



REPUBLIC OF KENYA



**In re Estate of Joseph Opondo alias Joseph Aguyo (Deceased) (Succession Cause 208 of 2012) [2023] KEHC 2781 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2781 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 208 OF 2012  
JN KAMAU, J  
MARCH 28, 2023**

**IN THE MATTER OF**

**CLEMENTINE ANYANGO SUKA ..... 1<sup>ST</sup> OBJECTOR  
TOM BAKELO SUKA ..... 2<sup>ND</sup> OBJECTOR  
NELLINGTON MASORE SUKA ..... 3<sup>RD</sup> OBJECTOR  
CAVIN GENO SUKA ..... 4<sup>TH</sup> OBJECTOR  
GERALD NYAKAKO SUKA ..... 5<sup>TH</sup> OBJECTOR**

**RULING**

1. In their Summons for Revocation or Annulment of Grant dated October 21, 2014 and filed on October 24, 2014, the Objectors herein sought orders that the Grant of Letters of Administration made to the Petitioner on July 19, 2012 and the Certificate of Confirmation of Grant given to him on October 5, 2012 in respect of the estate of the deceased be revoked and/or annulled and that the transfer of Land Parcel No Siaya/Nyadiwa/913(hereinafter referred to as the “subject property”) from the deceased to the Petitioner and registered on January 2, 2013 and all subsequent entries or dealings with the register of the subject property pursuant to the confirmation of the grant issued be cancelled and the status quo ante restored.
2. The said application was supported by the Affidavit of the 1<sup>st</sup> Objector that was sworn on October 21, 2014. She swore the same on her own behalf and on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Objectors.
3. The Objectors averred that the 1<sup>st</sup> Objector was a widow of Pius Vitalis Suka Opondo, the deceased’s brother, who died intestate on October 17, 1987 and that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Objectors were the 1<sup>st</sup> Objector’s sons. They asserted that on or about the October 11, 2013, they were served with Summons to Enter Appearance, pleadings and other legal processes issued in Kisumu ELC No 268 of 2013 in which the Petitioner had sued them seeking inter alia a declaration that he was the sole legal owner



of the subject property and that he was entitled to an unimpeded right of possession and occupation thereof.

4. They were categorical that the subject property was ancestral land which they had occupied for several years and had even buried their kin there. They further averred that the said subject property was only registered in the deceased's name because his brother who was their late husband and father was away at the time, a fact they said the Petitioner did not disclose in his suit at the time he obtained the title to the subject land. They stated that it was after they obtained an extract of the register of the subject property that they discovered that the Petitioner had obtained the title through this succession cause.
5. They pointed out that they perused the succession proceedings herein and discovered that the Petitioner lodged the Petition herein in his capacity as the deceased's son and had stated in Form P & A5 that the only asset left behind by the deceased was the subject property. They asserted that the signatures that were affixed on Form 37, Form 38 and Form No P&A 57 and P&A 11 were forged. They added that the Petition was undated and the affidavit in support thereof was incomplete.
6. They further contended that it was a requirement of law that a request for confirmation could only be made after the expiry of six (6) months from the date of issuing the grant which was not the case herein. They averred that the Petitioner obtained the Certificate of Confirmation of Grant by lying to court that their late father, who was his uncle, was trying to grab the subject property.
7. They stated that the Petitioner used the confirmed Grant to cause the Registrar to remove a restriction that had been placed on the title by the 5<sup>th</sup> Objector, on instructions of the family, and had the property transferred to his name. They pointed out that their father was the only brother of the deceased herein and that their parents, Opondo Humwa and Obwanga Nyasuka (both deceased) gave the subject property to the two (2) sons.
8. They asserted that neither the deceased nor the Petitioner ever lived on the subject property. It was their contention that they had lived on the subject property since 1986 without any problems and that they brought up and educated the Petitioner as the deceased died when he was just a year old while his mother died five (5) years thereafter.
9. It was their averment that they never saw the Gazette Notice inviting objections to the grant. They were categorical that the impugned grant was obtained by the concealment of facts material to the Petition and by adduction of false and forged documents and thus urged this court to allow their application.
10. In opposition to the said application, the Petitioner swore a Replying Affidavit on January 29, 2015. The same was filed on February 12, 2015. He averred that it was not in dispute that he was the only son of the deceased and that he was granted a Grant of Letters of Administration on July 19, 2012, which was subsequently confirmed on October 5, 2012.
11. He was emphatic that the subject property was not ancestral land but that it belonged to his deceased father and that he successfully transferred it to himself after completing the succession process. He contended that it was not true that the said subject property was registered in the deceased's name only because his brother was away from home at the time. He added that his grandfather, Opondo Humwa had two (2) sons namely, the deceased herein and his brother and five (5) parcels of land namely:-
  - a. Siaya/Nyandiwa/916-Vitalis Suka
  - b. Siaya/Nyandiwa/978-Vitalis Suka
  - c. Siaya/Nyandiwa/985-Tom Suka
  - d. Siaya/Nyandiwa/990-Lukas Opondo



