



**Obilo v Oloo (Civil Appeal E107 of 2021) [2023] KEHC 368 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 368 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E107 OF 2021  
KW KIARIE, J  
JANUARY 19, 2023**

**BETWEEN**

**EDWARD ONYANGO OBILO ..... APPELLANT**

**AND**

**DINA AWUOR OLOO ..... RESPONDENT**

*(Being an Appeal from the ruling in Oyugis Senior Principal Magistrate's SPMC Succession Cause No. 476 of 2020 by Hon. Celesa Okore – Principal Magistrate)*

**JUDGMENT**

1. Edward Onyango Obilo, the appellant herein, was aggrieved by the ruling of the trial court dated November 11, 2021. The appellant was, by an application dated August 10, 2021, seeking the revocation of the grant dated April 30, 2021. He contended that the grant had been obtained fraudulently. His application was dismissed.
2. The appellant was aggrieved and filed this appeal. He raised grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and fact in her ruling at paragraph(i) that the court record shows and clearly confirms that the objector now appellant did participate in the court process. That is misdirection by the trial court and for all intents and purposes the trial court at the time of confirmation of grant on 30/4/2021, was aiding the petitioner herein by recording the appellant's presence yet the appellants was not only privy to the filing of this succession but was not also present at the confirmation. To prove that the trial court was aiding the petitioner/respondent an her ruling was eschewed in favour of the petitioner/respondent herein; in the entire replying affidavit sworn on 24/8/2021 filed in court on 26/8/2021 nowhere the petitioner now respondent mentioned that the objector now appellant participated in court [sic] process something the respondent court not have forgotten to put in her replying affidavit.
  - b. The learned trial magistrate erred in law and fact in holding in her ruling at paragraph (j) that the objector now the appellant failed to prove that the death certificate used by the



petitioner now respondent was forged. The same was proved by the documentary evidence and well explained by the objector now appellant in his response to replying affidavit sworn on 6/9/2021 at paragraph 3 and the trial magistrate failed to apply the oral evidence in which the maker or the expert court have been called to give evidence as to which death certificate was genuine or forged but opted the same to be canvassed by way of submissions thereby reaching a wrong decision.

- c. The learned trial magistrate erred in law and fact in holding in her ruling at paragraph (k) that the objector now appellant failed to lay facts that the petitioner now respondent concealed material facts. The facts was properly laid by the objector now appellant before the trial court that he was not made aware or notified of the filing of the succession, his signature was forged as shown on P & A38 and that his consent was never sought at the filling and confirmation of grant. The trial magistrate avoided oral evidence thereby reaching a wrong decision.
  - d. The learned trial magistrate erred in law and fact in holding in her ruling at paragraph (l) that the objector now the appellant exhibited the character of a disgruntled and/or mean sibling who wants to eat the whole cake alone and does not want to share it with other beneficiaries. This misplaced assumption by the trial court as the objector now appellant laid it bare at paragraph 10 in his response to replying affidavit sworn on 6/9/2021 that he does not want the whole parcel of land only that his consent was never sought hence distribution was not fair. The trial court ignored the said paragraph and avoided oral evidence thereby reaching a wrong decision.
  - e. The learned trial magistrate failed to exercise her discretion judiciously by so ignoring oral evidence and misdirected herself in law and in fact in her ruling at paragraph (m) by making the whole objection application process filed by the objector now the appellant herein looks like the appellant was against the petitioner/respondent so applying to the deceased's estate. The said suggestion by the trial court is misplaced because the appellant's case was that he was not made aware of the court process and the respondent was required to comply with Rule 26 of P and A Rule[sic] which she did not to get the consent of all beneficiaries hence failed to distribute the deceased's estate fairly.
  - f. The learned trial magistrate erred in law and fact in failing to critically analyze and evaluate the pertinent and mandatory issue of consent at the filing of succession cause and at the confirmation of grant as provided for in the law of succession rule 26 of P & A Rule [sic] which was severally raised by the objector now appellant, the same are clear proof of fraud and concealment of material facts.
3. The appeal was opposed by the respondent through the firm of Ako Advocates LLP.
  4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
  5. Though the appellant had averred that the respondent proceeded without his knowledge, the proceedings of April 30, 2021 clearly show that he was aware of this succession cause. On that day he was in court and indicated that he had no objection to the proposed mode of distribution. He told the court that he was a grandson of the deceased. When he later claimed that the grant was obtained by concealment of some material facts he was not truthful and the learned trial magistrate was justified to dismiss his claim.



6. The appellant was given an equal share with the other heirs though legally speaking grandchildren can only inherit from a grandparent indirectly. *In the Matter of the estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR Musyoka J observed as follows:-

.....Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

7. In order for the appellant and the other grandchildren to step into their parents shoes, they ought to have taken out letters of administration in respect of their parents estates. Since the respondent approached the issue soberly, she did not ask them to do so. This is not a person the appellant ought to paint as being deceitful.
8. I therefore find that the learned trial magistrate arrived at the correct factual and legal position. The appeal lacks merit. The same is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 19<sup>TH</sup> DAY OF JANUARY, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

