



**In re Estate of Wayua Ojako Alias Wayua Kisiage (Succession Appeal
E004 of 2021) [2023] KEHC 1754 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION APPEAL E004 OF 2021
FA OCHIENG, J
FEBRUARY 28, 2023
(PROBATE & ADMINISTRATION DIVISION)
IN THE MATTER OF THE ESTATE OF WAYUA OJAKO ALIAS WAYUA KISIAGE**

BETWEEN

JACOB ODHIAMBO KISIAGE APPELLANT

AND

ALFRED ODHAYA OKUTTA RESPONDENT

JUDGMENT

1. On March 2, 2021 the learned trial magistrate dismissed the appellant's application dated September 29, 2020. The appellant had sought the revocation of the grant which had been issued to the respondent.
2. The appellant was convinced that the learned trial magistrate erred, hence this appeal.
3. First, the appellant was of the view that the grant had been procured by fraud, and through false statements which the respondent had made in his petition.
4. He was equally convinced that the respondent had concealed material facts from the trial court.
5. Secondly, the appellant faulted the trial court for making a finding of adverse possession, when that was not an issue before it.
6. In answer to the appeal, the respondent pointed out that prior to the issuance of the grant, he had followed all the procedures laid down by law.
7. In his considered opinion, the appellant had miserably failed to demonstrate that the grant was obtained by deceit or false statements.



8. Pursuant to section 76(c), a grant may be revoked or annulled if it was obtained by means of an untrue allegation of fact, essential in point of law to justify the grant, notwithstanding that the allegation was made in ignorance or inadvertently.
9. The respondent petitioned for the grant on September 8, 2020. In support of the said petition, the respondent filed an affidavit sworn by him.
10. In the said affidavit, the respondent described himself as a Nephew of the deceased, Wayua Ojako alias Wayua Kisiage.
11. It is my understanding that the respondent intended to portray himself as being entitled to the grant pursuant to the order of priority upon which the estate of the deceased should devolve. The said order of priority is set out in section 39 of the *Law of Succession Act*, as follows;
 - “39(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following orders of priority –
 - a. Father; or if dead,
 - b. Mother; or if dead,
 - c. Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none,
 - d. Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none,
 - e. The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares,
 - (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the state, and be paid into the Consolidated Fund.”
12. In his application for the revocation of the grant, the appellant expressly asserted that the respondent was not a nephew of the deceased.
13. The respondent filed a replying affidavit sworn on January 15, 2021. In his said affidavit, he said that he was the grandson of John Odila Omitha, who is said to have purchased LR No Kisumu/Sidho East/404, from Elena Okelo Wayua.
14. Pursuant to the alleged purchase of that parcel of land, the respondent’s grandfather acquired an interest to it.
15. In other words, the respondent’s connection, if any, to the estate of the deceased, was through the alleged purchase by his grandfather.
16. He then asserted that his father, Alloys Okelo Odila, inherited the land from John Odila Omitha.
17. In a nutshell, the respondent’s claim to the estate of the late Wayua Ojako alias Wayua Kisiage was not founded upon any of the provisions of section 39 of the *Law of Succession Act*. He was not a nephew of the deceased.



18. Therefore, by claiming that he was a nephew of the deceased, the respondent had put forth an untruth. The said untruth was intended to persuade, and did persuade the trial court that the respondent was entitled to the grant, by virtue of an alleged degree of consanguinity to the deceased.
19. In the result, I find that the learned trial magistrate erred when he dismissed the application dated September 29, 2020.
20. Accordingly, the appeal is allowed. I set aside the order dated March 2, 2021, and I substitute it with an order revoking the grant which had been issued to the respondent.
21. The respondent shall pay to the appellant, the costs of the appeal, together with the costs of the application dated September 29, 2020.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2023.

FRED A. OCHIENG

JUDGE

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR

