In re Estate of Michael Kiptoo Kebenei (Deceased) (Succession Cause 387 of 2012) [2025] KEHC 4902 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4902 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 387 OF 2012

JRA WANANDA, J

APRIL 25, 2025

IN THE MATTER OF THE ESTATE OF MICHAEL KIPTOO KEBENEI (DECEASED)

BETWEEN

LAF ..... OBJECTOR

AND

LILIAN CHEPTOO KEBENEI ..... 1ST ADMINISTRATOR

JUSTINE KIPLETING ..... 2ND ADMINISTRATOR

JUDGMENT

1. Before this Court for determination is the Objector's Summons dated 21/10/2020 seeking Revocation of the Grant issued herein and subsequently confirmed on 13/07/2017.

2. I delivered a Ruling in this matter on 6/11/2024 in which I dismissed an Application by the Objector seeking exhumation the body of the deceased herein for purposes of conducting a DNA test to assist in ascertaining whether the Objector is the biological son of the deceased, for the purposes of being declared an heir to his estate. In my introductory segment of the Ruling, I recited the background of this matter, including the genesis to the said Application, as follows:

> "1. The question whether to allow the extracting of samples, whether from a deceased person or from one who is alive, for purposes of conducting DNA tests to assist in establishing paternity continues to raise substantial debate, whether legal, cultural or religious.
>
> 2. A full viva voce trial was conducted in this matter in respect to Summons seeking revocation of the Grant of Letters of Administration issued herein. What was expected to follow was therefore the Court's Judgment thereon. However, it transpired, upon close of the trial, that there was a pending

Application seeking, inter alia, exhumation of the body of the deceased for purposes of conducting a DNA test to assist in determining whether the Applicant was an offspring of the deceased. Since it is clear that if the Application were allowed, the results of the exhumation of the body and subjecting it to DNA test for purposes of establishing paternity may have a bearing on the outcome of the Judgment, it became necessary to first determine the Application.

3. The background of this matter is that the deceased, Michael Kiptoo Kebenei, died intestate on 30/06/2011. On 23/11/2012, through Messrs Kimaru Kiplagat & Co. Advocates, the 1st Administrator/Respondent, as the widow and one Felix Kimutai Ben, as a brother to the deceased, jointly petitioned for a Grant of Letters of Administration over the estate. Listed as survivors were the widow (1st Administrator) and 2 sons and listed as the asset comprising the estate was only one property, namely, Kapsaret/Kapsaret Block 10(Lamayuet)93 measuring 6.19 hectares. The Grant was then subsequently confirmed on 13/07/2017 by which time the said Felix Kimutai Ben had died and had been substituted with a son to the deceased, Justine Kipleting (2nd Administrator).

4. It was therefore about 3 years after the Grant had been confirmed as aforesaid, that on 21/10/2020, the Applicant, LAF, through the firm of Messrs B.I. Otieno & Co. Advocates, filed the Summons already referred to hereinabove seeking revocation of the Grant. As also already stated, before determination of the Summons, whose viva voce hearing was already underway with the Applicant having already called all his 5 witnesses and closed his case, the Applicant filed the Application now the subject of this Ruling, namely, the Chamber Summons dated 1/10/2023, seeking, inter alia, exhumation of the body of the deceased and subjecting the same to a DNA test. As further stated, and although the entire viva voce trial on the Summons for Revocation of the Grant is now closed, I first need to determine the Application."

3. I may also at this juncture state that the correct date of the death of the deceased was 9/03/2002 at the age of 36 years, and not 30/06/2011, as erroneously stated in the excerpt above.

4. The Grant of Letters of Administration was initially issued on 4/09/2013 and it was when the initial 2nd Administrator died and was substituted with the current 2nd Administrator that the fresh Grant dated 13/07/2017 was issued, together with the Certificate of Confirmation of the same date.

5. With the above background, I now go back to the Summons for Revocation. The same is dated 21/10/2020 and is filed through Messrs Emmanuel Kipkurui & Co., which law firm had by then replaced Messrs B.I. Otieno & Co. as the Advocates for the Objector. The Summons seeks orders as follows:

   a. [.....] spent.

   b. [.....] spent.

   c. The Grant of Probate granted to Lilian Cheptoo Kebenei and Justine Kipleting on 13th July 2017 be revoked and/or annulled.

d. The Certificate of Confirmation of Grant issued to Lilian Cheptoo and Justine Kipleting on 13th July 2017 be revoked and/or annulled.

e. Costs of the Application be provided.

6. In his Affidavit in support of the Summons, the Objector deponed that he is the biological son of the deceased and the late Jennifer Lwenda Khayasi (his mother who is also now deceased), that his late mother informed him that she gave birth to him when she was still in school, that when he was young, the deceased used to visit them frequently, was hand-on and took great care to ensure that they were always catered for, and he used to pay the Objector's school fees and at times, whenever he visited the deceased, he used to direct the 1st Administrator to give the Objector pocket money which he had left with the 1st Administrator. He deponed further that upon the demise of the deceased, the Objector visited the Administrators in or about the year 2005/2006 and requested the 1st Administrator to give him some money to enable him go to college, but the 1st Administrator told him that she did not have money for college but promised to give him some funds Objector to enable him start a 2nd hand clothes (mitumba) business which promise she never fulfilled.

7. He deponed further that he never went to college and was forced to do menial jobs which he still does for survival and that he has been asking the Respondents to give him his rightful share of the inheritance. He deponed further that he then instructed his Advocates to find out whether anyone had petitioned for Letters of Administration upon which the Advocates traced the Court file and realized that the Respondents had applied and obtained a Grant and which had been confirmed. According to him, the Grant was obtained fraudulently by the making of a false statement or by concealment from the Court the fact that the deceased had one more son namely, the Objector, that the Grant was made by means of an untrue allegation that the deceased had only 2 children, that the Respondents knowingly gave false information to the Court as they have known the Objector from the time he was a minor as he used to visit them regularly and have never disowned him.

8. He added that the 1st Respondent has sub-divided the deceased's parcel of land known as Kapseret/Kapsabet Block 10 (Lamaywet)/93 into 10 sub-divisions, transferred 9 resultant sub-divisions to 9 people and has caused herself to be registered as the sole owner of one of the resultant sub-divisions known as Kapseret/Kapsabet Block 10 (Lamaywet)/835. He reiterated that the Administrators have declined and/or refused to give him his rightful share of the estate and their conduct is meant to unlawfully deprive him of such rightful share.

9. The Summons was also supported by the Affidavit sworn by one Elizabeth Lukasiva Lwenda who deponed that the Objector is the son of her late sister, Jeniffer Khayasi Lwenda. She deponed that her said sister gave birth to the Objector when she was still a student at Magereza School, Eldoret, that at the time they were residing at Langas within Kapseret Constituency and she knew the Objector's father, Michael Kebenei (the deceased herein) as they used to meet him when they went to buy milk from farmers at Kapsaret. She stated that her said sister used to take the Objector to visit the deceased and his mother and the deceased at times used to visit the Objector. She deponed further that the deceased used to cater for the Objector's upkeep and he even used to take care of the Objector's costs and welfare when he went for initiation. According to her, the Objector's mother was unemployed and had no stable source of livelihood and when the Objector's father passed on, she did not manage to take the Objector to college and the family of the deceased declined to assist. She deponed further that the deceased left behind a vast parcel of land and the Objector is entitled to a reasonable share thereof.

10. By the directions given by H. Omondi J (as she than was) on 2/11/2020, it was ordered that the Summons be heard by way of viva voce evidence. Pursuant thereto, the parties filed Witness Statements

and bundles of documents. I will hereinbelow recite the contents of the Statements of the witnesses who testified as they subsequently adopted the statements as part of their respective evidence-in-chief. I note that the Administrators also swore respective Replying Affidavits which were filed through Messrs Kipkorir Cheruiyot & Co. Advocates which appears to have taken over the conduct of the Administrators' case.

11. At the trial, both sides called 5 witnesses each. I may also state that the Objector's first 4 witnesses all testified before H. Omondi J (as she then was) before she was elevated to the Court of Appeal and it is thereafter that I took over the matter. It is the Objector's last witness and the Administrators' all 5 witnesses who testified before me. By this time, the firm of Messrs Ledishia J. K. Kittony & Co., had also replaced Messrs Kipkorir, Cheruiyot and Kigen & Co., as Advocates for the Administrators.

12. I also note that at some point, in the course of the trial, the matter was referred to Mediation but which was unsuccessful and the parties returned to Court to continue with the trial.