- e. Siaya/Nyandiwa/913-Joseph Aguyo
  - f. Siaya/Nyandiwa/1251-Owuor Suka
12. He denied the Objectors' allegation that they had lived on the subject property since 1986 or that they assisted him in his education but that they took advantage of him and his sisters being orphans and further drove them away from home into distant relatives' hands to be brought up under immense struggle.
- He was categorical that the Objectors had several parcels of land and proceeded to forcefully occupy the only parcel belonging to the deceased and demolished their home and hence that they had come to court of equity with unclean hands.
13. He annexed copies of the Green Card which he said was clear proof that indeed his father's name was not registered as trustee for his brother or because his brother was away from home but that it was the deceased's brother who had hoarded all the parcels for himself and in the name of his sons to the detriment of other beneficiaries.
14. He denied that the signatures on Form 37 and 38 were forged and stated that his sisters were available to attest to that fact. He added that the Guarantor's signature was also not forged and that the P&A forms were not deficient. He asserted that if the court was satisfied by reasons given, it could confirm the grant before the six (6) months period has lapsed and hence court could not be faulted.
15. It was his assertion that the Objectors had no locus standi to question the Grant that was issued as the proper procedure was followed involving his sisters who were persons of equal or lessor priority and that the Objectors were only intermeddling with the deceased's estate and seeking to grab all property of their grandfather which he never gave to the deceased and his brother.
16. He pointed out that the Objectors were his aunt and cousins and they therefore did not rank in priority over him under the *Law of Succession Act* Cap 160 (Laws of Kenya) in terms of who could apply for letters of administration in respect of the deceased's estate.
17. He asserted were only four (4) children namely, Christine Opondo Onyango, Jane Akinyi Okumu, Lilian Awuor Oduor and himself survived the deceased. He was emphatic that in law he was entitled to take over his father's estate which he had done and the Objectors had no valid grounds to challenge the same.
18. He termed the Objectors' application as misconceived, frivolous, vexatious, and bad in law and urged this court to dismiss the same.
19. The Objectors' Written Submissions were dated and filed on October 27, 2022 while those of the Petitioner were dated June 18, 2022 and filed on July 4, 2022. This Ruling is based on the said Written Submissions which the parties herein relied upon in their entirety.

### **Legal Analysis**

20. It was not in dispute that the parties herein had a common grandfather who acquired the subject property amongst many other properties. The Objectors reiterated that they had occupied the subject property and that they were still in occupation of the same for the last twenty (20) years and even buried their kin there which the Petitioner did not object to.
21. It was therefore their submission that the said subject property was ancestral land despite the deceased having been the first registered owner because he was registered as such for convenience and they were thus entitled to an equal share in the said subject property.



22. They invoked Section 76 of the *Law of Succession Act* and contended that a party seeking revocation or annulment of grant must prove that the proceedings were defective in substance, that the grant was obtained fraudulently by making false statements and concealment from court something material to the case of by making untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegations were made in ignorance or inadvertence.
23. They argued that it was trite law that where a property did not form the estate of a deceased and was indicated in the schedule of assets and distributed, it was a sufficient ground to order that such a grant to be revoked as was held in the case of *Re Estate of Justin Munyi Muriithi (Deceased)* [2019] eKLR.
24. They urged the court to revoke the grant issued to the Petitioner and allow parties canvass the issue of ownership of the subject property before the Environment and Land Court (ELC).
25. On his part, the Petitioner submitted that the Objectors filed their application under certificate of urgency in the year 2014 and for ten (10) years they had never appeared before the court, complied or produce anything to support their case. He asserted that he was the registered proprietor of the subject property and he was thus entitled to unimpeded right of possession and occupation thereof. He added that the Objectors remained in wrongful occupation of the subject property and were trespassers.
26. It was his contention that the Objectors' application was meant to defeat the criminal justice process and was therefore a premature violation of the court process.
27. Notably, a reading of the proceedings herein showed that the 5<sup>th</sup> Objector testified that the deceased herein was their father's younger brother. He stated that the subject property was registered in the deceased's name who was to hold it in trust for his father who was working as a police officer and was away from home at the time the land adjudication was done. He added that the subject property was given to his father by his mother when she died.
28. He further informed the court that he had no evidence to show that the subject property was registered in trust for his father or that his father was away at the time or that the signatures in the Petitioner's succession cause were forged.
29. He admitted that out of five (5) parcels, the deceased's family only had one (1) parcel of land and conceded that the deceased's children were also entitled to the subject property.
30. On his part, the Petitioner asserted that Siaya/Nyandiwa/1251 was not ancestral land but belonged to the Objectors and that that was where they used to stay. He stated that his father died before developing on the land.
31. Jane Akinyi Okumu (hereinafter referred to as "DW 2") corroborated the Petitioner's evidence. She was the Petitioner's sister. She stated that it was after the 3<sup>rd</sup> Objector served the Petitioner with a Notice to vacate the subject property that they conducted a search and discovered that the subject property had been registered in their father's names.
32. Section 107 of the *Evidence Act* Cap 80 (Laws of Kenya) stipulates as follows:-
  1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
33. In addition, Section 109 of the *Evidence Act* provides as follows:-



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

34. Notably, the Objectors did not present any evidence to show that their father was away during land adjudication. The onus was on them to prove that the deceased herein held the subject property in trust for their father. They did not also show that the signatures that were affixed on Form 37, Form 38 and Form No P& A 57 and P&A 11 were forged. Failure to adduce evidence that the deceased was holding the subject property in trust for their father or that the said signatures were forged greatly weakened their case.
35. On the other hand, the Petitioner tendered in evidence a Green Card which showed that the deceased was the original registered owner of the subject property. It therefore appeared to this court that the Objectors were trying to grab land which did not belong to them as the Petitioner herein stated.
36. This court also noted that the Objectors were not keen to mention that they were already in possession of other four (4) parcels of land, a fact that was raised and proved by the Petitioner through the Green Card and also admitted by the 5<sup>th</sup> Objector herein. It was indeed unequitable for one family to hold so much property to the exclusion of another.
37. This court was therefore not satisfied that the Objectors discharged their burden of proof regarding their assertions to the standards required by the law as required under Section 107 and Section 109 of the Evidence Act.
38. Going further, this court also had due regard to the provisions of Section 66 of the Law of Succession Act Cap 160 (Laws of Kenya) which state that:-

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;
  - c. the Public Trustee; and
  - d. creditors.
39. Section 39 of the Law of Succession Act further provides that:-
  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 order 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.
40. The deceased herein was survived by his children. As the sister in law and nephews to the deceased, the Objectors ranked lower in the persons who could inherit a deceased's estate as can be seen in Section 39 of the Law of Succession. Their argument that they could inherit from the deceased's estate when his children were alive was therefore rendered moot.
41. This court looked at Section 76 of the Law of Succession Act which states that:-

“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
    - iv. 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.”
42. An order for revocation of the grant can thus only be given if the aforesaid grounds for revocation had been satisfied. A similar finding was arrived at Re: Estate of L A K – (Deceased) [2014] eKLR.
43. After carefully considering the evidence on record and the respective parties' Written Submissions, this court found and held that the Objectors did not prove their assertions as required by the law. It was thus not satisfied 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 as envisaged in Section 76(b) of the Law of Succession Act as the Objectors had contended. This court was therefore not persuaded that there was merit in revoking the Grant of Letters of Administration that was issued to the Petitioner herein.

## Disposition

44. For the foregoing reasons, the upshot of this court's decision was that the Objectors' Summons for Revocation or Annulment of Grant dated October 21, 2014 and filed on October 24, 2014 was not



merited and the same be and is hereby dismissed. The Objectors will bear the Petitioner's costs of this Summons.

45. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF MARCH 2023**

**J. KAMAU**

**JUDGE**

