



In re Estate of Lasaro Mbogo Odalo (Deceased) (Succession Cause 12 of 2021) [2023] KEHC 24045 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 12 OF 2021
RPV WENDOH, J
OCTOBER 26, 2023**

BETWEEN

FREDRICK ODHIAMBO OCHOLA APPLICANT

AND

JOSEPH ODHIAMBO ODALO RESPONDENT

RULING

1. This cause relates to the estate of Lasaro Mbogo Odalo (Deceased) who died intestate on 5/9/1977. Fredrick Odhiambo Ochola (the applicant) filed summons for revocation or annulment of grant (the application) dated 26/7/2021. The applicant is seeking that the grant of probate made on 10/7/2015 be revoked/annulled on the grounds that the grant of letters of administration was issued to Joseph Odhiambo Odalo (the respondent) by concealment and/or non - disclosure of material facts. The application is supported by the affidavit of the applicant sworn and deposed on 26/7/2021.
2. The applicant filed this application in his capacity as the grandson of the deceased. He deposed that this court issued a grant to the respondent on 10/7/2015; that himself and Judith Akoth Omondi the daughter of the deceased were left out of the estate; that in the certificate of confirmation, the applicant and his mother's share is not disclosed and neither are they mentioned as beneficiaries; that in an attempt to conceal the facts, the respondent apportioned to the applicant's mother land measuring 0.8 Ha from South Sakwa/Kogelo/286 measuring 41 Ha; that in the succession petition, the applicant sought a letter from the chief of South Sakwa Location as opposed to the chief of East Sakwa Location where the suit property is situated. On that basis, the applicant asked this court to preserve and/or conserve the suit property pending the hearing and determination of this application.
3. The application was opposed. The respondent filed a replying affidavit dated 9/3/2022. The respondent admitted that he petitioned for grant as the son of the deceased after being given consent by the surviving dependents of the deceased herein. The respondent also confirmed that the applicant is a grandson to the deceased; that the applicant was a son to Robert Ombogo Odalo his deceased brother;



- that his brother is survived by two widows namely: - Lewnida Atieno and Lewnida Auma Ochola; that Lewnida Auma Ochola is the mother to the applicant; that the applicant cannot therefore be treated as a direct beneficiary or dependent of the deceased.
4. The respondent contended that he distributed his deceased's brother share in the estate to his two widows land measuring 9.8 Ha being land parcel number South Sakwa/Kogelo/1562 which was jointly registered in the names of the widows; that the widows have since amicably shared the parcel equally having 4.9 Ha each; that South Sakwa/Kogelo/1611 has since been registered in the name of Lewnida Auma Ochola the applicant's mother and South Sakwa /Kogelo/1610 has been registered in the name of Lewnida Atieno her co-wife; that it is not true that the applicant's mother was only allocated 0.8 Ha; that the applicant not being a dependent of the deceased and having benefited from the share allocated to his father's family cannot claim from the present proceedings. The respondent stated that he has faithfully, fairly and equitably administered the estate of the deceased and not concealed any material facts.
 5. The summons proceeded by way of viva voce evidence. The applicant testified as PW1. He adopted his witness statement dated 20/4/2022 as his evidence in chief. He testified that upon conducting a search on South Sakwa/Kogelo/286 (the suit property) he discovered that it has been subdivided and transferred into several parcels of land namely South Sakwa/Kogelo/1560, 1561 and 1562; that he inquired from the respondent who told him that his share had been given to his mother Lewnida Auma Ochola; that he went to the area assistant chief and he told him that succession had been done but his office was not involved; that together with Judith Akoth Omondi, they decided to apply to revoke the grant on the grounds that the applicant, his mother and siblings were not among the beneficiaries listed in the grant, that the beneficiaries were not given their shares and the administrator gave other persons who are not family members; that the suit property was not divided equally, that the people who consented to the succession process were strangers, that the mutation form shows that the suit property was sub divided but they are not aware of any surveyor who visited the land nor is the office of the area chief aware.
 6. PW1 further testified that his father and mother are both deceased; that the grant issued in the High Court in Kisii dated 10/7/2015 does not indicate his name nor his mother's name; that his brothers are Aloys, Okoth, Paul Otieno but he denied knowing Alex, George Odhiambo and Dominic Odhiambo. PW1 stated that when the case was filed, the Chief of South Sakwa wrote the letter of introduction but they come from East Sakwa Location.
 7. On cross examination, he testified that he is not known as George Odhiambo and he was not present at Kisii High Court when the grant was confirmed; that Robert Ochola died before the proceedings in Kisii were filed; that Robert left two widows; Lewnida Auma his mother and Lewnida Atieno; that the land parcel is South Sakwa Kogelo/286 which has been partitioned into three (3) portions, 1560, 1561 and 1562; that No. 1562 was jointly registered in names of his mother and her co-wife as per the court documents; that land parcel no. 1562 is subdivided into 2. PW1 could not tell the acreage that his mother was given.
 8. On re-examination PW1 stated that in the process of succession, survey and subdivision, he did not participate and survey has not been done on the suit land.
 9. Judith Akoth is PW2. She adopted her statement dated 20/4/2022. She testified that she is the daughter to William Oyugi Odalo and Jenifer Atieno who are both deceased; that the deceased herein was her grandfather; that she is the only child left after both her parents died. PW2's written statement reiterates the contents of PW1's statement dated 20/4/2022.



