



**In re Estate of Alexander Owuor Ouko (Deceased) (Succession Cause  
437 of 2001) [2023] KEHC 19390 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 437 OF 2001**

**JN KAMAU, J**

**JUNE 27, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE  
ALEXANDER OWUOR OUKO (DECEASED)**

**AND**

**IN THE MATTER OF AN APPLICATION BY**

**BETWEEN**

**MARY ADHIAMBO OWUOR ..... OBJECTOR**

**AND**

**NASHON AGWANDA OWUOR ..... 1<sup>ST</sup> PETITIONER**

**KEPHA OMOLLO AGWANDA ..... 2<sup>ND</sup> PETITIONER**

**RULING**

**Introduction**

1. In her notice of motion dated June 13, 2022 and filed on June 20, 2022, the objector herein sought for orders that the 2<sup>nd</sup> petitioner together with his servants and/or agents be restrained from interfering, blocking access roads, digging trenches, constructing houses and fencing access road on land parcel No Kamnwa/Keyo/Ogoro/486 (hereinafter referred to as “the subject property”) blocking and enslaving her on the said parcel of land pending hearing and determination of this cause.
2. She swore an affidavit in support of the said application and averred that she was the deceased’s daughter. She averred that the 2<sup>nd</sup> petitioner had been constructing on the subject property which she had objected to on the ground that the letters of grant of administration that was issued herein was obtained fraudulently since other beneficiaries had been left out. She contended that the said subject property was awaiting sub-division amongst the beneficiaries and that no one had the right to use it leaving out the rest of the beneficiaries.



3. She further contended that they had been locked out and could not pass through the said subject property as the 2<sup>nd</sup> petitioner had been digging trenches all round hence blocking their access. She urged the court to restrain him until the cause herein was heard, finally determined and subdivided amongst all the beneficiaries.
4. On his part, the 2<sup>nd</sup> petitioner swore two (2) replying affidavits. Both were sworn on November 10, 2022 and filed on November 11, 2022. He averred that he stayed on the subject property together with the objector. He explained that the lower part where he lived was swampy and water logged and that was what necessitated him to dig trenches around his home to prevent floods from invading his homestead. He denied having blocked any entrance to the objector's home. He added that any developments made were well within his homestead and that being a beneficiary of the deceased's estate, he was thus entitled to develop and use the same.
5. He contended that the objector's home was about two hundred (200) metres from his homestead so there was no way he could interfere with her. He asserted that it was her who had actually subjected the said subject property to acts of destruction by cutting down trees for her exclusive use, digging soil and making bricks subjecting the same to serious environmental degradation. It was his contention that the objector's application was actuated by malice with a view to staying in his compound and to paralyse him in his day to day operations.
6. In his second replying affidavit, he averred that the 1<sup>st</sup> petitioner was the transferee and the current registered proprietor of the subject property and was now deceased. He contended that it was therefore necessary that he be substituted with a legal administrator to his estate before institution or proceeding with the present summons for revocation of grant (sic). He asserted that there being no legal administrator to the estate of the 1<sup>st</sup> petitioner herein, the present application was premature and incompetent.
7. It was also his assertion that the awards that were made in Nyando Miscellaneous Civil Case No 284 of 2009 (sic) and the Land Disputes Tribunal were therefore a nullity and of no effect in these proceedings. He termed the objector's summons frivolous and without merit and urged the court to dismiss the same.
8. The objector's written submissions were dated and filed on December 5, 2022. The 2<sup>nd</sup> petitioner did not file any written submissions despite the court having given him an opportunity to do so. This ruling is therefore based on the objector's written submissions only.

### **Legal Analysis**

9. The objector pointed out that at the time of the deceased's death, the title deed to the subject property was being held by the Kenya Commercial Bank for a loan of Kshs 25,000/=.
10. She contended that the deceased was polygamous and had two (2) wives namely Dorice Oyieko and Plista Onditi (both deceased) and that the first wife had four (4) children namely, Joyce, Aska, Darmar and the 1<sup>st</sup> petitioner herein while the second wife's children were Margaret, Zeppha, Martha, Phebbly and herself. She pointed out that the 2<sup>nd</sup> petitioner was a grandson to the deceased as he was the son of the 1<sup>st</sup> petitioner.
11. It was her averment that the two (2) wives lived in one compound before the demise of the deceased and he had given each of them a portion of land to cultivate and they lived peacefully. She stated that thereafter, the 1<sup>st</sup> petitioner became wild and threatened her mother and their family with eviction. She added that the 1<sup>st</sup> petitioner insisted that her mother and her family should not be living on the



- deceased's subject property because he was his sole beneficiary thus disowning all his sisters from the 2<sup>nd</sup> wife's house.
12. She averred that the 1<sup>st</sup> petitioner became more violent towards her mother forcing her to report the matter to the area chief via a letter dated October 16, 2002. She added that her mother sought more help from the clan elders who advised her to seek the legal procedure so that the deceased estate could be subdivided equally among the two (2) wives.
  13. She further contended that the subject property hence had two (2) different letters of grant with different holders and issued in different years. She averred that her mother applied for the letter of grant (sic) in Kisumu Succession Cause No 369 of 2002 and the same was issued on July 14, 2004.
  14. She asserted that the 1<sup>st</sup> petitioner also applied for letter of administration in Kisumu Succession Cause No 437 of 2001 and was also appointed as the legal representative of the deceased's estate in the year 2002. She was emphatic that the 1<sup>st</sup> petitioner obtained the said grant unprocedurally because neither her mother nor any family member was involved in the said succession proceedings and consequently, none was involved in the transfer of the title deed of the subject property from the deceased to him.
  15. She further asserted that her mother then took the matter to the land dispute committee at Nyando to seek an order stopping eviction and an order for sub-division of the deceased's estate among his wives. She averred that the 1<sup>st</sup> petitioner died in 2005 whereupon the 2<sup>nd</sup> petitioner took charge of the subject property.
  16. She further stated that the land committee from Nyando visited the subject property in 2007 and ordered that the same be subdivided equally among the two (2) wives but the 2<sup>nd</sup> petitioner appealed the said order. She pointed out that the Provincial Land Committee in Kisumu upheld the Nyando Land Dispute Ruling and an order was issued that they proceed with the subdivision and each party to get equal share.
  17. She submitted that the land surveyors from Kisumu carried out the sub-division which was witnessed by the area chief (South East Nyakach Location) as per letter dated September 18, 2020 and that the boundary demarcation was done under the witness of the clan elders but that later on, the 2<sup>nd</sup> petitioner uprooted the sisal plants.
  18. She asserted that after the sub-division, she went to Kisumu District Land Surveyor's Office and found mutation form dated December 1, 2008 which indicated the two (2) parcels of land as per the subdivision namely No A 662 for the 2<sup>nd</sup> respondent and B 663 for her mother.
  19. She pointed out that thereafter the 2<sup>nd</sup> petitioner appealed in the High Court Kisumu claiming that the whole parcel belonged to his father and that Aroni J (as she then was) stopped the mutation to proceed. She contended that that made her family's life very tough as he threatened with eviction.
  20. It was her contention that since her mother died in 2015, they had never enjoyed peace as they lived as squatters in their father's land. She pointed out that on December 31, 2021, he forcefully constructed a homestead blocking the entrance and exit not only for the family but also for the public and school going children.
  21. She added that after blocking the path, he went ahead and dug a big trench preventing even the animals from reaching the grazing land forcing them to use the neighbours homestead as a pass way or passing through the fence. She argued that that was an indication he wanted to claim the whole subject property neglecting the other children of the deceased which she added was against the Constitution.



