hold that the deceased was not of sound state of mind or health to make the Will. This is particularly also because, as aforesaid, the 2nd Objector, under cross-examination, conceded that the deceased was of sound mind at the time of his death.

44. Regarding the contention that the Will is invalid insofar as the parcel of land indicated therein as **Nandi/Kaboi/477** does not belong to the deceased, I agree that material misdescriptions in a Will that render an intended bequest or gift impossible to identify may lead to a complete failure of the gift. If the misdescription is so significant that the gift or the intended property or beneficiary cannot be identified, that specific part of the Will may, indeed, be declared void. In some circumstances, a misdescription can, under the principle of "***ademption*"** or "***lapse*"** enunciated at **Section 23** of the **Law of Succession Act**, even invalidate the entire Will

45. I however also draw attention to the principle of "***falsa demonstratio non nocet***", which basically means that "***a wrong description does not harm***". The position of the law is

therefore that slight inadvertent misdescriptions made in a Will, such as typographical errors or incomplete description of land title numbers, or names of beneficiaries, generally, would not invalidate a bequest intended to be given out under the Will, provided the intention of the testator can be clearly discerned or ascertained from a consideration of the full context surrounding the matter, or even from extrinsic evidence. Courts will therefore always as much as possible, try to construe the intention of a testator. The Court's focus is therefore required to be geared towards giving effect to the intention of the testator rather than magnifying such slight inadvertent or technical errors to the point of invalidating a gift which from all indication, was meant to be bequeathed to a beneficiary. Where there is an obviously inadvertent misdescription, the Court can interpret the Will to identify the true intended subject matter or beneficiary. Where there is sufficient description of the beneficiary or the intended property, a minor error in that description should therefore not vitiate the gift. Indeed, under the provisions of **Section 74** of the **Law of Succession Act**, the Court is empowered to correct in names and/or descriptions, and thus alter and amend accordingly.

46. Applying the above principles, I observe that in this case, it is indeed true that the copy of the Search Report produced in evidence shows that the parcel of land **Nandi/Kaboi/477** is registered in the name of a separate person, one **Kili arap Mugun**, and not by the deceased. However, considering this whole matter holistically, and within its full context, I am constrained to believe, on a balance of probabilities, that the parcel of land that the deceased intended to bequeath is **Nandi/Kaboi/977**, and not **Nandi/Kaboi/477**. I am prepared to accept that the misdescription was simply an inadvertent typographical error. I say so because **Mr. Jones Nyachiro Advocate**, who testified that he is the one who prepared the Will, and that the deceased made the Will in his presence, together with **Mr. Simon Lilan Advocate**, while both were still employed at the law firm of **Kalya & Co. Advocates**, was emphatic that the parcel of land bequeathed by the deceased under the Will was **Nandi/Kaboi/977**, and not **Nandi/Kaboi/477**. He also testified that together with **Mr. Lilan Advocate**, he witnessed the deceased appending his signature and/or thumbprint on the Will. Although his attempt to produce the alleged hand-corrected version of the Will was thwarted by this Court's Ruling, I do not find that such omission changed the relevant facts. All the parties being in agreement that the parcel of land **Nandi/Kaboi/477** indicated in the Will is registered in the name of the different person, one **Kili arap Mugun**, who has no connection whatsoever to the deceased, why would the deceased take the inexplicable step of bequeathing it? There being no evidence that the deceased had any link to the parcel of land **Nandi/Kaboi/477**, what would make the deceased purport to bequeath it when what he

knew very well that the parcel of land he owned is **Nandi/Kaboi/977**? Under these circumstances, I find no reason whatsoever upon which the deceased would have purported to bequeath the parcel of land **Nandi/Kaboi/477**, in respect to which he has never claimed ownership. The intention of the deceased is evident and insisting on any other interpretation is, with respect, attempting to stretch imagination too far. In my assessment, the description of the parcel of land **Nandi/Kaboi/477** in the Will was simply a typographical error as all indication is that what the deceased meant to bequeath was **Nandi/Kaboi/977**. I so find.

47. The other challenge raised by the 2nd Objector is that the Will is void because it does not provide for all the children of the deceased. I am also not persuaded by this contention since, as correctly asserted by Counsel for the beneficiaries, **Mr. Martim**, **Section 5** of the **Law of Succession Act** cited above gave the deceased freedom of testation to dispose of his property as he pleased. The law therefore grants individuals the exclusive right to choose their beneficiaries and distribute assets according to their desires. In any event, a person unjustifiably left out in a Will has a remedy under **Section 26** of the **Act**, to apply for reasonable provision, and as such, the mere fact that the Will herein left out some of the children from benefit cannot, on its own, be a basis for invalidating the Will. In this case, the children left out having not invoked or moved the Court on the basis of **Section 26** above, they cannot be heard to push for invalidation of the Will on the mere ground that they were left out.

48. A related challenge raised is that the Will in Clause 3, prohibits sub-division of parcel of land, which prohibition, according to **Ms. Odwa**, is against justice and impedes the administration of the estate. No elaboration of what exact "injustice" shall be caused, or how it shall be caused if this clause is upheld was however offered, and no evidence of any such "injustice" was also presented. Similarly, no elaboration was given on how the prohibition "***impedes the administration of the estate***", as alleged. For this reason, I am unable to interrogate the contention further, and in upholding the principle of "freedom of testacy", I also reject it.

49. Ms. Odwa also cited the provisions of **Rule 54(3)** of the **Probate & Administration Rules**, which provides as follows

> **"Before <u>admitting to proof a written will</u> which appears to have been signed by a blind or illiterate testator or by another person by direction of such a testator, or which appears to be written in a language with which the testator was not wholly**

familiar, or which for any other reason gives rise to doubt as to such testator having had knowledge of the contents of the will at the time of its execution, the court shall satisfy itself that the testator had such knowledge by requiring an affidavit stating that the contents of the will had been read over to, and explained to, and appeared to be understood by, the testator immediately before the execution of the will."

50. The Affidavit referred to above is what is generally referred to as "***an Affidavit of plight and condition***", which is meant to confirm that the Will was read and explained to the testator, and that the testator fully grasped its contents before signing it. Ms**. Odwa** asserted that in this case, the said requirement was not complied with since no such Affidavit was sworn by the representatives of **Messrs Kalya & Co. Advocates**, nor any evidence tendered by the said law firm to confirm that the Will was read over to the deceased, the contents of each clause explained to him, and that he confirmed that he understood the same. My simple comment on this contention is that in this case, there was never any allegation or, at the least, some evidence that the deceased was "***blind"***, or "***illiterate"***, or that he was not familiar with the language in which the Will was written, or that the Will was not interpreted to him in a language he understood before he signed it. In other words, there is no allegation, or evidence that the deceased did not grasp what was contained in the Will. **Rule 54(3)** is not therefore applicable herein.

51. Although the drawing of the Will appears to have been made without much caution and to some extent, with less care as should have been expected of the Advocates concerned, and as a result, leaves what may be construed as ambiguities, in my view, considered generally, it passes the basic requirements test.

52. In any event, even assuming that **Rule 54(3)** applies, **Rule 54(4)** provides that:

"If the court, after considering the evidence—

(a) is satisfied that a written will was not duly executed, it shall refuse probate and shall mark the will accordingly;

(b) <u>is doubtful whether the will was duly executed, it shall make an order for hearing and give such directions in regard thereto as it deems fit</u>."

53. A full hearing having now been conducted by way of a ***viva voce*** trial, and the Court having now made its findings, the requirement of **Rule 53(3)** and **(4)** has now been fully met.

54. Another challenge raised by **Ms. Odwa** is that that there is discrepancy in the numbering of the pages in the Will as page 3 and 4 both mention pages 3,4,5 and 6. To this challenge, I will apply the *"**de minimis**"* rule derived from the legal maxim "***de minimis non curat lex*** ("***the law does not concern itself with trifles"***). I will apply this principle to avoid invalidating the Will herein over what I, with due respect, find to amount to insignificant or trivial minor clerical errors, that do not materially affect the testator's overall intentions.

55. It is also true, as contended by **Ms. Odwa**, that the beneficiaries had initially filed their Cross-Petition on the basis that the estate was to be administered on intestate basis. They however explained that this was because they were not aware of the existence of the Will at the time that they filed the Cross-Petition, and having now been made aware of the Will, they have now opted to proceed on the basis of the Will, and pray that the estate be administered on the basis of testacy. I find no wrong committed by the beneficiaries in changing their position since indeed, there is no evidence that they were aware of the existence of the Will at the time when they filed the Cross-Petition.

56. Ms. Odwa's further contention is on the reference in Clauses 2, 3 and 6 to the parcel of land **Nandi/Kamobo/480** in the Will yet the property did not belong to the deceased, which situation, although the beneficiaries downplayed as a mere error, according to her, cannot have been a mistake, considering that it consistently appears at two different pages of the Will. Looking at the copy of the Search Report, it is indeed true that inclusion of the parcel of land **Nandi/Kamobo/480** and its bequest to the 2nd Objector in the Will made in the year 1997 was perplexing since the property already belonged to the 2nd Objector who had already been registered as owner thereof way back in the year 1976.