Administrators' Replying Affidavits

13. The 1st Administrator, in her Replying Affidavit sworn on 16/12/2020, deponed that she is the widow of the deceased, and denied any knowledge of the Objector as being a son of the deceased, or knowledge of any person by the name Jenniffer Lwenda Khayasi. She deponed that it was not until she received a letter from the local Chief that she learnt of the allegations by the Objector which are strange to her. Regarding the Succession proceedings herein, she deponed that due process was followed in obtaining the Grant and maintained that the Objector is not known to the family of the deceased and is a stranger. She deponed further that the deceased was buried at their Kapseret home which burial the Objector did not attend and/or raise any objection prior to the burial despite an announcement being made that whoever had an issue with the family should talk to the family and that that neither the Objector nor his mother did so.

14. She added that prior to the issuance of the Grant herein, a notice of the commencement of these proceedings was published in the Kenya Gazette. About the meeting convened by the Chief, she deponed that she could not attend because she was unwell. She then deponed that the estate is already sub-divided and all beneficiaries and the persons indebted have already received their parcels of land and that it had been more than 3 years since the Grant was confirmed and the Objector never raised any challenge until now that he has woken up from his slumber. She contended that the Objector had not produced any documents to prove his position as the biological son of the deceased, that the Application is a waste of the Court's precious time, and is an afterthought aimed at destabilizing the family of the deceased.

15. The 2nd Administrator, on her part, deponed that he is the 2nd born son of the deceased who died when the 2nd Administrator was barely 10 years old. He, too, denied any knowledge of the Objector as a son of the deceased, and maintained that the Objector is a complete stranger to the family. Like his mother, he similarly pointed out that no documents have been attached to support the Objector's claims and averred that the Objector's birth certificate does not show any link or connection between the Objector and the deceased, that the Objector did not surface during the death and burial of the deceased or during the Objector's initiation into adulthood for him to be introduced to the family. Regarding the meeting convened by the Chief, he deponed that he could not attend because he was nursing his sick mother (1st Administrator).

16. He, too, maintained that Objector did not attend the burial and/or raise any issue during the burial despite an announcement being made requiring any person having an issue with the deceased to speak

out. He echoed the claim that the Objector delayed to come to Court, and that the estate has been sub-divided and beneficiaries have already received their titles.

Objector's Witness Statements

17. The Objector, LAF, in his Statement stated that he was raised up both in Kenmosa Estate and Langas-Kasarani within Uasin Gishu County, that his maternal grandfather resided in Kenmosa and also had a plot in Langas where he (Objector) used to live with his mother and the parents. He stated that he knew his father (the deceased herein) when he was still very young when his father had come to Langas-Kasarani to visit them and was introduced to him by his mother, and that he used to visit them regularly and would give them money and also take him out. He stated that his father introduced him (Objector) to his (deceased) brothers and friends and also once introduced the Objector to the 1st Administrator as his son. He claimed also that his father used to own a "matatu" christened "Promise", that whenever the Objector would miss school fees, he would go to the matatu/bus stage and wait around for the deceased who when he came, would give him the school fees, and that the deceased also catered for his "initiation" expenses.

18. He also claimed that when the deceased's health deteriorated, he (Objector) used to visit him at his Kapseret home where he would find the 1st Administrator, that he also visited the deceased on several occasions at Elgon View Hospital where he had been hospitalized and where the Objector also used to meet the 1st Administrator, the deceased's grandmother, Emily Chepsiror and other members of the family. He stated that when the deceased was about to be discharged from hospital, he asked the Objector to go and visit him at his Kapseret home the following day and which invitation was also extended by the 1st Administrator, that he honoured the invitation and visited, and thereafter, regularly visited, and that anytime he visited, the 1st Administrator would give him lunch and pocket money for school. He added that when the deceased died in 2002, he attended the burial in the company of a friend, that he participated in the tradition of "throwing" a handful of soil into the grave by family members and had lunch at the home. He claimed that after he completed high school, his mother, Jenniffer Lwenda, became mentally disturbed and when the Objector went to the 1st Administrator to seek assistance, she promised to help and asked him to go and apply for a National Identity Card and advised him to take his documents to a sister of the deceased, one Hellen Chepkoech, who was working at the District Commissioner's office to assist in fast-tracking the process.

19. He stated that he complied and took the documents to Hellen Chepkoech who indeed assisted him. He also claimed that he visited the 1st Administrator on several occasions in the company of his wife, Elizabeth Wangu, around the year 2016, that the 1st Administrator promised to give him some money to start a "mitumba" (2nd hand clothes selling) business but that in one of the visits, the 1st Administrator, in the presence of the 2nd Administrator, told him that she would not give the Objector any share in the estate of the deceased because the Objector had threatened to sue her. He claimed that later he informed his Pastor, one Reverend Kipchumba, who was also a cousin of the deceased, about the issue, that the Pastor tried to intercede and later, the 1st Administrator promised to buy for the Objector a parcel of land and build him a house because she feared that the Objector would make more demands if he was given a share, that this what she had also told the Pastor. In conclusion, he stated that the Pastor is also the one who handed him over to his wife's family during their wedding held on 6/07/2019.

20. Geoffrey Nyamari stated that he has known the Objector since they were "kids" as they grew up in the same neighbourhood at Langas-Kasarani within Uasin Gishu County, that he also knows the Objector's paternal grandmother and father and that he also met the Objector's step-mother and step-brothers when he visited them at their home at Langas. He stated that the Objector's mother used to

operate a small boutique at Langas where he used to see the Objector's father come and have lengthy conversations with the Objector's mother. He stated further that there was a time he accompanied the Objector to Elgon View Hospital to visit his father who was hospitalized there and when they got there, they met with the Objector's step-mother and that the Objector had a lengthy conversation with his father. He added that he also accompanied the Objector to his father's home at Kapseret much later after the hospital visit and again met the Objector's father and his step-mother. In conclusion, he stated that when the Objector's father died, he accompanied the Objector to the burial at Kapseret and on that day, he met the Objector's paternal grandmother, step-brothers and step-mother and took lunch at the home.

21. Jairo Kiplagat Rotich stated that his father used to work as a "shamba boy" at the home of the deceased's grandfather (Philip Chepsiror) and that his family and those of other workers used to live in respective servants' quarters within the compound. He stated that the deceased initially used to live with his parents in the main house but later built his house next to the servants' quarters. He recounted how the Objector's mother, Jenniffer, then still a schoolgirl, used to come to the home to buy milk and vegetables in the course of which the deceased spotted her and took an interest in her, how the deceased "roped" him (Jairo) into the scheme to win the Objector's mother's affection, how he and the deceased planned the "conquest", the major role that he (Jairo) played in the whole scheme and how eventually, the Objector's mother also fell in love with the deceased and they started dating. He described how, through his (Jairo) "assistance", the deceased used to secretly sneak the Objector's mother to his house and where they would spend the night together until the Objector's mother conceived (Objector's pregnancy). He also stated that the mother of the deceased (Emily Chepsiror), when the Objector's mother became expectant, brought home the 1st Administrator who had been his (Jairo) classmate, to marry the deceased.

22. According to him, the Objector continued to associate with the Objector's mother during the pregnancy and used to send him to escort her to pre-natal clinic and would even give money for the same, that she had to drop out of school when she gave birth to the Objector and thereafter, the deceased got married to the 1st Administrator. According to him however, even after the marriage, and even after the Objector's mother gave birth, the deceased continued her relationship with the Objector's mother and on several occasions, the deceased used to send him (Jairo) to the Objector's mother to see the child, to deliver foodstuff and money for medical attention and upkeep and also asked him to accompany them to post-natal clinics. He recounted how one day, the deceased sent him (Jairo) to one Mzee Chepkwony's home to pick his visitors there, when he reached there, he found the Objector's mother with the baby (Objector) whom he collected and took to the house of the deceased but the deceased's mother (Emily) chased then away and the next day terminated his (Jairo's) parent's employment and evicted them from the home. According to him the deceased continued visiting and spending nights at the Objector's mother's house at Langas and that subsequently, he (Jairo) met the deceased on several occasions coming from the Objector's mother's home. He further claimed that the deceased also used to visit the Objector's mother's parents including when her grandmother died and that at one time, the deceased told him that he would give his son (Objector) a portion of land as inheritance.

23. Elizabeth Wangu stated that he is the Objector's wife and that they have been visiting the 1st Administrator at her home in Kapseret from the year 2016, that in 2015, the 2nd Administrator visited them accompanied by one Titus Tuwei, and the Objector introduced them to her as his brother and a cousin, respectively. She claimed that they normally visited the 1st Administrator's home on Sundays after church and would have lunch there and stay there until evening, and that it is during one such visit that she met the Objector's paternal grandmother, Emily, with whom the Objector even took a photograph (selfie).

24. She stated that one of the reasons for the visit was to discuss the issue of the Objector's inheritance from the deceased (his father) but the 1st Administrator kept on postponing the discussion until one day, she told the Objector that she will not give him any share because the Objector had threatened to sue her and that, she, instead, offered to give him some money to start a "mitumba" business. She stated that in the month of June 2019, she and the Objector visited the Objector's said maternal grandmother, Emily, at her Elgon View home and as the couple was preparing for their wedding, the grandmother agreed to attend the wedding, that sometime in June 2019, the Objector told her that the 1st Administrator had sent him some money as her contribution for the wedding and the 2nd Administrator had also sent his contribution separately to the committee Treasurer, Faith Mbaria. She stated that during the wedding held on 6/07/2019, the presiding Bishop asked Reverend Philip Kipchumba, being a relative of the Objector, to accompany the Objector to the altar to stand-in, in place of the Objector's father (the deceased), and that this is what happened and it is Reverend Kipchumba who thus handed over the Objector to her (Elizabeth Wangu) family.

25. Faith Njeri Mbaria stated that Elizabeth Wangu who is married to the Objector is her cousin, that in the year 2019, she was the Treasurer during the couple's wedding preparations and that she formed a Whatsap group in which the couple's relatives were members. She stated that contributions by family members were sent to her via Mpesa and she used to prepare a list of the contributors for that purpose and the two Administrators were among the people who sent contributions as the Objector's step-brother and step-mother, respectively. She also stated that in one of the wedding committee meetings, it was resolved that during the wedding, the Objector would be presented to his bride's parents at the altar by his uncle who is a preacher, that she attended the wedding on 6/07/2019 and that indeed it is the uncle and his wife who presented the Objector as resolved in the meeting.

Administrators' Witness Statements

26. The 1st Administrator, Lilian Cheptoo Kebenei stated that she got married to the deceased on 29/04/1990 and were blessed with 3 children, including the 2nd Administrator, that due process was followed in commencing these proceedings, that as far as she is concerned, the deceased did not leave behind any other dependents and that if there were any, they would have presented themselves during the burial of the deceased. She reiterated that at the burial, an announcement was made requiring any person with a claim against or over the estate of the deceased to come forward but no one did so, that the estate has already been distributed, parcels of land sub-divided and beneficiaries and creditors have already received title deeds for their respective parcels of land.

27. She also stated that under Nandi customary law, any child born out of wedlock acquires the name of his father and such name appears in the birth certificate and other documents.

28. The 2nd Administrator, Justine Kipleting, reiterated that he is the 2nd born son of the deceased and insisted that he only has 2 other siblings-brothers. He denied any knowledge of any other siblings and contended if there were any, their surnames would have reflected the name of the deceased in their birth certificates and other documents and also their mother or members of the community would have informed or hinted to them about it. He maintained that throughout their life, no one had approached them claiming to be a dependent of their father, that if there was any sired by their father, they would have been initiated together under their Nandi customs. He, too, reiterated that an announcement was made at the burial of the deceased for anyone with a claim against the estate to come forward and no one did, and also that the estate has been fully distributed and title deeds issued.

29. Joseph Kiplagat Sing'oei stated that he is the immediate neighbour of the deceased whom he grew up together with as close friends and used to share a lot about issues touching on their lives and family but

at no time did the deceased ever mention siring a child out of wedlock. He stated that he was present at the wedding of the deceased in December 1990 and also during his burial arrangements after his death on 9/03/2002. He, too, maintained that during the burial, an announcement was made inviting any person with an issue with the estate of the deceased to speak out but no one did. According to him, the deceased only had 3 children and the Objector is a stranger to him. He insisted that the deceased would have informed him if he had a child outside marriage since they were long-time friends.

30. Henry Togom stated that he used to be the Chief, Kapseret Location between 1987 and 2014, that he was very conversant with the deceased and his family, that the deceased was a regular visitor to his office, and that the family had a number of administrative issues which he handled. He, too, stated that he was present at the wedding of the deceased, during his burial arrangements after his death, and also at the burial itself, and that at the burial. an announcement was made inviting any person with an issue with the estate of the deceased to speak out but no one did. He, too, stated that he only knows the 3 children of the deceased, and the Objector is not one of them. He stated that he is the one who issued the letter used in commencing the Succession proceedings herein, and maintained that to the best of his knowledge, the deceased had no other children outside wedlock.

31. Samuel Cheruiyot Malel stated that he is a cousin of the deceased with whom they grew up together, that he attended his wedding and knows his wife (1st Administrator), and that he only knows the 3 children of the deceased. He stated that he also knows the Objector who resides in a neighbouring location, Langas but at no point did the Objector's family mention to him about having relationship with the family of the deceased and that the deceased, too, never mentioned any child outside marriage in spite of being very close and sharing a lot. According to him, the allegations made by the Objector are shocking and strange.

Oral Testimonies of Objector's Witnesses

32. PW1 was Faith Njeri Mbaria. She adopted her Statement earlier recited and reiterated the matters already stated therein, including that she was the Treasurer of the Objector's wedding committee for which she opened a WhatsApp group for collecting monetary contributions, and that the Objector's wife is her cousin. During cross-examination by Mr. Kigen, Counsel for the Administrators, she stated that the WhatsApp group she formed was for family only and had over 50 members. She insisted that the Administrators both sent their contributions. She however conceded that she did not know them physically and that it is the Objector who told her that they were the Objector's step-mother and step-brother.

33. PW2, Geoffrey Nyamari, also adopted his Witness Statement and reiterated that he grew up with the Objector as neighbours and friends in Langas estate. When shown the photograph (selfie) earlier referred to, he identified the deceased's mother posing with the Objector. He then stated that he knew the deceased, whom he met on 3 occasions, and knew as the Objector's father, and that although he did not live with the Objector's mother, he used to pass by frequently and bring biscuits and other snacks. He stated that he knew the deceased well because the family of the deceased used to have a cattle dip around the neighbourhood where people used to take their cows for treatment and that the deceased used to be referred to as to as "Mike" and his father as Philip. He reiterated that he accompanied the Objector to visit his father in hospital when he was ailing and who invited the Objector to visit him at home once he was discharged. He also reiterated that when the deceased died, he accompanied the Objector to the burial wherein the Objector was treated as family and even "threw soil" at the grave as per traditions. In cross-examination, he stated that he was in Class 8 or Form 1 when the deceased died. He claimed that whenever "Mike" visited, the Objector's mother used to ask the Objector's friends to go and greet "Baba A". He stated that he does not know whether the deceased used to pay school fees

for the Objector or extend any further assistance and that "Mike"'s family was affluent and was ranked highly in the neighbourhood as it used to carry out large scale farming and owned lots of livestock.

34. PW3, Jairo Kiplagat Rotich also adopted his Statement and reiterated that his father used to work as a "shamba boy" (gardener) at the home of the deceased's grandfather (Philip Chepsiror) wherein their family used to be housed in the servant's quarters. He described how he was involved in the start and blossoming of the love affair between the deceased and the Objector's mother, how they used to sneak the Objector's mother (then a schoolgirl) into the home where she would spend nights with the deceased until she fell pregnant, how the mother of the deceased (Emily Chepsiror) discovered the pregnancy and became hostile about it, how she once chased the Objector's mother from the home and on the next day evicted PW3's family from the home on suspicion that it participated in nurturing or encouraging the relationship between the deceased and the Objector's mother, and how, despite all this, the deceased continued to secretly assist during the pregnancy and even after the birth of the child (Objector). He then pointed out the 1st Administrator in the said photographs as the mother of the deceased and reiterated that she was his classmate in primary. He also mentioned the names of the siblings of the deceased and also of some of the neighbours then. In cross-examination, he stated that the family of the Objector's mother used to live about 300 metres from the home of the deceased.

35. PW4, the Objector, ALF similarly adopted and reiterated his Statement and stated that his name "L" is from his mother's side. He, too, referred to the photographs and produced the documents in his bundle as exhibits. Apart from the photographs, the bundle also contained screenshots of the WhatsApp group indicating that the 1st Administrator contributed a sum of Kshs 3,000/-, and an Mpesa Statement showing the contribution by the 2nd Administrator. He referred to one of the photographs (selfie) in particular, which he claimed he took with the 1st Administrator on one occasion after church service. He stated that he could not raise any issues prior to the burial because the 1st Administrator is a private person and had also not shown any signs of neglecting him. About the name of the deceased not appearing in his birth certificate, he stated that it was because he died when the Objector was still a minor and it was also next to impossible to obtain the relevant documents from the family of the deceased to use in the Application. He stated that it is her maternal grandmother, Emily Chepsiror, who told her that Reverend Philip Kipchuma was the family Chairman and who would represent the family at the wedding. He stated that he used his maternal mother's Identity Card to obtain his own. In cross-examination, he admitted that he did not produce his birth certificate and also denied that he had intentionally left out the said alleged uncle (Reverend Philip Kipchumba) as a witness.

36. He claimed that he asked Reverend Philip to testify but he declined stating that as the family chairman, he is neutral. About the wedding WhatsApp group referred to earlier, he insisted that it was only for family members. He admitted that he did not produce any evidence to show that the deceased used to support him. He stated that his mother's sister, one Elizabeth, lives in Mombasa and although she had not testified, she had sworn an Affidavit.

37. PW5, Elizabeth Wangu also adopted her Statement and reiterated matters already stated therein. She, too, referred to the photograph (selfie) which the Objector and Emily Chepsiror (mother of the deceased) took together after a church service on a Sunday, which she stated was taken in her presence sometime in the year 2016. Regarding the second photograph, she stated that it showed the said Reverend Philip Kipchumba (the alleged paternal uncle to Objector) at the wedding, and stated that Reverend Philip Kipchumba attended as the Objector's guardian. In cross-examination, she agreed that any one, not only a relative, can contribute to a wedding fund but denied that the Administrators contributed as mere church members arguing that they are not even members of the same church. She admitted that neither of the Administrators or Emily Chepsiror attended the wedding and also that

Reverend Philip was a member of the church where the wedding was conducted. She also admitted that the family of the deceased did not attend the engagement ceremony conducted before the wedding but stated that she later learnt that they did not attend because the family of the deceased did not have a good relationship with the Objector. Regarding the phone numbers via which the wedding contributions were allegedly sent by the Administrators, she admitted that she had no certificate from the mobile phone provider showing that the phone numbers belonged to the two. About the alleged visit made to their house with the Objector by the 2nd Administrator, she admitted that she had no proof. In re-examination, she stated that the bad relationship that caused the family of the deceased not to attend the engagement ceremony and the wedding was the Objector's demand for his inheritance which had caused a rift between the Objector and the family.

Testimonies of Administrator's Witnesses

38. The 1st Administrator, Lilian Cheptoo Kebenei insisted that she did not know the Objector. Shown the photograph that her mother-in-law (Emily Chepsiror) had allegedly taken with the Objector, she agreed that two bore some resemblance in appearance but denied knowledge of where it was taken. Shown the photographs allegedly taken at the Objector's wedding, she denied any knowledge of the wedding and also stated that the Chairman of their family is one Sammy Cheruiyot.

39. According to her, she contributed to the wedding without knowing whose wedding it was and she also did not know that her son, the Administrator, also contributed. She stated that she thought she was contributing for an orphan. Regarding the phone numbers via which the contributions were sent, she confirmed that they were hers and the 1st Administrator's correct phone numbers but registered her disappointment that the Objector used her generosity to trap her. She claimed that they were told about the ceremony by a neighbour and she understood it to be only some sort of a celebration, and she did not know it was in fact a wedding. She denied any knowledge of the alleged Reverend Philip Kipchumba whom the Objector claimed represented the Administrator's family at the wedding. About whether the Objector attended the burial of the deceased, she maintained that she never saw him there although there were many people. She contended that that the funeral arrangements and vigil were conducted for about a week and on none of all these days did she see the Objector, that at the burial no one rose up to raise any issue and that by that date, the Objector was an adult. She insisted that the deceased never at any time mentioned to her that he had any child outside marriage. In cross-examination, she claimed that it is normal for her to contribute for any good cause and that she even has orphans in her house whom she takes care of. About the person who asked her to contribute, she insisted that it was a neighbour but whose name she could not recall.

40. The 2nd Administrator, Justine Kipleting, also adopted his Statement. In cross-examination, he maintained that he does not know of any other child born outside marriage. When shown the first photograph, she agreed that it showed her grandmother, Emily Chepsiror, with the Objector and also admitted that he contributed a sum of Kshs 2,000/- to the Objector's wedding. He stated that he met the Objector sometime in 2020 long after the death of the deceased and it was only because the Objector was a musician and he met him at a club when he had gone to entertain himself and that at that time, he did not even know that the Objector had any claims against his family. According to him, he also did not know the real purpose of the contributions and also took the position that the Objector's taking of the photograph with his grandmother does not mean anything. He insisted that he only contributed to the wedding because he had been added into the WhatsApp group by one Beatrice who was his friend. He stated that about 200 attended people the burial of the deceased and insisted that despite an announcement being made for any person with a claim to come forward, no one did. He stated that he was about 10 years at that time and insisted that he never saw the Objector at the burial. In re-

examination, he maintained that although he was in the said wedding WhatsApp group, he did not know the person who was wedding and that it was much later that he met the Objector.

41. DW3, Joseph Kiplagat Sing'oei, too adopted his Statement. Under cross-examination, he maintained that he was a neighbour of the deceased whom he grew up together with as close friends, that they used to confide in each other and that at no time did the deceased mention that he had another woman lover apart from his wife. He further maintained that he was present at the burial of the deceased and that he only knew the deceased's 3 children.

42. DW4, Henry Togom also adopted his Statement and reiterated that he used to be the area Chief, Kapseret Location. Under cross-examination, he stated that he retired in 2014, that he handled many cases brought to him by the deceased, that he attended the burial of the deceased, and that he used to go to the same church as the family of the deceased, which church, Emily Chepsiror, the mother of the deceased was one of the founders. He denied any knowledge of the Objector. He identified Emily Chepsiror in the photograph showed to him and also stated that he had known the deceased for about 20 years, even before he became the Chief.

43. DW5, Samuel Cheruiyot Malel, too, adopted his statement and reiterated that he is a cousin of the deceased and knew him very well as they grew up together. In cross-examination, he stated that he knew the Objector separately as he used to work with his grandfather, one Francis Lwenda, at EATEC (a company in Eldoret), and that the Objector's house was along the way to his own. He also stated that his father and the deceased were brothers and that it is the 1st Administrator who informed him that Francis Lwenda was the Objector's grandfather. To prove that the deceased was his cousin, he proceeded to mention the names of siblings of the deceased, and stated that one of the siblings, Leah Chepsiror used to work at the District Commissioner's office but is now retired. She also identified the deceased's grandmother, Emily Chepsiror, in the photograph showed to him. In conclusion, he stated that that the deceased never mentioned to him that he had any other child outside marriage.

Directions on Filing of Submissions

44. By the directions given on 6/11/2024, the parties were directed to file written Submissions. It however transpired that the Petitioners had, on their part, already filed their Submissions earlier on 2/07/2024 after the trial closed. The Objector then filed his Submissions on 19/11/2024. That big gap in the dates of the respective Submissions arose because the process of setting down of this matter for Judgment was delayed by the filing, during the course of the trial, of the Objector's said Application on the issue of DNA testing.

Objector's Submissions

45. Counsel for the Objector, Mr. Kipkurui, began by making a passionate plea to the Court to come to the aid of the Objector who, by Counsel's words, is "a heartbreaking plea from a son who, despite his father's acknowledgment, now faces the cruel sting of rejection", that "he was born out of wedlock, raised with dignity by a devoted single mother and has always carried the hope of finding a place in his father's family – a hope that his father once granted by recognizing him as his own", that but "with his father now passed, that hope is under attack, as his step-mother has chosen to disown him and exclude him from his rightful place in these Succession proceedings". He submitted that the testimonies of the Administrator's witnesses were false and full of contradictions. He pointed out that for instance, that, the 1st Administrator (DW1), despite claiming that she did not know the Objector, did not deny that she contributed to her wedding. He submitted that the 1st Administrator misled the Objector to believe that the distribution of the estate would be done amicably and that he would be catered for yet behind his back, she was pursuing the Grant.

46. He contended that the 1st Administrator never denied withholding documents from the Objector thereby ensuring that it was impossible for him to have the name of the deceased appear in his documents as his father. He claimed that the matter went for Mediation and the 1st Administrator offered the Objector a share but which, being too little, the Objector declined. According to him, the 1st Administrator did not disprove that the Objector was was maintained by the deceased prior to his death. Regarding the testimony of the 2nd Administrator (DW2), he submitted that, in cross-examination, it came out that he had lied about his claim of not knowing the Objector. On the 2nd Administrator's claim that if the Objector were his brother, they would have been circumcised at the same time, Counsel termed the claim as misleading as this would not have been possible since the Objector was much older than the 2nd Administrator. Regarding the 2nd Administrator's contributions to the Objector's wedding, Counsel submitted that it is highly unlikely that he would send money to a stranger. About the testimony of Samuel Cheruiyot Malel (DW3), Counsel submitted that in his Witness Statement, he denied knowing the Objector but in his oral testimony, he admitted that he knew the Objector's family, their home and even the Objector's paternal grandfather, one Francis Lwenda, with whom he used to work at EATEC and that when asked how he knew that the said Francis Lwenda was the Objector's grandfather, he disclosed that it is the 1st Administrator who told him so. He submitted further that although the deceased's mother, Emily Chepsiror, did not testify, in her Statement, she had confirmed that the Objector had visited her requesting for fees to join college.

47. On revocation of Grants, Counsel cited Section 76 of the *Law of Succession Act*, on the definition of a "dependent", he cited Section 29. on the definition of a "child", he cited Section 3(2) and on the Court's power to determine "dependents", he cited Section 27. He submitted that the Objector had established his "dependency" because he demonstrated that the deceased publicly acknowledged him as his son before his family, including his mother, and also friends, that the deceased maintained him and his mother prior to his demise such as by paying rent, school fees and by assisting the Objector's mother when she was expectant and even after birth, by giving the Objector pocket money, and that he visited the deceased in hospital when the deceased was ailing and even attended the funeral when the deceased died. He contended that the Objector's witnesses gave specific and consistent details such as where the Objector and his mother used to live, seeing the deceased with the Objector, and witnessing the deceased actually giving assistance to the Objector and his mother. Counsel urged the Court to take judicial notice of some facts that were not canvassed during the trial, such as that the Administrators, during the Mediation, offered to the Objector some share but which the Objector turned down, and a letter from a Chief (which was however not produced in evidence), and in which the Chief allegedly recognized the Objector as being a son of the deceased. Counsel submitted that from the foregoing, it is apparent that the Objector's assertions have transcended mere claims and have been cemented by evidence which established his claim on a balance of probabilities. He cited the case of In re Estae of PWM (Deceased). In conclusion, he prayed that the Grant be revoked, or in the alternative, the Objector be given reasonable and/or equitable provision from the estate.

Administrators' Submissions

48. On her part, Ms. Kipseii, Counsel for the Administrators, submitted that the Objector claims to be a son of the deceased yet has not adduced any evidence to prove the same. She cited Section 107 of the *Evidence Act*. She submitted further that apart from the Administrators, other close relatives of the deceased have equally denied the Objector's claims, and that the Objector's allegations of the participation of the Administrators in raising funds through a social platform for his wedding cannot be proof of paternity. She also pointed out that the Objector did not produce any Certificate of Birth or clinical records, and stated that the deceased and the Objector's mother were never married and also that the Objector did not seek for DNA tests until after close of the pleadings. She cited authorities

on the principle that evidence cannot be introduced by way of Submissions. She also cited the case of Susan Nyambura Mwathi v Duncan Kiria Kabete [2020] eKLR and also the case of Njiru Micheni Nthiga v Governor, Tharaka Nithi County Government & 5 Others [2021] eKLR.

49. Regarding the prayer for revocation of the Grant, she, too, cited Section 76 of the *Law of Succession Act* and submitted that in prosecuting these proceedings, the Petitioners fulfilled all that was required of them as they correctly filled all the forms and availed the letter from the Chief, list of assets and liabilities and their values, and also the names of the dependents of the deceased as well as sureties. She also urged that the Petitioners were the rightful Applicants in the order provided by the law and therefore had the right capacity. According to her therefore, the Objector has not established any wrongdoing on their part to justify revocation of the Grant. She cited the case of Albert Imbuga Kisigwa vs. Recho Karai Kisigwa [2016] eKLR. She also cited the case of Nbi HC Misc. Appli. E087/2021 Samwel Kimani & Another vs Dominic Kamiri Karanja in which, she submitted, the Judge followed the holding made in the case of Evans Kidero v Speaker of Nairobi City County Assembly & Another [2018] eKLR, that the "Court would be failing in its duty to allow what are essentially spent proceedings to linger on, thereby dissipating the Court's resources and, to the prejudice of the Respondent". In conclusion, Counsel urged that the time that the Objector has taken to bring this Application, long after the deceased died, and long after the Grant was issued and estate already distributed, is clear demonstration that the same is an afterthought.

Determination

50. The broad issue herein, in my view is "whether this Court should recognize the Objector as a son of the deceased and thus, whether the Grant of Letters of Administration issued herein and subsequently confirmed should be revoked on the ground that the Objector's existence or interests were not disclosed to the Court or catered for".

51. Regarding the provisions of the *Law of Succession Act* guiding the handling of a claim of paternity for purposes of inheritance from the estate of a deceased person, the Court of Appeal, in the case of E.M.M v I.G.M & Another [2014] eKLR, in which the issues determined were more or less similar to those now arising herein, stated as follows:

> " The real issue before us on this appeal is whether the appellant proved before the High Court on a balance of probabilities that he is a child of the deceased. Under section 29(a) of the *Law of Succession Act*, if the appellant is able to prove that he is a biological child of the deceased, he would be a dependant of the deceased without having to prove that he was maintained by the deceased immediately prior to his death.
>
> Independent of being a biological child of the deceased, and therefore an automatic dependant, the appellant would also qualify as a dependant of the deceased if he can prove that he is a child whom the deceased had taken into his family as his own, and who was being maintained by the deceased immediately prior to his death. Unlike the dependant under section 29(a), the dependant under section 29(b) has to establish that the deceased had taken him or her into his family as his own child and that he or she was being maintained by the deceased immediately prior to his death.

52. In this case, I understand the Objector's claim to have been brought on both the two alternative fronts referred to above, namely, the first, that he is a biological child of the deceased, and secondly, independent of being a biological child, that he is a child whom the deceased had taken into his family thus a dependent.

53. In echoing the explanations given by the Court of Appeal above, in respect to a “child” or “children”, the answer as to their “dependency” in the context herein is addressed in Section 29 of the *Law of Succession Act* which provides that a "dependant" means-

> “(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
>
> (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
>
> (c) .....”

54. It is therefore settled that, unlike Section 29(a) of the *Law of Succession Act*, proof of “dependency” is a condition precedent to the exercise of the Court’s powers under Section 29(b) thereof. In respect to this meaning ascribed under Section 29(b), Mabeya J, in the case of Beatrice Ciamutua Rugamba. vs. Fredrick Nkari Mutegi & 5 Others, 2016 eKLR, held as follows:

> “From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

55. The *Law of Succession Act* also contains the following explanations in its definition part:

> “(2) (2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
>
> (3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.

56. Njagi J, in the case of NSA & Another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another [2019] eKLR, held inter alia that in view of the provisions of Section 3(2) of the *Law of Succession Act* aforesaid, any infringement of the right to inheritance for children born out of wedlock would be unconstitutional. On this, I agree with the Judge that it would be unfair and unjust for children born out of wedlock to be arbitrarily excluded from inheriting their parent’s estate on the basis of their being categorized as “illegitimate”. A distribution of an estate which does not comply with the spirit, intent and aspirations set out in Article 27 of *the Constitution* must be termed discriminatory, and thus unconstitutional.

57. In this case, as in all other cases of the nature arising herein, it was incumbent upon the Objector to prove his claims. In regard to this “burden of proof”, the Supreme Court in the case of Gatirau Peter

Munya v Dickson Mwenda Kithinji & 3 Others (2014) eKLR, the Supreme Court guided as follows generally:

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

58. In a Succession Cause in which similar claims of paternity arose as herein, Mativo J (as he then was), in the case of In re Estate of Patrick Mwangi Wathiga - Deceased [2015] eKLR, held that:

> " In my view, the practice of persons emerging after the demise of a deceased person purely to claim a share of properties of the deceased person should be discouraged unless the alleged claimant can demonstrate that there were attempts to have him or her recognized as a beneficiary/member of the family during the deceased's life time, or the deceased left clear instructions to that effect, or his claim can be reasonably inferred from the express or implied circumstances of the case including the conduct of the deceased or from such reasonable or probable circumstances that can be proved by way of evidence. Alternatively, such a claim can also be admitted if the claimant demonstrates that he was prevented from associating with the deceased during the deceased's life time by either infirmity of body or mind or both or any other reasonable circumstances. In my view, where someone remains delinked from a family or the person he claims to be a parent for 24 years and only emerges after his/her death, the burden lies on him/her to establish his claim to the deceased's estate and to tender such evidence as may be necessary to establish his claim beyond reasonable doubt.
>
> I am clear in my mind that the burden of proof lies on the objector to prove paternity or his claim to be a beneficiary of the deceased's beyond reasonable doubt. In Kimani Mathenge Muriuki vs Patricia M. Muriuki & Another[5] the court of Appeal emphasised on the need for the person alleging paternity to prove it on a balance of probabilities. The case becomes even more difficult where no medical evidence is adduced to prove paternity or to prove that the deceased was step father or lawful guardian. No other evidence was adduced except what the objector states. The position is complicated by the fact that the objector emerged only after the deceased's death and 24 years after the Petitioner had been married to the deceased.
>
> It is trite law that the burden of establishing all the allegations rested on the objector and in law he was under an obligation to discharge the said burden. It's not enough to state that the deceased was his father. He ought to have supported the said allegation by adducing the necessary supporting evidence."

59. In this case, after carefully studying the record, I find myself forming the impression that the Administrators were not quite candid or sincere in their denials of the Objector and in labelling him a stranger. I say so because in my view, they appeared evasive on many aspects. First, regarding the sending of monetary contributions by the Administrators for the Objector's wedding, while I agree that the mere act sending of such contributions may not itself have been proof that they knew the Objector, considering the circumstances of this case, I find it quite improbable that they truly did not know him. The fact that they sent the contributions separately and on different occasions, is quite telling. They both agree that before sending their contributions, they had been "added" into the WhatsApp group

formed for that purpose and which, according to the Objector and his witnesses, was exclusively for "relatives". Being in that group and believing that they were therefore able to see and view the exchanges made in the group "wall", it would be unlikely that they would truly not know the purpose for which the group was formed. From the evidence of record, they at all times remained members of the group and, like other members, sent their contributions via Mpesa, the 1st Administrator sent Kshs 3,000/- and the 2nd Administrator Kshs 2,000/-, on separate occasions. The claim that they did not know the purpose of the money they were sending and the person whose wedding they were contributing reeks of a clear insincerity. For these reasons, I am not persuaded by the 1st Administrators claim that the Objector used her generosity to trap her.

60. The 1st Administrator claims that she sent the money because a neighbour merely asked her to do so. I find this, similarly, highly unlikely. When asked to give the name of the neighbour, she unconvincingly alleged that she could not recall who it was. She did not even disclose whether it is the same neighbour who also gave her the Mpesa line to send the money to and whether she got in touch with the owner of the number to confirm the correctness of the line before she sent the money, or even to confirm receipt of the money. I raise these questions because in ordinary circumstances, one would usually make follow-up of the nature I have cited before or after sending money to a person unknown to him or her. Assuming therefore that they at first truly did not know the purpose of the contributions, then I want to believe that if they made follow-up, they were informed of the purpose. Both Administrators were however silent on these crucial aspects.

61. I also take note of the testimony of one Samuel Cheruiyot Malel (DW5), who was called as a witness for the Administrators and who stated that he is a cousin of the deceased with whom they grew up together and were very close. He stated that he also knew the Objector separately as he used to work with his grandfather, one Francis Lwenda, at EATEC (a company in Eldoret), and that the deceased never at any time mentioned to him that he had any child outside marriage. What I found curious in his testimony is that in cross-examination, he disclosed that it is the 1st Administrator who informed him that Francis Lwenda was the Objector's grandfather. This proves that despite purporting to have no knowledge of the Objector, the Administrators knew the Objector and his family quite well. These are some of the reasons that convince me that the Administrators have not been candid or sincere with this Court. I discern a systematic and deliberate effort to mislead the Court.

62. Regarding the photograph ("selfie") that the Objector took with Emily Chepsiror, the mother of the deceased and thus the 1st Administrator's mother-in-law, all witnesses who were shown the same, including both Administrators, agreed that those in the photograph were the Objector and the said Emily Chepsiror. According to the Objector, they took the photograph on one afternoon after attending church. Further, according to the Objector, Emily Chepsiror was his paternal grandmother who had accepted him as her son's child. The Objector stated that he had visited Emily Chepsiror on several occasions at her home in Elgon View Estate with his wife, who as (PW5), supported this contention. The Administrator's legal team did not seriously probe these allegations during cross-examination. I would want to believe that, if these allegations were doubted, the Administrators' Lawyers would have aggressively interrogated the same. I would have expected them to put the Objector to task by challenging him and his wife to identify to the Court the exact location of Emily Chepsiror's house, the appearance of the house, who else lived there, what landmark items were in the compound and such other matters. Had such questions been put to the Objector and his wife, their answers thereto could have given the Court an indication whether they were false. The decision by the Lawyers not to ask questions such as those I have raised leaves me with the impression that they concluded that such questions were too risky as the answers that the Administrator and his wife would have given had the potential to bolster the Objector's case. I therefore find the Objector's claims that she visited Emily Chepsiror at her home on several occasions and that she accepted the Objector as her grandson

to remain uncontroverted. It is highly unlikely that Emily Chepsiror would have welcomed a stranger and his wife to her home on several occasions, considering, in addition, the huge age gap between her and the so-called "stranger" and also possibly the lack of any common interest as a reason for their associating with each other.

63. Most questionable is the fact that Emily Chepsiror was herself never called to testify. Although the Administrators procured her Witness Statement and filed it in Court and also included her in their List of Witnesses, for reasons not disclosed to the Court, they never called her as a witness at the end of the day. While it is entirely a party's sole discretion to choose the witnesses to call in support of his/her case, considering the damning nature of the Objector's allegations of having been embraced and accepted by Esther Chepsiror as her grandson, in my view, only she could disprove those allegations. To this extent, she was, in my view, a crucial witness for the Administrators. The fact that they found it fit to procure her Witness Statement, means that the they were well aware of the crucial nature of her testimony. The Court was not told that she Esther Chepsiror was unavailable, or was incapacitated in any way such that she could not testify, or that she was unwilling to do so. Was she therefore omitted from the witnesses because perhaps her testimony would have weakened the Administrators' case? To this extent, the Court would be at liberty to form the impression that the decision not to call her as a witness was a tactical move by the Administrator's legal team.

64. On the issue of the Court's liberty to draw an "adverse inference" as aforesaid, I cite the decision of Havelock J, in the case of Simba Commodities Limited v Citibank N. A. [2013] eKLR in which he held as follows:

> " ..... Further, I hold no stock as to the Defendant's view that the Plaintiff should have called the said Caroline Luzze to give evidence in respect of the said forgery. In that regard I adopt the finding of the United States Court of Appeals in the Gafford case (supra) in that:
>
> "Failure of a party to call an available witness possessing peculiar knowledge concerning the facts essential to a party's case, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness would naturally be favourable to the party's contention, relying instead upon the evidence of witnesses who were less familiar with the matter, gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of the party. No such inference arises where the only object of calling such witness would be to produce corroborative, punitive, or possibly unnecessary evidence."
>
> In this matter, I am satisfied from PW3's evidence that the said Caroline Luzze, if she had been produced by the Plaintiff, would have entirely corroborated the evidence of PW 3. As detailed above, I was concerned that the Defendant solely relied upon the evidence of DW1, without in any way calling those persons who actually dealt with the transaction of the said cheque dated 8 January 2002 and/or officers involved in the Defendant's branch in Mombasa who knew about the transaction."

65. Similarly, Odunga J (as he then was), in the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, while following the earlier decision of Mabeya J, made in Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR, held as follows:

> " Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
>
> > " Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
> >
> > > " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

66. There was also the testimony of Jairo Kiplagat Rotich (PW3) who stated that when his was young, his father had been employed at the home of the Chepsirors (Mr. Philip Chepsiror and the said Mrs Emily Chepsiror), the family of the deceased, as a gardener, and that by reason thereof, they used to live in the servants' quarters with their own family, within the home and compound of the Chepsirors. He explained that initially, the deceased used to reside in the main house with his parents but subsequently built his own house next to the servants' quarters. To demonstrate that indeed he familiar with the family of the deceased, he mentioned the names of the siblings of the deceased and also of some of the neighbours. None of the Administrators' witnesses controverted or even denied this account. Jairo Kiplagat Rotich then proceeded to give a clear, vivid, and detailed description of how the deceased, then a young man fresh from school, took a fancy on one Jenniffer (Jenniffer Lwenda Khayasi, the Objector's mother), then a stunning "yellow-yellow" Goan-Luhya "cross-breed" lass, then still a schoolgirl from the neighbourhood, who used to go the home of the affluent large scale farming Chepsiror family, to buy milk and vegetables and where the deceased noticed her.

67. He stated that the family of the Objector's mother used to live about 300 metres from the home of the deceased. Jairo detailed how the deceased sought his help to "conquer" Jenniffer's heart. Jairo, the ever the loyal son of the servant, was always willing to assist the Boss' son, the deceased. Jairo did not hesitate and put everything in motion, employed his street-wise romance skills and eventually managed to get Jenniffer to reciprocate the love from the deceased. According to Jairo, the love between the deceased and Jenniffer blossomed to the extent that he would regularly assist in "sneaking" Jenniffer into the compound at night under the cover of darkness, into the house of the deceased, where Jenniffer would spend nights with the deceased. She testified that this liaison continued until Jenniffer became pregnant and later, had to drop out of school. According to Jairo, the deceased used to regularly give him money to take to Jenniffer to assist in meeting her pregnancy costs until Jenniffer gave birth to a baby boy – the Objector herein. He stated further that this assistance from the deceased continued even after the birth, and that on several occasions, he (Jairo), upon instructions from the deceased, even accompanied Jenniffer for post-natal clinic visits and on one occasion, the deceased even gave him a sack of maize to take to Jenniffer, which he did. He testified that somehow the family matriarch, Emily Chepsiror,

found out about the pregnancy and angered by the same, immediately brought a girl for his son, the deceased, to marry. That girl was none other than the 1st Administrator herein, Lilain Cheptoo.

68. He then described how, after the birth, one day, upon instructions from the deceased, he (Jairo) attempted to "sneak" Jenniffer, together with the baby (Objector) into the house of the deceased but hell broke loose when somehow Emily Chepsiror found out. He stated that Emily, livid and angry, chased away Jeniffer, together with the baby (Objector) from the home, stating that she did not want a Luhya in her family. He then stated that on the very next day, Emily fired" Jairo's father from employment and evicted him and his family from the home, accusing them of colluding to nurture or encourage the liaison between the deceased and Jeniffer. Jairo testified further that although the deceased married the 1st Administrator as per his mother's wish, his heart still being with Jenniffer, he continued "seeing" Jenniffer. To cut the long story short, Jairo stated that after the eviction, he later went to reside within the neighbourhood, not far from where Jeniffer also used to live, and was emphatic that even during those latter days, he still used to meet the deceased coming from or going to Jeniffer's house. He also claimed that at one point, the deceased told him that he would give his son (Objector) a portion of land as inheritance.

69. This long account by Jairo was, needless to state, neither controverted or denied by the Administrators or by any other witnesses. Jairo remained unshaken and consistent with this same story when he was cross-examined. More relevant is the fact that Jairo was unequivocal that the Objector was, by all means, a product of the liaison between the deceased and Jenniffer (Objector's mother). To him, he had no doubt that the Objector is the son of the deceased, Michael Kiptoo Kebenei. Although this may not be taken as a relevant factor, I cannot also overlook the fact that in cross-examination, the 1st Administrator admitted that in the photograph in which the Objector and Emily Chepsiror posed, the two resemble each other. As aforesaid however, this, in law, alone, may not be considered a decisive factor. However, considered together with the other overwhelming evidence on record, it just might, indeed, count to something.

70. The Objector also stated that the deceased introduced him to his (deceased) brothers and friends and also once introduced the Objector to the 1st Administrator as his son. He stated also that his father used to own a "matatu" christened "Promise", that whenever the Objector would miss school fees, he would go to the matatu/bus stage and wait around for the deceased who when he came, would give him the school fees, and that the deceased also catered for his "initiation" expenses. The Objector also claimed that when he reached the age of applying for a National Identity Card, he consulted the 1st Administrator, who advised him to take his documents to a sister of the deceased, one Hellen Chepkoech, who was working at the District Commissioner's office and who would assist in fast-tracking the process, and which was actually done. The Objector's wife (DW5) also stated that sometime in 2015, the 2nd Administrator, Justine Kipleting, visited them accompanied by one Titus Tuwei, and the Objector introduced them to her as his brother and a cousin, respectively. Again, all these allegations were not seriously countered or controverted. Even during cross-examination, they were not seriously interrogated.

71. Another witness whose testimony was not also seriously questioned nor controverted by the Administrators was one Geoffrey Nyamari (PW2), who stated that he grew up with the Objector as neighbours and friends in Langas estate. He stated that he knew the deceased, whom he met on 3 occasions, and knew as the Objector's father, and that the deceased used to pass by frequently and bring biscuits and other snacks. He stated that he knew the deceased well because the family of the deceased used to have a cattle dip around the neighbourhood where people used to take their cows for treatment and that the deceased used to be referred to as to as "Mike" and his father as Philip.

72. He also stated that he was in Class 8 or Form 1 when the deceased died and that whenever the deceased visited, the Objector's mother used to ask the Objector's friends to go and greet "Baba A". He confirmed that the family of the deceased was affluent and was revered within the neighbourhood as it carried out large scale farming and owned lots of livestock. This, to me, seems to be credible, vivid and clear description of true events as they were.

73. The Objector also alleged that during the lifetime of the deceased, he used to occasionally visit the family home of the deceased and that whenever he visited, the deceased used to direct the 1st Administrator to give the Objector pocket money which he would have left with the 1st Administrator. He also claimed that he visited the deceased at the Elgon View Hospital when he was ailing. One Geoffrey Nyamari Ndege (PW2) stated that indeed, he accompanied the Objector to the hospital and while, he met members of the family of the deceased, including the 1st Administrator, who during the interaction, all knew the Objector as the deceased's son. The Objector also claimed that after the demise of the deceased, he visited the home in or about the year 2005/2006 and requested the 1st Administrator to give him some money to enable him go to college, but that the 1st Administrator told him that she did not have money for college but would to give him some funds to enable him open a 2nd hand clothes (mitumba) business but which promise she however never fulfilled. The Objector's wife (PW5) supported the allegation that they visited the home of the deceased after his demise as she accompanied the Objector. The Objector also claimed that he attended the burial of the deceased and even participated in the tradition of "throwing" a handful of soil" into the grave by family members and that he even had lunch at the home. In this, he was again supported by the said Geoffrey Nyamari Ndege (PW2) who stated that he is the one who also accompanied the Objector to the burial at the home of the family of the deceased at Kapseret. The Administrators have on their part, countered that they never saw the deceased at the burial and that in any case, even if he were there, the Objector did not raise any issue or make any claims over the estate prior to the burial despite an announcement being made These allegations were never really pursued during the examination-in-chief and also during cross-examination of the Administrators and it is therefore difficult to conclusively determine the same. However, since the Objector (and also his wife) was also not seriously taken to task over the allegations during his own cross-examination, and considering that it is the Administrators who risked a bigger loss if such damning allegations were left unaddressed or uncontroverted, I would say that, on a balance of probabilities, I would believe the Objector. The Administrators' legal team had the opportunity to shatter the claims during cross-examination but failed to take that opportunity.

74. The Administrators placed much reliance on the fact that the Objector did not produce his Certificate of Birth to demonstrate that the name of the deceased appears therein or any documents to prove his claim of being the biological son of the deceased. I would not place much premium on this issue. First, from the evidence on record, the deceased died when the Objector was still a minor thus the Objector cannot be held to account for why the name of the deceased does not appear in his documents. His mother, Jenniffer Lwenda, who could have given explanations is also deceased. I find it unfair to put the above questions to the Objector. From the evidence of Jairo Kiplagat Rotich (PW3), it is clear that the deceased's mother was hostile towards the liaison between the deceased and the Objector's mother. For this reason, I would not rule out the possibility that, as is common in most "secret" love affairs of this nature, the father may not have been comfortable enough to openly have his name appearing in the Objector's birth documents as the father. Be that as it may, whatever arrangements the deceased and the Objector had in respect to the name of the deceased appearing in the Objector's birth documents, only they can disclose. Unfortunately, they are both now deceased and we may therefore never know.

75. The Objector also referred to one Reverend Philip Kipchumba, whom the Objector claimed was a cousin of the deceased and also Chairman of the extended family of the deceased group (though this

was denied by the Administrators), and whom the Objector claimed stood in during his wedding as a representative of the family of the deceased. Photographs taken at the wedding were produced in evidence and the Court was told that one of the people therein was the said Reverend Philip Kipchumba. The Objector, when asked in cross-examination, why he did not bring Reverend Philip Kipchumba as a witness, he stated he asked Reverend Philip Kipchumba to testify but he declined stating that as the family chairman, he is neutral. I agree the Reverend would have been a crucial witness as well, but unlike in the case of Emily Chepsiror as aforesaid, for the Reverend, an explanation, which I find credible, was offered. For him therefore, there would be material upon which an adverse inference may not need to be drawn.