22. Right from the onset, this court found it prudent to first determine the question of whether or not it was necessary to substitute the 1<sup>st</sup> petitioner who died in the year 2005 as the same would have an effect on the core substance of the succession proceeding herein.
23. Notably, three (3) petitioners petitioned for letters of administration in respect of the deceased's estate. In the succession proceedings herein, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners were joint administrators of his estate.
24. Where there are several administrators, in the event of the death of one or more of joint administrators, the surviving administrator or administrators had the mandate to continue with his duties to completion without the need to replace the deceased ones. This position was affirmed in the case of *In Re Estate of George Ragui Karanja (Deceased)* [2016] eKLR.
25. Notably, section 81 of the *Law of Succession Act*, cap 160 (Laws of Kenya) states as follows:-
- “Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them...”
26. It therefore followed that when the 1<sup>st</sup> petitioner died, the 2<sup>nd</sup> petitioner took over the sole mandate of being the administrator of the deceased's estate. The 2<sup>nd</sup> petitioner's claim that there was need to substitute the 1<sup>st</sup> petitioner with his legal representative before the objector could institute her objection proceedings did not represent the correct position of the law and did not therefore find favour with this court.
27. Turning to the merits of the application herein, in her ruling of July 14, 2011 in Kisumu Miscellaneous Application No 284 of 2009, Aroni J (as she then was) held that the Land Dispute Tribunal referred to by the objector herein had no jurisdiction to handle the matter herein. She rendered herself as follows:
- “The interested party claims a share of the land that belonged to her husband. She claims that she was left out in the succession. She took her claim to the land dispute tribunal...I find the aggrievement of the ex-parte applicant genuine but the question was whether she took the grievance to the right forum...The court has a duty to facilitate the just, expeditious, proportionate and affordable resolution of disputes and to ensure that at the end of the day substantive justice is achieved. In this regard I hereby therefore direct the parties to maintain status quo pending the interested party referring her claim by way of revocation and annulment of grant issued in succession No 437 of 2001 and determination thereof.”
28. Notably, the aforesaid interested party who was mentioned in the aforesaid decision was the objector's mother who was now deceased. The objector herein therefore proceeded to institute her objection proceedings herein. The aforesaid summons for revocation of grant was dated December 14, 2021 and filed on March 9, 2022. In that application, the objector did acknowledge that the court had issued the grant of letters of administration on January 31, 2002. The 2<sup>nd</sup> petitioner was therefore lawfully allowed to manage and control the subject property as the objection proceedings were yet to be determined by this court.
29. Having said so, unless the confirmed grant of letters of administration was revoked or annulled by the court, the estate remained as it had been distributed namely No A 662 for the 2<sup>nd</sup> petitioner and B 663 for the objector's mother. The objector had no other way of obtaining the land lawfully unless she took out letters of administration in respect of her mother's property so that the same could be distributed and/or had the grant of letters of administration intestate herein revoked.



30. In her notice of motion application dated February 16, 2022 and filed on March 16, 2022, the objector had sought that the letters of administration that were issued on January 31, 2002 be annulled as not all the deceased's beneficiaries were included in the whole succession. She had also sought that the name of the 2<sup>nd</sup> petitioner and the other beneficiaries be removed and/or deleted and that the subject property revert to the deceased's name for distribution to all his beneficiaries.
31. This application for revocation of grant of letters of administration intestate was yet to be heard. The 2<sup>nd</sup> petitioner's only ground of opposition to the objector's application was the fact that the 1<sup>st</sup> petitioner had not yet been substituted, a position that this court did not agree with.
32. This court could not pronounce itself on the said application as a matter of procedure as the said application was not presently before it for hearing and determination. Consequently, to avoid further acrimony and to maintain law and order, there was need to maintain the status quo pending the hearing and determination of the objector's notice of motion seeking revocation of the grant of letters of administration intestate.
33. Aroni J (as she then was) appreciated this fact and directed that the status quo would be maintained pending the hearing of the application for revocation of grant of letters of administration intestate by the objector's mother. this is a power that the court can exercise pursuant to rule 73 of the *Probate and Administration Rules* which empowers the court to invoke its inherent powers to meet the ends of justice.
34. Accordingly, as the grant of the letter of administration that was issued on January 31, 2002 had been challenged in these proceedings, it was necessary that the 2<sup>nd</sup> petitioner be restrained from interfering with the subject property or any developments thereon, until further orders of this court.

### **Disposition**

35. For the foregoing reasons, the upshot of this court's decision was that the objector's notice of motion application dated June 13, 2022 and filed on June 20, 2022 was merited and the same be and is hereby allowed in terms of prayers No (1), (2) and (3) therein. As this is a family matter, the court deviated from awarding costs in order to preserve the family ties and directs that each party bears its own costs of this application.
36. It is hereby directed that this matter and Kisumu Succession Cause No 369 of 2002 which emanate from the deceased's estate be mentioned on July 10, 2023 before the DR High Court Kisumu with a view to giving a date before the judge who will have been allocated to take over this matter to give further orders and/or directions.
37. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF JUNE 2023**

**J. KAMAU**  
**JUDGE**