10. On cross - examination, PW2 testified that her father died in 2013 and her mother is also deceased. She stated that she lives in Migori - Oruba and William is a brother to Joseph Odhiambo.
11. The applicant filed written submissions on 21/6/2023. It was submitted that in the probate Form 5 in support of the petition for letters of administration intestate, the following were listed as the survivors of the deceased: -
 - a. Joseph Odhiambo Odalo
 - b. Alosi Odalo.
 - c. Rafael Odira Odalo.
 - d. Alex Okoth Obwogo.
 - e. Paul Otieno Obwogo.
 - f. George Odhiambo Obwogo.
 - g. Dominic Odhiambo Obwogo.
12. The applicant submitted that Rafael Odira Owalo is not known to the applicant and George Odhiambo Obwogo was said to be a computer error; that the following were not listed as survivors of the deceased: -
 - a. Fredrick Odhiambo Ochola - the applicant.
 - b. Timon Ochieng Ochola - Grandson.
 - c. Barsil Francis Ochola - Grandson.
 - d. Judith Akoth - Grand daughter.
 - e. Lewnida Auma Ochola - Mother to the applicant.
 - f. Lewnida Atieno Ochola - Step mother to the applicant.
13. It was further submitted that only 5 of the 7 persons listed as surviving the deceased signed the consent; that from the house of the applicant's mother, only his brother Dominic Odhiambo Obwogo was listed as a beneficiary; that the applicant never consented that he is entitled to 9 acres as shown in the consent filed in court on 7/5/2015; that those appearing in Form 5 as the survivors of the deceased are not the same ones giving consent in Form 38 and also in Form 108 for summons for confirmation of grant. The applicant relied on the court's findings in RE: Estate of Kimining Arap Kiboigut (Deceased) (2021) eKLR on the grounds for revocation of a grant. The applicant urged the court to find that the process was unprocedural, some survivors were left out and the consent alluded to smacks of fraud and the court should revoke and/or annul the grant.
14. Joseph Odhiambo Odalo is DW1. He adopted his statement dated 22/2/2022. He also produced the mutation form 1562 that subdivided the suit property into 1610 and 1611 annexed to his replying affidavit dated 9/3/2022. He testified that he comes from South Sakwa in Awendo Sub County; that the deceased Lasaro Mbogo Odalo, was his father; that he does not know Fredrick Odhiambo Ochola; that the estate of the deceased comprises of South Sakwa / Kogelo/ 286.
15. DW1 testified that the applicant is a son to Robert Ochola Odalo who was survived by two widows namely Lewnida Atieno and Lewnida Auma Ochola; that the applicant is a son to Lewnida Auma