76. I also note that as aforesaid, one Elizabeth Lukasiva Lwenda swore an Affidavit in support of the Summons for Revocation stating that she is a sister to the Objector's late mother and that she grew up with the full knowledge that the Objector was sired by the deceased. She did not however testify. When asked why the said Elizabeth Lukasiva Lwenda did not testify, the Objector did not give a convincing answer but only stated that she lives in Mombasa. It is not clear whether he meant that she lived too far and bringing her all the way to Mombasa was difficult. I do not know. What I know is that her testimony would have been crucial. I would have, like in the case of Emily Chepsiror, drawn an adverse inference for this omission by the Objector to call her as a witness. However, in light of the overwhelming evidence presented pointing to the fact that the deceased was the Objector's father, drawing such adverse inference would not affect the outcome of this case.

77. I appreciate that the Administrators called as their witnesses, one Joseph Kiplagat Sing'oei (DW3), who claimed to be a neighbour of the Chepsiror family since childhood and a close friend of the deceased with whom they grew up, one Henry Kibet Togom (DW4), a former Chief Kapseret Location, and one Samuel Cheruiyot Malel (DW5), who stated that he was a cousin of the deceased. They all claimed that they were close to the deceased and shared a lot with him but that at no time did the deceased mention to any of them about having a child out of wedlock. While I have no reason to doubt what these witnesses stated, weighing it against the counter evidence available, I would not rule out the possibility that the deceased could have genuinely kept away this "secret" from non-members of his immediate family. This is not at all a strange thing. Stories are told daily about closest of friends only learning, after the demise of a man, sometimes at the funeral, that their so-called close friend had several children out of wedlock when the mothers show up unexpectedly. Even if it is therefore true that indeed the deceased never mentioned to the 3 witnesses about a child born out of wedlock, such non-disclosure may not turn on much.

78. I also cannot ignore the aggressive bid mounted by the Objector in seeking orders to be subjected to a DNA test to prove his paternity. Although the Court declined the request, having been brough too late in the day, the mere fact that the Objector was confident enough to ask for such test, despite the possibility, if the test came out negative, of irredeemably demolishing his case, demonstrates his resolve and certainty that indeed he was a scion of the deceased and that there could be no other result whatsoever.

79. As aforesaid, although this Court declined the Application for conducting a DNA test, that did not in any way deprive the Objector of his right to advance his case as he still could prove his claims on the basis of other available evidence. In respect thereto, I concur with the view taken by Achode J (as she then was), in the case of In Re Estate of JMK (Deceased) [2021] eKLR, in which she held as follows:

> " 22. It is my view that where sufficient evidence exists which resolves the issue in controversy without necessarily ordering for a DNA test, an order for a DNA test would be inappropriate. ....."

80. Having made the finding that, on a balance of probabilities, the deceased was the Objector's father, the issue whether the Objector was maintained by the deceased and thus a "dependent" within the meaning of Section 29(b) of the Law of Succession of Act may no longer be relevant. This is because under the provisions of Section 29(a), the Objector becomes an automatic heir. However, if I were to be pressed to make a determination on the issue of "dependency", I would say that no sufficient material was placed before the Court to demonstrate that the deceased "maintained" the Objector during his lifetime. Granted, the Objector claimed that the deceased would give him and his mother now and then. However, the explanations he gave, if true, sounded more like a reference to occasional once-in-a-while financial "handouts" which, to me, would not amount to "maintenance" within the meaning contemplated under Section 27(b) above. There is no evidence that the deceased shouldered major financial obligations for the Objector such as for instance, payment of the Objector's school fees or his day-to-day upkeep.

81. Regarding revocation and/or annulment of Grant, Section 76 of the *Law of Succession Act* referred to above, provides as follows:

> " 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."

82. It is clear that the grounds that is likely to accommodate the matters raised by the Objector would possibly be sub-Sections (a). (b) and (c) above.

83. Section 76 was expounded upon by Hon. Justice W. Musyoka in the case of Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR in the following terms:

> " Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust."

84. Having made the finding that, on a balance of probabilities, the deceased was the Objector's father, the question now is whether the above recognition by this Court should automatically lead to revocation of the Grant and also an order for re-distribution of the estate. This question arises because Section 76 of the *Law of Succession Act* gives the Court discretion whether 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. Power to revoke a Grant is a discretionary power that must be exercised judiciously and only on sound grounds. The Court 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. The discretion must therefore not be exercised whimsically or capriciously (see decision of Mwita J in the case of Albert Imbuga Kisigwa v Recho Kavai Kisigwa [2016] eKLR).

85. In applying the above principles, I am not persuaded that the Petitioners who commenced these proceedings can be accused of having fraudulently omitted the Objector from the list of survivors and beneficiaries that they presented to the Court. The issue of inheritance by a children born outside "wedlock" can be a contentious issue within families and there is always a "push-and-shove" about it. In most cases, as herein, it would take the intervention of an adjudication, such as by the Court, to compel a family to "accept" such a child. Even in such cases, the family would comply with the order, not because they "accept" it but merely because the law dictates so. In this case, although, seemingly, the Petitioners "knew" about the Objector, they refused to expressly "recognize" him. I cannot blame them because including the Objector in the list of heirs would have meant that they had abandoned their "non-recognition" of the Objector. In any case, the 1st Administrator is the widow and the 2nd Petitioner (now replaced by the 2nd Administrator) was a son of the deceased. The family not being polygamous, the Petitioners were clearly the lawful and rightful people under the known hierarchy, to take out the Letters of Administrators. For this reason, I do not think that it would be fair to allude that

the Petitioners obtained the Grant by fraud or by the making of a false statement. I would therefore be hesitant to revoke the Grant on that ground.

86. In any case, I do not think revocation of the Grant is what the Objector wants in the long run. Revocation of the Grant will not benefit him in any way. What he wants is clearly a share of the estate. The Court having now "recognized' him, he will now be entitled to a share, whether or not the Grant is revoked. There is therefore little benefit, if any, in revoking the Grant. I may however quickly add that I do not expect the Objector to demand an equal share to what the rest of the deceased's children have received. This is because he was never openly accepted into the family and thus never grew up as part thereof. His claims emerged much later and it is understandable that other members of the family genuinely doubted his claims of lineage to the family. Having lived away from the family for all his life, he cannot be said to have contributed anything to its status, including acquisition of the property that he now seeks a share of. I believe he will be contented with the lesser share that he will eventually get after this long and arduous battle that he has successfully mounted in the end, which I am certain, has taken a great toll on his well-being, mental stability and even resources.

87. I find that due to the exceptional and/or unique circumstances arising in this matter, it will not serve the interest of justice to revoke or annul the Grant.

Final orders

88. The upshot of my findings is that the Objector's Summons for Revocation only partly succeeds in the following terms:

    i. The Court, for the purposes of Section 27(a) of the *Law of Succession Act*, declares the Objector to be the son of the deceased herein, Michael Kiptoo Kebenei.

    ii. The prayer for Revocation and/or annulment of the Grant of Letters of Administration issued herein is however declined.

    iii. With the above finding on recognition of the Objector as a lawful heir to the estate of the deceased now made, I now refer the parties back to Court Annexed Mediation to discuss and attempt an amicable settlement on the share of the estate that shall now be allocated to the Objector, and which for reasons already stated in the Judgment herein, should not necessarily be equal (should be less) to the shares allocated to the other children of the deceased.

    iv. If after the 60 days Court Annexed Mediation window, the parties are unable to reach a settlement, and no extension is granted, this Court shall proceed to rule on the share of the estate of the deceased that the Objector shall be allocated or be entitled to.

    v. In the interim, pending further orders of this Court, the Lands Registrar, Uasin Gishu County, the Administrators herein, the beneficiaries, and/or any other person, whether acting by themselves or by their agents, are hereby restrained, jointly and severally, by an order of injunction from effecting or registering any transfer, charge or sub-division of, or in respect to, the property described as Kapsaret/Kapsaret Block 10 (Lamauyet) 93 if it still exists, and if not, of any sub-division or property arising from or created out of its sub-division, or any other act that may jeopardize the availability or ownership or validity of the said property or properties or sub-divisions thereof as aforesaid.

    vi. The Court shall now fix a Mention date when the progress of the Court Annexed Mediation proceedings shall be reported to the Court.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 25TH DAY OF APRIL 2025

.....

WANANDA J. ANURO

JUDGE

Delivered in the presence of:

Mr. Kipkurui for Objector

N/A for Administrators

Court Assistant: Brian Kimathi