IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, SICHALE & ODEK &, JJ.A)

CIVIL APPEAL NO 130 OF 2017

BETWEEN

DANIEL KIREHU MURAI.....APPELLANT

AND

SAMMY MAINA KIREHU.....1ST RESPONDENT

EUNICE GATHONI KIREHU.....2ND RESPONDENT

JACOB GACHANJA KIREHU.....3RD RESPONDENT

LUCY NJERI KIREHU.....4TH RESPONDENT

ERIC KARIUKI WAIRIMU.....5TH RESPONDENT

JOHN KIREHU JOYCE.....6TH RESPONDENT

JUDE WANJIKU WAIRIMU.....7TH RESPONDENT

MARTHA NYAMBURA MAINA.....8TH RESPONDENT

JOHN KIREHU MAINA.....9TH RESPONDENT

NAOMI WANJIKU MAINA.....10TH RESPONDENT

ESTHER NJERI MAINA.....11TH RESPONDENT

NANCY WAHU MWANGI.....12TH RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Musyoka, J.) dated 9th December, 2016 in **SUCCESSION CAUSE NO. 1865 OF 2011**

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JUDGMENT OF THE COURT

The appellant, ***Daniel Kirehu Murai,*** filed the appeal herein against the judgment of ***Musyoka, J***. delivered on 9th December 2016.

A brief background to this appeal is that the appellant applied for grant of letters of administration in respect of the estate of ***John Kirehu Kariithi*** in his capacity as the deceased's grandson. Consequently, the letters of administration were issued to the appellant on **13th February, 2012**.

On 23rd April, 2012, the 9th respondent (being the widow of the deceased) and the 1st, 3rd, 4th and 5th respondents, (being the deceased's

children) applied for revocation of the grant issued to the appellant on the grounds that:-

> "i***) the grant was obtained fraudulently by concealment from coart*** (sic***) of material facts.***
>
> ***ii) The proceedings to obtain the Grant were defective in substance.***
>
> ***iii) The grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the Grant particularly that the respondent has any beneficial interest in the estate, which is false and untrue.***
>
> ***iv) The grant was obtained by means of a false statement that the applicant had failed to take out a grant or file necessary objections whereas the applicant had procured the disappearance of the file, from the shelves pigeons making it inaccessible to the applicants until the grant was duly signed and issued."***

In the impugned judgment, ***Musyoka, J***. directed as follows:

> ***"(a) That the grant of letters of administration intestate made on 13th February, 2012 to Daniel Kirehu Murai is hereby revoked***,
>
> ***(b) That given the circumstances of the case, I do hereby appoint the surviving children of the deceased, that is to say Sammy Maina Kirehu, Eunice Gathoni Kirehu, Jacob Gachanja Kirehu and Lucy Njeri Kirehu, as administrators of the estate***,
>
> ***(c)That a grant of letters of administration intestate shall issue to them accordingly***,
>
> ***(d) That the new administrators shall move with due dispatch and apply for confirmation of their grant given that the deceased died in 1997***,
>
> ***e) That the deceased hailed from Longonot and the estate comprises of only one asset, being LR .No. 413/20 Longonot, which is situated in the Naivaisha Sub-County of Nakuru county, consequently the cause herein shall be transferred to the High Court of Kenya at Naivasha for disposal; and***
>
> ***f) That the applicant shall have costs of the application."***

The appellant was dissatisfied with the said outcome, hence this appeal. In a "***record of appeal***" dated **17th May, 2017,** the learned judge was faulted for revoking the grant made on **13th February, 2012** in spite of the fact that the appellant had complied with **Section 76** of the Law of Succession Act; that the applicant had made full disclosure of all material facts; that the learned judge did not give full consideration to the appellant's submissions and finally, that the appellant ought to have been made a co-administrator.

On **5th December, 2018** the appeal came before us for plenary hearing. The appellant wholly relied on his written submissions filed on **30th October, 2017.** In the written submissions the appellant contended that in 1978 his late mother, ***Mary Muthoni Kirehu,*** moved to the suit land together with him and his two other siblings; that in **1994** his sister, ***Naomi Wanjiku,*** died of a road accident and was buried on the suit land; that the deceased had agreed to give his daughter, ***Mary Muthoni Kirehu,*** (the mother of the appellant) 2 acres of the land as she was unmarried; that the deceased died before transferring the land; that when his mother died on **6th December, 2002**, she was buried on the land; that his claim is for his mother's share who was the deceased's first born daughter.

Miss Omariba, learned counsel for the respondents, also wholly relied on their written submissions dated **12th January, 2018** as well as a list of authorities of the same date. In their submissions, the respondent contended that **Section 76** of the Law of Succession Act gives the court wide powers on revocation or annulment of grants. For this proposition the respondent relied on the decision of ***NYAGA COTTOLENGO FRANCIS V. PIUS MWANIKI KARANI [2017] eKLR, CA NO. 5 OF 2016.*** Further, that the appellant had failed to disclose that a large number of survivors existed which was a material non-disclosure; that the appellant had failed to substantiate his submissions that were allegedly not considered by ***Musyoka, J***. On whether the learned Judge erred in issuing the letters of administration to the deceased's surviving children, the respondent supported this action on the basis that it was in the interest of justice to do so.

We have considered the record, the rival written submissions, the authorities cited and the law. This is a first appeal and that being so, we have a duty to re-evaluate the evidence relied on by the trial court and arrive at our own independent conclusion. In so doing however, we should never lose sight that unlike the trial court, we did not have the benefit of seeing or hearing the witnesses. In the case of ***Ephantus Mwangi & Geofrey Nguyo Ngatia -vs- Duncan Mwangi Wambugu, (1982-1988) 1 KAR 278,*** this Court held that it would hesitate before reversing the decision of a trial judge on findings of facts. It will only do so if, first, it appears that the judge failed to take into account particular circumstances or probabilities material for the evaluation of the evidence, or secondly, that the judge's impression based on the demeanour of a material witness was inconsistent with the evidence in the case generally; or thirdly, the finding is based on no evidence, or the judge is shown demonstrably to have acted on wrong principle.

It is not disputed that the appellant was the deceased's grandson. It is also not disputed that the deceased's mother was the 1st born daughter of the deceased. The appellant's claim is in respect to what he refers to as his mother's entitlement which he stated that his grandfather had agreed to give his mother. According to him, his mother's share and by extension his share, is 1 ½ acres.

However, be that as it may, it is our considered view that the appellant's claim to ownership of 1½ acres of the land being a share of his mother's right did not give him the exclusive rights to apply for letters of administration of the deceased's estate, to the exclusion of the deceased's children. In our view, the learned Judge came to the correct conclusion in revoking the grant issued to the appellant as there had

been material non-disclosure. As submitted by the respondent's counsel, **Section 76** of the Law of Succession Act gives the court wide powers for revocation and or annulment of grant if it is obtained fraudulently or by concealment of material particulars.

Further, and as rightly submitted by the respondent, the decision of the learned Judge did not amount to distribution of the deceased's estate as this is to be done at a later stage wherein the appellant's claim to the 1½ acres will be considered.

It is in view of the above that we find no merit in this appeal. It is hereby dismissed. As regards costs, given that the parties herein are family members, we direct that each will bear his/her own costs.

Dated and delivered at Nairobi this 7th of June, 2019.

D. K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR