



**Omollo v Omollo & another (Civil Appeal E116 of 2023)
[2024] KEHC 15312 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15312 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E116 OF 2023
RE ABURILI, J
NOVEMBER 28, 2024**

BETWEEN

HENRY OCHIENG OMOLLO APPELLANT

AND

WASHINGTONE AUMA OMOLLO 1ST RESPONDENT

FLORENCE ACHIENG OMOLO 2ND RESPONDENT

(Appeal from the decision of the Ruling and order of Hon W.K.Onkunya, Principal Magistrate delivered on 29/6/2023 at Kisumu in Kisumu CM Succession Cause No. 320 of 2016)

JUDGMENT

Introduction

1. The respondents herein, who were objectors before the trial court, moved the trial court vide summons for revocation of grant dated 4th December 2020 seeking to revoke the grant of letters of administration intestate issued to the appellant herein on the 28th February 2006 and confirmed on the 20th February 2017 in Kisumu CM Succession Cause No. 320 of 2016.
2. The respondents also sought an order to the Land Registrar Kisumu to cancel all the entries transferred by way of transmission of all the deceased assets namely Land Parcel Nos. Kisumu/Buoye/4021, 4019 and 4357 that were in the appellant's name and have the same revert back to the name of the deceased, Sylvester Omollo Onditi and thereafter distributed afresh amongst all the beneficiaries.
3. In response, the appellant filed a replying affidavit dated 27th January 2021 and filed on 27th January 2021 in opposition to the Summons for revocation of grant.



4. In her impugned ruling, the trial magistrate found that the appellant obtained Certificate of Grant to the deceased's estate without involving all the beneficiaries and by concealing material facts. The trial magistrate thus allowed the respondent's application as prayed.
5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 28th July 2023 2024 raising the following grounds of appeal:
 - a. That the honourable magistrate erred in law and fact by incorrectly applying the Law of Succession Act procedure on the case and issues before him and thereby arriving at an erroneous finding.
 - b. That the learned trial magistrate erred in law and fact by failing to find that the appellant is the absolute owner of the disputed parcel number Kisumu/Buonye/4019 & 4357 having been issued to the appellant by the deceased.
 - c. That the Honorable magistrate erred in law and in fact in failing to consider submissions and arguments of counsel for the appellant and in failing to consider and apply case law cited which precedents are binding upon the court hence arrived at a wrong decision.
 - d. That the Honourable magistrate erred in law and in fact by incorrectly applying section 26 (1) of the Land Registration Act on the standard required on proof of proprietorship of land.
 - e. That the Honourable magistrate was biased against the appellant in his decision making since the two parcels of land had been rightfully given to the appellant by the deceased.
 - f. That the Honourable Magistrate failed to take cognizance of the fact that the deceased had gifted the two parcels of land to the appellant when he was still alive hence failing to respect the wishes of the deceased.
 - g. That the Honourable magistrate ignored the solid evidence given by the appellant.
 - h. That the decision was against the weight of evidence.
 - i. That the Honourable Magistrate did not consider the contradictions in the respondent's case and thus arrived at an unjust decision.
6. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. The appellant submitted that his mother who was the deceased's wife, allowed him to petition for the grant of letters of administration to the deceased's estate after the 1st respondent had disappeared from home for a period of over 20 years. It was the appellant's submission that he informed his other siblings as well as the 2nd respondent who were beneficiaries of the estate.
8. The appellant further submitted that he was further allowed to sell some portion of the deceased's estate to raise money to repair their mother's house.
9. It was submitted that prior to his death, the deceased orally distributed his estate and that Luo custom allows the last born to inherit the homestead which he did by inheriting parcel no. Kisumu/Buoye/4019 which was the deceased's matrimonial home.
10. It was thus submitted that the ruling of the trial magistrate was harsh and should be overruled as she did not appreciate the customs of the appellant's community as well as the fact that the evidence adduced by the respondents which was insufficient to grant cancelation of the grants.



The Respondents' Submissions

11. On behalf of the respondent, it was submitted that the 1st respondent, who was a son of the deceased was not included in the process of succession and that whereas the 2nd respondent, a wife to the deceased's late son testified that her name was included in the process, she denied being part of the process and signing any documents thereof.
12. The respondent further submitted that in the application for letters of administration and the Chief's letter, the appellant referred to the 2nd respondent erroneously as his sister.
13. It was submitted that the 1st and 2nd Respondents have not benefited from the estate of the deceased as the appellant unilaterally bequeathed himself all the properties comprising the estate of the deceased to the exclusion of other beneficiaries.
14. The respondent submitted that the appellant's case was particularly caught under Section 76 (b) and correctly held by the appellant as such on the basis that the grant was obtained fraudulently by the making of false statement and by the concealment from the court of something material to the case. Reliance was placed in the case of *In the Matter of the Estate of L.A.K (deceased) 2014 eKLR*.
15. It was submitted that the appellant having not provided any reason for the court to alter the judgement of the trial court, the appeal ought to be dismissed with costs.

Analysis and Determination

16. This is the first appellate court and as per section 50 of the *Law of Succession Act*, the final Court except with leave of court, to the Court of Appeal. The duty of this Court as the first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. Further, this court ought not to ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See *Mwanasokoni vs. Kenya Bus Service Ltd. (1982-88) 1 KAR 278* and *Kiruga vs. Kiruga & Another (1988) KLR 348*).
17. I have re-evaluated the evidence which was tendered before the trial court and also perused through the pleadings which were before the learned trial magistrate.
18. Section 66 of Cap 160 provides the court with final discretion as to the person or persons to whom a grant of Letters of Administration are made in the best interest of all concerned. Section 66 provides as follows: -
 - “ 66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-
 - (a) surviving spouse or spouses, with or without association of other beneficiaries;
 - (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
19. The appellant's case before the trial court was that he applied for letters of administration after receiving the go ahead from his mother, the deceased's widow. It was his testimony that he did so because his



- brother, the 2nd respondent, had disappeared from home for over 20 years. He testified that he included the 2nd respondent in the petition. The appellant further averred that prior to his death, the deceased had orally distributed his wealth and that being the last born, he inherited the homestead while he sold part of the estate to repair their mother's house.
20. On their part, the respondents, starting with the 1st respondent contended that he was not involved in the filing of the petition application and subsequent distribution of the deceased's estate. The 2nd respondent on her part testified that although her name was included in the petition, she never signed any document and that she was wrongly listed as the deceased's daughter whereas she is the daughter-in-law. She also testified that she was coerced into signing the said documents presented to court by the appellant as she did not understand anything on them. The respondents contended that the reality was that the appellant was the sole beneficiary of the deceased's estate. The respondents thus sought revocation of the grant issued to the appellant.
21. Section 76 of Cap 160 provides as follows on revocation of grants:
- “ 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 making of a false statement or by 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.
22. I have perused the trial court record. It is clear that the 1st respondent was not listed as a beneficiary of the deceased's estate despite being the appellant's elder brother and further, the only asset listed as belonging to the deceased was Land Parcel Kisumu/Buoye/4021 whereas in the affidavit of the mode of distribution sworn on the 10th February 2017 by the appellant, he included two more parcels being Kisumu/Buoye/4019 and 4357 respectively.
23. The aforementioned affidavit also provides for the appellant as the sole beneficiary of the deceased's estate as confirmed in the Certificate of Confirmation of Grant dated 27th February 2017. There is nothing to show that the appellant was acting on behalf of other beneficiaries or holding the estate in their trust. There is also no evidence that the deceased bequeathed to the appellant the estate and if he did so, why the appellant made himself the sole beneficiary of the estate to the exclusion of the respondents whom he now acknowledges as beneficiaries. There is also no reason why he failed to list all the assets and beneficiaries or surviving beneficiaries of the deceased's estate in P&S, an affidavit in support of the Petition.
24. The chief's letter dated 1/6/2016 deliberately left out of the estate the 1st respondent and listed the 2nd respondent as daughter yet she is daughter inlaw. Further, the appellant claims that there are married daughters who were never listed. There is no evidence of their renouncing their entitlement to the estate.
25. Section 76 of the *Law of Succession Act* allows revocation of a grant where the proceedings are defective; where the grant was obtained fraudulently by making false statement or by concealment to court of something material; or that the grant was obtained by means of untrue allegations.



26. In Re Estate of Magangi Obuki (DECEASED [2020] eKLR the court considered the circumstances under which a grant can be revoked and stated:

“In the case of Jamleck Maina Njoroge vs. Mary Wanjiru Mwangi (2015) eKLR the court discussed circumstances when a grant can be revoked. The court observed:

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

27. In Albert Imbuga Kisigwa vs. Recho Karai Kisigwa (2016) eKLR Mwita J stated: -

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

28. The appellant’s submissions that the deceased orally distributed his estate prior to his death are unsubstantiated and have no factual or legal backing as there is no will of probate filed in Court for adoption. Additionally, it is not ascertainable whether the alleged oral will meets the provisions of section 9 of the [Law of Succession Act](#).

29. The trial court found that the appellant obtained Certificate of Grant to the deceased’s estate without involving all the beneficiaries and by concealing material facts. Nothing is far from the truth. The trial court record shows exactly that and there is no contrary evidence. The trial Court cannot, therefore, be faulted for pronouncing itself on facts and the law supporting those facts. I find no basis to interfere with the finding and holding of the trial court. I uphold it.

30. The appellant claimed that he sold part of the land to built a house for their mother. In doing so, the appellant acted clandestinely without involving other beneficiaries of the estate who would have been part of the family supporting their mother. Selling estate property without authority of the Court and other beneficiaries is what is called intermeddling. If such property is sold before confirmation of grant, it is barred by section 45 of the [Law of Succession Act](#). One can only sell what belongs to them. Since the estate belongs to beneficiaries and not one person, there can be no unilateral sale of the estate property.

31. This Court does not believe the appellant’s story that the 1st respondent had disappeared from home for over 20 years and if so, what efforts he made to trace him, and whether the 1st respondent had a family or not. There is the legal regime for presuming persons death. That was not done meaning the appellant knew the whereabouts of the 1st respondent and chose to exclude him in the succession process.

32. The upshot of the above is that I find this appeal to be devoid of any merit. It is hereby dismissed. The appellant has the opportunity to join hands with the respondents herein and any other bonafide beneficiary of the estate to petition for a fresh grant and distribute the estate of the deceased in accordance with the provisions of the [Law of Succession Act](#).



33. As parties are family members, each party bear their own costs of the appeal.

34. This file is closed and the lower court to be returned forthwith.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

