



**Obiero v Ooko (Civil Appeal E028 of 2021) [2022] KEHC 375 (KLR) (25 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 375 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAAYA  
CIVIL APPEAL E028 OF 2021  
RE ABURILI, J  
APRIL 25, 2022**

**BETWEEN**

**JULIUS OOKO OBIERO ..... APPELLANT**

**AND**

**GODFREY OKOTH OOKO ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Lester Simiyu Principal Magistrate delivered on 14th July 2021 in Siaya PMCC Succession Cause No. 140 of 2019)*

**JUDGMENT**

1. The appellant Julius Ooko Obiero vide Summons dated December 19, 2019 sought orders before the trial court, for revocation of the grant issued to the respondent Godfrey Okoth Ooko and that he and other family members of the deceased William Ooko Wadhier, be made administrators of the deceased's estate.
2. The appellant's case before the trial court was grounded on the facts among others, that the grant was obtained fraudulently, that issuance of the said grant was prohibited under section 47 of the *Law of Succession Act*, that the respondent misappropriated the assets of the deceased and that the respondent left out the appellant and his siblings when filing the petition for grant.
3. In her judgement after considering the submissions by both parties, the trial court found that the appellant had been catered for through an earlier allocation made to his deceased father and was thus not entitled to a share of the estate of the deceased subject of these proceedings.
4. Aggrieved by the trial court's findings the appellant lodged this appeal vide a memorandum of appeal filed on the August 10, 2021, setting out the following grounds of appeal:
  - i. That the learned trial magistrate in her judgement grossly misdirected herself both in law and fact in not determining whether the appellant is the legal heir to the estate of William Ooko Wadhier as his father Joseph Obiero Ooko (deceased) is the son to William Ooko Wadhier.



- ii. That the learned trial magistrate grossly misdirected herself that land parcel number North Gem/Malanga/1191 originated from William Ooko Wadhier whereas it originated from James Oruko.
  - iii. That the learned trial magistrate erred in law and in fact by distributing the estate of William Ooko Wadhier without considering the other beneficiaries.
  - iv. That the learned trial magistrate misdirected herself by not considering the appellant's claim that he was being excluded as a beneficiary of the estate of William Ooko Wadhier.
  - v. That the learned trial magistrate did not appreciate that indeed the two letters of the chief confirmed that indeed the appellant was a beneficiary of the estate of William Ooko Wadhier as the grandson being that his father died before receiving his share.
  - vi. The learned trial magistrate misdirected herself in determining that the appellant benefitted from North Gem/Malanga/1191 which is not the property of William Ooko Wadhier the grandfather of the appellant.
5. The appeal was canvassed by way of written submissions.

### **The Appellant's Submissions**

6. The appellant framed two issues for determination in his submissions namely:
- i. Whether the appellant was entitled to inherit from the estate of William Ooko Wadhier (deceased) and
  - ii. Whether the appellant had been provided for
7. As to whether the appellant was entitled to inherit from the estate of the deceased William Ooko Wadhier, it was submitted on behalf of the appellant that the deceased William Ooko Wadhier had two sons, the appellant's father who had since died and the respondent. It was further submitted that the appellant's father resided and had been buried on the suit property where the respondent also resided.
8. The appellant cited the case of *Re Estate of Wabome Njoki Wakagoto* [2013] eKLR where the court held that grandchildren have no right to inherit from their grandparents unless it is indirectly through their own parents.
9. As to whether the appellant had been provided for, it was submitted that the respondent's claim of double provision did not have any substance as land parcel number North Gem/Malanga/1191 was not part of the estate of William Ooko Wadhier and that the same was given to Joseph Obiero Ooko.
10. The appellant's counsel further submitted that the respondent's claim that under Luo customary law, the last born is entitled to inherit the homestead did not stand as the instant proceedings did not fall under Luo customary law but under the *Law of Succession Act*.

### **The Respondent's Submissions**

11. The respondent framed three issues for determination in his submissions namely:
- i. Whether the appellant had placed anything before the court to warrant interference with the trial court's decision.
  - ii. Whether the respondent being a son of the deceased (William Ooko Orokoo) ranked higher in priority as per section 66 of the *Law of Succession Act*.



- iii. Whether the appellant had been adequately catered for as North Gem/Malanga/1191 was in the name of the appellant's deceased's father.
12. It was submitted that the respondent's recollection of the facts was substantiated by the trial magistrate in her judgement and further that no new evidence had been adduced by the appellant to warrant this court's interference with the trial court's finding.
  13. Relying on section 66 of the Law of Succession Act, it was submitted that where a deceased person is survived by a spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person as was held in the cases of Nairobi Succession Cause No. 2015 of 2012 In the Matter of the Estate of Joshua Orwa Ojode (Deceased) and that of In Re Estate of George Muriithi Gitabi (Deceased) [2019] eKLR.
  14. The respondent further submitted that the appellant was well catered for as North Gem/Malanga/1191 was registered in the name of the appellant's deceased's father.

### Analysis & Determination

15. As a first appellate court, this court has a duty to examine matters of both law and fact and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is captured by Section 78 of the Civil Procedure Act which espouses the role of a first appellate court which is to: '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' This provision was reinforced by the Court of Appeal in several cases among them, Selle v Associated Motor Boat Company Ltd [1968] EA 123 where it was held that:
 

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
16. In Peter M. Kariuki v Attorney General [2014] eKLR it was held that:
 

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence... (See Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche [2019] eKLR).
17. I have considered the pleadings and submissions filed herein as well as those filed before the trial court which formed the basis of the parties' cases as they elected not to give viva voce evidence. I have also considered the case law cited by both parties' advocates.
18. In my view, the grounds of appeal advanced by the appellant raise questions as to the status of the appellant as an alleged heir of the deceased William Ooko Wadhier and the appellant's alleged benefit of North Gem/Malanga/1191 to the exclusion of the respondent hence the appellant allegedly not being beneficially entitled to Land Parcel No. North Gem/Malanga/1187.
19. I therefore find the issues for determination in this appeal to be:



- i. Whether the appellant is a beneficiary of the estate of the deceased William Ooko Wadhier and thus beneficially entitled to the estate comprising land parcel Number North Gem/Malanga/1187.
- ii. Whether the grant issued to the respondent on the 23.4.2019 should be revoked.
- iii. What orders should this court make?

**Whether the appellant is a beneficiary of the estate of the deceased William Ooko Wadhier and thus entitled to North Gem/Malanga/1187**

20. To resolve this issue, it is important to first delve into the history of the suit property as it emerges from the pleadings herein and before the trial court.
21. It is an uncontroverted fact that the estate suit property herein emanated from land parcel No. North Gem/Malanga/799 which was owned by late Joseph Wadhier, the great grandfather to the appellant and grandfather to the respondent. The respondent is the paternal uncle to the appellant and the brother to the appellant's father.
22. It is also clear that the aforementioned land was subdivided and the title No. North Gem/Malanga/1191 was registered in the name of James Oruko Wadhier on 27/3/1992 and on the same day, it was transferred to Joseph Obiero Ooko. This is as per the Green card issued on 28/06/2019.
23. On the other hand, William Ooko Wadhier was registered as the owner of the suit property, North Gem/Malanga/1187. Nothing much is said about the other titles that emerged from the subdivision of North Gem/Malanga/ 799 being Nos. 1186,1188, 1190 and 1192. However, in paragraph 4 of the supporting affidavit of the appellant herein as sworn in support of his Summons for revocation of grant, he deposed that both him, his family and the Respondent herein reside on parcel No. North Gem/Malanga/1189 where his father built a permanent house.
24. According to the appellant, when him and his siblings asked the respondent to give them apportion of land to enable them built their homestead, he declined leading to the appellant filing a citation against the respondent vide Siaya Citation Cause No. 37 of 2019 in which a consent was entered and the respondent agreed to petition for grant. That when the respondent finally filed for succession, he deliberately omitted the appellant and his siblings who are also beneficiaries of the estate, to benefit from their deceased father's share.
25. In 2019, the appellant herein placed a restriction to the land parcel No. North Gem/Malanga/1187 as grandson to the registered owner thereof.
26. The respondent in his replying affidavit sworn on 18<sup>th</sup> February 2020 maintained that being the son to Wiliam Ooko Wadhier unlike the appellant who was the grandson, the latter could not benefit from the estate of his grandfather and that the claim therefore offended sections 67 and 68 as well as section 66 (b) of the *Law of Succession Act*. He claimed that he ranked in priority to the objector herein.
27. The respondent further pleaded and submitted before the trial court that the direct transfer of North Gem/Malanga/1191 made to the appellant's father was because the latter was the eldest son of the deceased William Ooko Wadhier whereas the suit property, North Gem/Malanga/1187 was the deceased's homestead and as the lastborn, the respondent was entitled under Luo customary law to inherit the homestead.
28. This raises the question of whether Luo customary law is applicable herein as asserted by the respondent, noting that he who pleads custom must prove the same as the court cannot presume



existence of a customary practice which is not proved. The deceased whose estate is subject of these proceedings died on July 8, 2010. The date of death is important because of the fact that the [Law of Succession Act](#) came into operation on 1<sup>st</sup> July 1981. Sections 1 and 2 of the Act provides that:

- (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.
- (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

29. Accordingly, it follows that the estate of the deceased William Ooko Wadhier is governed by the [Law of Succession Act](#) and its provisions relating to distribution of the estate of the deceased.

30. It is not in doubt that the appellant is a grandson of the deceased William Ooko Wadhier, who was also the father of the respondent herein and who died on the July 8, 2010 and this fact is admitted by both parties. The appellant herein is the son of Joseph Obiero Ooko, who died on the February 5, 1996, predeceasing his father William Ooko Wadhier.

31. The position of grandchildren with regard to estates of their grandparents was considered by Musyoka J. *In the Matter of the estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR as follows:

“...Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1<sup>st</sup> 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.”

32. In *Joseph Achichi Aburili v George Ochola Aburili* [2017] eKLR (no relation to Aburili J), Majanja J stated as follows citing the Court of Appeal decision and I concur:

“A grandchild will therefore take the share due to his or her deceased parent in the estate under the principle of representation stated in section 41 of the Act. On this issue the Court of Appeal in *Christine Wangari Gachigi v Elizabeth Wanjira Evans and 11 Others* NKU CA Civil Appeal No. 221 of 2007 [2014] eKLR stated as follows:

Although Sections 35 and 38 of the [Laws of Succession Act](#) is silent on the fate of surviving grandchildren whose parents’ pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate, then that child’s issue alive or en ventre sa mere or that date of the intestate’s death will take in equal shares Per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate’s death.”



33. The Court in the above case went further and held that:

“We affirm the learned trial Judges decision that the beneficiaries of the estate of the deceased herein comprised all the deceased’s children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the Succession Proceedings to court.”

34. The same position was also reiterated in [Re Estate of Joyce Kanjiru Njiru \(Deceased\)](#) [2017] eKLR where it was held that:

“My view is that the children are entitled to inherit the share which their deceased parents would have inherited.”

35. Further, Section 29 of the [Law of Succession](#) provides the list of persons who qualify to be dependents. [In Re Estate of James Kiani Kiranga \(Deceased\)](#) [2020] eKLR, the court held that the deceased’s grandchildren ought to be in priority to the deceased’s daughter in-law. It follows that grandchildren are entitled to share equally the portion which their parent would have received. [In Re Estate of Florence Mukami Kinyua \(Deceased\)](#) [2018] eKLR, it was held that:

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent’s share in the estate of the grandparents.” [emphasis added]

36. From the case law cited above and the affidavit evidence presented before the trial court and submissions before this court, the respondent herein does not rank in priority to his deceased brother Joseph Obiero Ooko as survived by the appellant herein and his siblings if any, as the appellant and his siblings take the position of their late father Joseph Obiero Ooko in claiming for entitlement of his share of the estate of their late grandfather William Ooko Wadhier.

37. In my humble view, the respondent did not demonstrate on a balance of probabilities that the intentions of James Oruko, when he transferred parcel No. North Gem/Malanga/1191 to the late Joseph Obiero Ooko as the eldest son of William Ooko Wadhier, was to exclude the appellant from inheriting from the estate of his late father.

38. Accordingly, I am satisfied that despite the respondent being the son to the deceased William Ooko Wadhier, and the appellant being the grandson to the said William Ooko Wadhier, the two have equal rights to that estate by virtue of being his son and grandson (whose latter’s father Joseph Obiero Ooko had predeceased the deceased William Ooko Wadhier.)

39. The fact that the appellant’s father had been previously provided for by virtue of the direct transfer of North Gem/Malanga/1191 to him by his grandfather is, in the circumstances of this case immaterial, as there is no evidence that the transfer or gift was inter vivos and intended to exclude the appellant’s father and from benefitting from befitting from the estate of William Wadhier. I reiterate that that allocation of a portion of land from a grandfather to his grandson and I find no evidence that that allocation was intended to remove the appellant’s father from benefitting from the estate of his deceased father.

40. It is also clear from the proceedings herein that the said transaction was not part of succession proceedings and as such, this court cannot scrutinise the purposes of the said transfer. I am therefore unable to find any evidence of unjust entitlement by the appellant’s claim, as alleged by the Respondent herein.



41. Although the respondent claimed that James Oruko held the title in trust for his younger brother William Ooko Wadhier as per the Green Card for parcel No. Gem/Malanga/799 opened on 16/5/1977, the Succession Court has no jurisdiction to determine matters land held in trust. That is a matter within the jurisdiction of the Environment and Land Court to determine. The argument by the Respondent cannot therefore cloth this court with jurisdiction to determine the issue of trust. The duty of the succession court has been reiterated in numerous cases and it is the distribution of the estate of the deceased. *In Re Estate of GKK (Deceased)* [2017] eKLR Musyoka J held that:
- “The primary function of a probate court is distribution of the estate of a dead person...”
42. Further, it is not in doubt that the appellant’s father Joseph Obiero Ooko died in 1996 before his father William Ooko Wadhier who died in 2010 and therefore had Joseph Obiero Ooko been alive, he had an equal right with the respondent herein to petition for letters of administration intestate in respect of their deceased father’s estate.
43. The Respondent cannot therefore claim a superior right over the appellant herein and his siblings as named in the Chief’s introductory letter dated 17/1/2017 namely: Sophia Atieno, David Omondi and Mildred Aloo. To hold otherwise would be in violation of the established law and would in my view amount to discrimination.
44. I therefore find and hold that the appellant and his siblings are lawfully entitled to claim for their father’s share from the estate of the deceased William Ooko Wadhier, unless they renounce the same.

#### **Whether the grant issued to the respondent on the 23.4.2019 should be revoked**

45. The conditions for the revocation of a grant are set out in section 76 of the Law of Succession Act. From my analysis of the pleadings filed in the trial court by the appellant, it appears that the relevant provision is section 76 (a), (b) and (c) as the application before the trial court related to the obtaining of the grant. That section provides that:
- “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.”
46. These grounds ought to be proved with evidence as the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds but not to be exercised whimsically or capriciously. (See *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] eKLR).
47. The appellant herein got into the shoes of his deceased’s father upon the latter’s demise, acquiring equal rights with the Respondent to petition for the grant of letters of Administration intestate as the two fall in the same degree of consanguinity, 2<sup>nd</sup> Degree, according to Rule 7(1)(e)(iii) and Rule 4 of the Second Schedule to the *Probate and administration Rules* See *Immaculate Wangari Munyaga v Zachary Waweru Ireri* [2016] eKLR; with the appellant taking the position of his deceased father.



48. Rule 4 of the Probate and Administration Rules provides:

“In determining the degree of consanguinity of a person from the deceased by tracing through an intermediate relative, it is not necessary that such relative was living at the death of the deceased, e.g. a grandchild of the deceased living at the latter’s death would be included among the relatives notwithstanding that his parent (i.e. the deceased’s child) had died before the deceased.

49. It follows that the appellant ought to have been informed of and involved in the succession proceedings affecting the estate of the deceased William Ooko Wadhier. Indeed, a perusal of the P&A Form 5 reveals that the respondent listed himself as the only beneficiary of the deceased’s estate, leaving out the appellant.

50. Although the trial magistrate relied on the Chief’s letter which introduced the respondent and his other deceased siblings including the appellant’s father Joseph Obiero Ooko and stated that the appellant had already been provided for in the earlier allocation to his father therefore he was not entitled to this estate subject of these proceedings, I find that finding erroneous as there was no evidence of *intervivos* transfer of the land in question.

51. Gifts *inter vivos* are provided under Section 42 of the *Law of Succession Act* which provides that:

“Where-

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

52. The features of the gifts *inter vivos* are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary. Further, the intention of the parties and their acts done must be established sufficiently to establish the passing of the gift to the donee. It was incumbent upon the respondent to prove those facts and intentions which he did not.

53. Rule 26 of Probate and Administration Rules provides that letters of administration shall not be granted to any applicant without notice to every person entitled in the same degree as or in priority to the applicant. *In Re Estate of Wahome Mwenje Ngonoro* [2016] eKLR, it was held and I concur that:

“It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant



can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.

The evidently deliberate failure by the Respondent to involve the applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in our view in bad faith and amounts to concealment of material facts. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant.”

54. Taking into account the circumstances and facts of this appeal, the statutory and the case law cited, I have no difficulty in finding and holding that the Respondent concealed material facts in the succession cause, material facts being the existence and interest of the appellant in the estate of the deceased William Ooko Wadhier. In the circumstances, I am satisfied that the interests of the appellant will best be served if the grant of letters of administration issued to the respondent is revoked.
55. In the end, I find this appeal meritorious. I allow it. I set aside the orders of the trial court made on 14<sup>th</sup> July, 2021 and substitute the said orders with an order revoking the grant of letters of administration intestate issued to the respondent herein Godfrey Okoth Ooko on 23/4/2019 in respect of the estate of the deceased William Ooko Wadhier.
56. I further order that fresh succession proceedings shall be commenced by the respondent in conjunction with the appellant to take into account the interests of the appellant's siblings who have equal rights as his in the administration of the estate of the deceased William Ooko Wadhier.
57. As the dispute is between family members, I order that each party bear their own costs of this appeal.
58. This file closed.
59. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 25<sup>TH</sup> DAY OF APRIL, 2022**

**R.E. ABURILI**

**JUDGE**