57. In attempting to explain the above confusion, **Cornelius Kipngeno Kilel**, the 3rd Beneficiary, who testified as **DW1**, testified that the 2nd Objector (**Paul Kiprono Kilel**), after disagreements between his (2nd Objector's) wife and another brother, procured a separate parcel of land measuring 2 acres but subsequently, their father, realizing that the plot was too small, asked the 2nd Objector to procure a bigger plot, upon which the Objector procured a 10 acres parcel of land but since the 2nd Objector did not have money, he requested their father to purchase the land for him. According to the 3rd beneficiary, upon their father's request, their other brother, the 2nd beneficiary (**Andrew Kipsang Kilel**), gave out some money for

the purchase. He stated that as the purchase price was Kshs 9,000/-, their father contributed Kshs 5,000/- while the 2nd beneficiary contributed the balance of Kshs 4,000/-, and that the parcel of land was then registered in the name of the 2nd Objector. This explanation was refuted by the 2nd Objector but it might as well explain the reasoning of the deceased when he included the parcel of land **Nandi/Kamobo/480** in the Will and purported to "bequeath" it to the 2nd Objector yet the same had already been long registered in the name of the 2nd Objector.

58. Be that as it may, for the above reasons, it is clear that the "purported" bequest of the said **Nandi/Kamobo/480** to the 2nd Objector was of no effect and by reason thereof, I will declare it as such, that is, of no effect. In any event, the parcel of land being already owned by the 2nd Objector, there is no prejudice that he will suffer by that non-effectual bequest. I cannot get into the mind of the deceased or verify the version given by the 3rd beneficiary but whatever the circumstances, it is clear that according to him, he left out the 2nd Objector from the Will because he (deceased) had already "gifted" the parcel of land **Nandi/Kamobo/480** to the 2nd Objector. In the spirit of upholding the principle in **Section 5** of the **Act** which gave the deceased the freedom of testacy to dispose of his property as he pleased, I will not interfere.

59. Yet another challenge raised by **Ms. Odwa** is that the Will in Clause 5 directed that the 1st Objector (**Peter Cheruiyot Kilel**) do continue residing in an undisclosed parcel of land. This is also true. In, again, attempting to explain this bequest, **Cornelius Kipngeno Kilel**, the 3rd Beneficiary, testified that the 1st Objector resided on 3 acres of the parcel of land **Nandi/Kaboi/977** which, according to him, is the parcel of land referred to in the Will. The 1st Objector (PW1) indeed, also stated that he has been occupying 10 acres of the said parcel of land with his children, which 10 acres the deceased had allocated to him by the deceased. Since this contention was not controverted or even challenged, I have no reason not to believe it. This is because being members of the same family, the 2nd Objector would have refuted the allegation if it was not true. As there was no such denial, I find that the intention of the said bequest is identifiable and/or ascertainable. I will accordingly also give it effect.

60. **Ms. Odwa** also alluded that the Will can no longer be enforced because there is now no executor, the executor appointed under the Will, the said **Philip Chepkwony**, having withdrawn and discharged by the Court. I find this submission to be unfounded since the mere discharge of an executor does not invalidate the Will. Where an executor is discharged, the Will still remains valid, save that a new person must be appointed to manage the estate according to the terms of the Will. The Court will simply replace the executor to ensure the

deceased's wishes are still carried out. Where the Will names other executors who have not been discharged, they may continue as such but if no other executors remain, a beneficiary (usually the residuary legatee) or a close relative can be appointed to take over. This is the grant referred to as a ***Grant of Letters of Administration de bonis non***, which means a limited grant issued to complete distribution of an estate where a previous executor or Administrator died, or became incapacitated before completing the transmission of the estate. Just as in cases of intestate administration therefore, where an executor is discharged or removed, under the provisions of **Section 76(e)** of the **Law of Succession Act**, the existing grant will be rendered ***"useless and inoperative"***, but this consequence does not invalidate the Will itself; instead, it paves the way for a new representative to be appointed to complete implementation of the instructions and/or directions given by the deceased in the Will. I accordingly therefore refuse to accept the line the Will is no longer enforceable simply because the sole appointed executor withdrew when the matter because contentious and protracted.

61. In concluding on addressing the issue of validity of the Will, I find that the Will bears the thumbprint and/or signature alleged to be those of the deceased and which are alleged to have been appended by the deceased in the presence of two witnesses. It also bears the signatures and/or thumb-prints of the three alleged witnesses said to have been appended in the presence of each other. On the face of it therefore, the Will fits the prescribed format since it is drawn, executed and witnessed. Indeed, the 2nd Objector has not taken issue with the form rather the argument that I hear him to be advancing is suspicion that the Will was "manufactured", the signature and/or thumbprint thereon was not appended by the deceased and is therefore not authentic, which contentions I have now rejected and laid to rest.

62. I now, as promised, return to the first issue, that is, the question whether the beneficiaries act of leaving out the Objectors and the sisters from the process of filing the Petition in **Eldoret High Court Succession Cause No. 261 of 2010** justifies revocation of the Grant as the only viable option. As aforesaid, this question arises because **Section 76** above is discretionary in that it gives the Court power to determine whether or not to revoke or annul a grant even where transgressions have been committed. As aforesaid, it is not therefore the position that any breach or violation must always or automatically lead to revocation of a Grant. (see **Albert Imbuga Kisigwa v Recho Kavai Kisigwa [2016] eKLR**).

63. In exercising my discretionary power judiciously and on sound grounds, not whimsically or capriciously, and taking into account the interests of all beneficiaries to ensure that the action taken will be for the interest of justice, I am not satisfied that, in this case, revoking the Grant is the best alternative that will serve the interest of justice. This is because all the beneficiaries have since been disclosed and most are now before this Court. For those not participating, I am sure they are also now aware of this Cause considering that this case has been in Court since 2006, and have, most probably, made a personal choice not to participate. The dispute also involves a monogamous family and all beneficiaries are therefore children of the same father and mother. Considering that this matter has been in Court for 20 years now, sending the family back to the drawing boards by revoking the Grant will not, in in my view, be assisting them but will only further complicate the dispute. I also consider that I have upheld the Will herein, in accordance with which the estate shall now be administered, and that the 2nd Objector, is now the only remaining Objector, the 1st Objector having withdrawn his Objection. This therefore means that since the estate comprises majorly of one property, the said parcel of land **Nandi/Kaboi/977**, in respect to which the 2nd Objector has not been included in the Will, he would have no much further interest in the estate.

64. This therefore is one of those rare cases in which, although I have found that the Petitioners are guilty of deliberately leaving out other beneficiaries from the process of filing the Petition, revoking the Grant will not be the wise action to take. By reaching this decision, I am in no way condoning the beneficiaries' conduct. On the contrary, I strongly rebuke the same.

65. Having found as above, the third issue of how the estate is to be distributed no longer arises. since the occupation and utilization of the said **Nandi/Kaboi/977** shall be in terms of the Will admitted herein, dated 7/11/1997, with the modifications referred to hereinabove.

Final Orders

66. In the end, I made declarations, rule and order as follows:

i) The Objection raised against the validity of the Will dated 7/11/1997 made by the deceased and drawn by **Messrs Kalya & Co. Advocates**, is rejected and/or dismissed. The Will is accordingly upheld and declared to be valid.

ii) The prayer for revocation of the Grant of Letters of Administration dated 22/06/2011 issued in **Eldoret High Court Succession Cause No. 261 of 2010** before these two matters were subsequently consolidated, is also hereby declined.

iii) The estate of the late **Simon Kipkilei Arap Kirui (the deceased herein)** shall therefore be occupied, utilized and distributed in accordance with the said Will dated 7/11/1997 made by the deceased and drawn by **Messrs Kalya & Co. Advocates**, save for the exception or modification that the bequest made in Clause 4 of the Will purportedly gifting the parcel of land described as **Nandi/Kamobo/480** to the 2nd Objector is declared to be of no effect and thus inconsequential, the said parcel of land having at all times already been owned or registered in the name of the 2nd Objector since the year 1976.

iv) In view of the above, the Administrators of the estate of the late **Simon Kipkilel Arap Kirui** shall remain as they were in the Grant of Letters of Administration dated 22/06/2011 issued in **Eldoret High Court Succession Cause No. 261 of 2010** before these two matters were subsequently consolidated, namely, **Joseph Kilel**, **Andrew Kilel** (**2nd beneficiary**), and **Conelius Kilel** (**3rd beneficiary**)

v) It is expected that in view of the declarations made, or orders, and/or directions given above, the beneficiaries shall be in a position to determine the manner in which they shall occupy and utilize the parcel of land **Nandi/Kaboi/977**, and also the manner of distributing the rest of the bequests as directed in the Will. They shall however be at liberty to return to Court for further orders or directions should they fail to so agree.

vi) Any party aggrieved by the decision hereinabove has leave to appeal, and there shall be a stay of execution of implementation of this Judgment for a period of **forty-five (45) days** to allow any aggrieved party time to file the appeal.

vii) Upon expiry and/or lapse of the period above-stated, the parties shall be at liberty to extract the Certificate of Confirmation of Grant, which shall be drawn in accordance with the terms of the said Will dated 7/11/1997.

viii) As this is a family matter, I order that each party bear his/her own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2026

……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Ms. Odwa for the Objector

Mr. Martim for the Administrators

Court Assistant: Brian Kimathi