- Ochola; that the suit property forms the net estate of the deceased; that with the consent of the family members, the respondent distributed the estate of the deceased as follows:-
- i. Joseph Odhiambo Odalo - 13.79 Ha for himself and in trust for the family of Raphael Odira Odalo (South Sakwa/Kogelo/1560).
 - ii. Aloys Odalo - 17.23 Ha (South Sakwa/Kogelo/1561).
 - iii. Lewnida Atieno and Lewnida Auma Ochola - 9.8 Ha (South Sakwa/Kogelo/1562).
16. It was DW1's further testimony that land parcel no. South Sakwa/Kogelo/1562 has since been divided between the two widows each having 4.9 Ha and further registered in their individual names; that it is therefore not true that the applicant's mother was only allocated 0.8 Ha; that the applicant was involved in the whole succession process and even signed the consent for confirmation and distribution. The land was subdivided into two and given to Lewnida Auma and Lewnida Atieno.
17. On cross examination, DW1 testified that he knows Fredrick Odhiambo Ochola as the child of Lewnida Auma Ochola; that Lewnida had sought to get the deceased's property for her husband; that the Certificate of confirmation of grant Migori is dated 10/7/2015; that Lewnida is not one of the beneficiaries named therein; that the land is in South Sakwa; that the search still shows South Sakwa but not East; that he did not avoid the chief of East Sakwa since it was created recently; that at the time of succession, the suit property was in South Sakwa.
18. It was his further testimony that at time of succession, he notified Lewnida Auma and her first born son, Dominic Odhiambo who is listed as a beneficiary but he is in prison; that Aloys is Odalo's son; that the second (2nd) born of Leonida is Fredrick; that he had written the name of Fredrick but the computer wrote George. He stated that he did not have the Chief's letter of introduction but Fredrick is mentioned therein
19. On re-examination, he testified that Dominic is the first born of Lewnida Auma; that Lewnida Auma was given land of Odalo; that apart from Fredrick and Dominic there are others; that he notified everyone about the succession; that Lewnida Auma gave him two sons to be witnesses; that Fredrick's family had been given land which they have.
20. Alex Okoth Obwago is DW2. He testified that he is the eldest son of Robert Obwogo Odalo (deceased) and his mother is Lewnida Atieno; that the applicant herein is his step brother; that the suit property formed the net estate of his grandfather; that his grandfather was survived by 6 sons namely:-
1. Aloys Onyango Odalo.
 2. John Mbogo Odalo.
 3. Robert Obwogo Odalo.
 4. Raphael Odira Odalo.
 5. William Oyugi Odalo.
 6. Joseph Odhiambo Odalo.
21. DW2 stated that before his death, his grandfather had demarcated his land to all the above named sons and they settled in their respective portions; that the applicant herein was present and participated in the succession proceedings in Kisii and even signed consent for the confirmation of the grant; that his father was survived by two widows and they were jointly allocated land measuring 9.8Ha; that it was



- subsequently apportioned into two with each wife getting 4.9Ha; that it is not true that the applicant's mother was assigned 0.8Ha; that the mode of distribution was agreed upon by the whole family.
22. On cross examination, DW2 testified that Joseph took 13.79Ha; that both wives Leonida each have 4.9Ha; that Alloys Odalo, his eldest uncle took 17.23Ha; that he knows Raphael who is the one Joseph comes after; that George Odhiambo is his brother from Auma's house. DW2 stated that presently, the land is in East Sakwa but before it was in South Sakwa. On re-examination, DW2 testified that he was satisfied with the manner in which the land was subdivided.
 23. In his written submissions, the respondent submitted that Section 29 of the Law of Succession Act, defines who dependents are; that the applicant did not lead evidence to show that prior to the death of the deceased, he was being maintained by the deceased; that the deceased herein preceded the death of the applicant's parents; that without proof that the applicants were being maintained by the deceased, they cannot be said to have been dependents of the deceased. The respondent submitted that the reason for revocation of the grant is baseless and should be dismissed.
 24. I have considered the summons application, the response, the viva voce evidence, the submissions by both parties and the entire succession proceedings before this court.
 25. It is not disputed that the applicant together with Judith Akoth (PW2) are grandchildren of the deceased herein. The respondent is a son to the deceased. The applicant's contention is that his mother was allocated 0.8 Ha of the suit property. The applicant and PW2 also contend that they were not considered during the distribution of the estate. The respondent took the position that the applicant's mother who is now deceased, Lewnida Auma Ochola was apportioned 4.9 Ha which fact has not been disputed by the applicant.
 26. It also came out from the proceedings that one of the deceased's sons Robert Ochola Odalo (deceased) had two wives Lewnida Atieno and Lewnida Auma Ochola. Lewnida Auma Ochola (deceased) is the mother to the applicant and she was apportioned 4.9 Ha of the suit property as her inheritance on behalf of her deceased husband. DW1 and DW2 testified that one Dominic Odhiambo is a brother to the applicant herein but he is in prison. The certificate of confirmation of grant dated 10/7/2015 indicates that one Dominic Odhiambo Obwogo was listed as a grandson and one of the beneficiaries of the deceased.
 27. In succession proceedings, dependency is an important aspect prior to distribution of property. Section 29 of the Law of Succession defines a dependant for purposes of provision as follows: -
 - " For the purposes of this Part, "dependant" means-
 - (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."



28. The place of grandchildren in being considered dependants is after the nuclear family for the deceased has been considered and adequate provision has been made to them. In *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* (2016) eKLR it was held:-

" From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

29. In this regard, the applicant and Judith Akoth have not led evidence to show that prior to the death of the deceased, they were being maintained by the deceased for provision to be made to them. Although the names of the wives in the house of Robert Ochola Odalo (deceased) have not been listed as beneficiaries and their respective shares indicated, there is evidence that they were allocated each a share of the suit property where they have settled. In any event, the mother of the applicant is now deceased and being the son in the home, he can proceed and conduct succession proceedings on behalf of the estate of his mother.

30. The grounds upon which a person can move the court to revoke or annul a grant whether or not confirmed is provided for in Section 76 of the *Law of Succession Act*. The law provides: -

" 76. Revocation or annulment of grant

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 such inventory or account of administration as is required by the provisions of paras (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.”

31. The circumstances which a grant can be annulled and/or revoked are where the process of obtaining the grant was defective in substance, the grant was obtained fraudulently or through concealment of material facts, the grant was obtained by untrue allegation of fact essential in a point of law to justify the grant notwithstanding that the same was made ignorantly and that the person to whom the grant was made has failed, to apply for confirmation within a year, to proceed diligently with the administration of the estate, to produce in court accounts and inventory as and when needed; and the last ground can be where the grant has become useless and inoperative.
32. It is not an automatic right that since one was a grandchild, they should be apportioned apart estate of their grandparents. I reiterate that proof of dependency has to be led. I find that there was no concealment of facts prior to the grant being confirmed on 10/7/2015. The court proceedings show that the court noted that all parties were present, although the court did not note down their names, except two who were absent but the distribution had been agreed upon. The application for summons to confirm the grant dated 2/12/2014 was allowed. I also observe in the affidavit of consent to the making of the grant of administration intestate to persons of equal or lesser priority, the applicant appended his signature.
33. I have also considered the age of the applicant using the copy of the national identification card on record. When the confirmation was being done in the year 2015, he was 29 years old. I do not believe that when the succession proceedings were on going, he was unaware. In addition, the mutation form shows that the portion of the suit property allocated to his mother was registered in the year 2017. Being the only son who is at home, he must have been aware of the mutation process.
34. This court finds that the summons for revocation of the confirmed grant dated 10/7/2015 is devoid of merit. It is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 26TH DAY OF OCTOBER, 2023

R. WENDOH
JUDGE

