



REPUBLIC OF KENYA



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**Okech & another v Ondeje (Succession Appeal E38 of 2021)  
[2022] KEHC 11974 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
SUCCESSION APPEAL E38 OF 2021  
RE ABURILI, J  
MAY 24, 2022**

**BETWEEN**

**PASKALIA AMOLO OKECH ..... 1<sup>ST</sup> APPELLANT**

**MARGARET AWUOR NYAMBOGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**STEPHEN OIRO ONDEJE ..... RESPONDENT**

*(An appeal from the ruling and order of Hon J P Nandi, Principal Magistrate  
at Bondo in Succession Cause no 316 of 2016 delivered on January 21, 2022)*

**JUDGMENT**

1. The appellants are Paskalia Amolo Okech and Margaret Awuor Nyamboga. They are both widowed and their respective deceased husbands were brothers. The appellant is Stephen Oire Ondeje. He is the son to the elder brother in law of the appellants.
2. The appellants herein were the petitioners for letters of administration intestate in Bondo PM Succession Cause no 316 of 2016, in respect of the estate of the deceased Omogo Nyando alias John Omogo Nyando.
3. The deceased Omogo Nyando was the father to Lawrence Okech - husband to Paskalia Amolo Okech; (now deceased); Fabian Nyambogo - deceased, Alphonse Nyando, deceased and Joseph Odero – deceased. Save for Joseph Odero, all the deceased's son's died leaving behind families/beneficiaries.
4. From the affidavit of Paskalia Amolo Okech, Omogo Nyando also inherited the grandmother to the respondent herein and bore the Respondent's father Ondeje Omogo. His grandmother was the wife of Onyango.



5. According to the appellants, the deceased whose estate is subject of these proceedings allocated Ondeje Omogo the father of the respondent herein, Land parcel number South Sakwa/Migwena/546 since he sired him from an inherited woman.
6. On the other hand, that all the deceased's sons including the appellants' husbands were left on land parcel no South Sakwa/Migwena/249 measuring 8.0 ha which is to be shared among the family of the deceased's sons including the late husbands of the appellants and excluding the father (also deceased), to the respondent herein.
7. The deceased John Omogo Nyando died on December 2, 1979 aged 80 years old.
8. However, on November 16, 2016, the appellants herein petitioned for the grant of letters of administration intestate to administer the estate of the late John Omogo Nyando in their capacities as wives, not daughter in laws. They listed 12 other beneficiaries excluding the respondent herein. They also obtained consent from all those listed beneficiaries.
9. On February 24, 2017, the appellants were issued with a grant of letters of administration intestate signed by Hon E N Wasike, Senior Resident Magistrate, Bondo Law Courts.
10. The appellants then filed summons for confirmation of grant dated February 20, 2021 on the same date and they were issued with the Certificate of Confirmation of grant on April 9, 2018 signed by Hon M Obiero, Principal Magistrate.
11. It was after that stage of confirmation of grant that the respondent herein filed summons for revocation of grant, on June 9, 2021, claiming that he was a grandson to the deceased and that he was legally entitled to a share of the estate of the late Omogo Nyando alias John Omogo Nyando. He also sought and obtained an injunction against the administrators barring them from disposing of the said land subject of the estate.
12. The respondent also named Denis Odhiambo Ondeje, Joseph Ondong Ondeje and himself as well as the widow of Thomas Ochieng Ondeje and Lucas Ouma Ondeje as being beneficiaries and dependants of the Late Omogo Nyando.
13. He claimed that the appellants herein fraudulently concealed material facts that the estate of the deceased was under dispute and that a decision had been made by the Land Disputes Tribunal to the effect that his father, Ondeje, must have a share of the estate of the deceased which decision was adopted as judgment of the court on September 11, 2009 hence he was entitled to a reasonable share of that estate. He annexed to his affidavit S00-1 and S00 2 - copies of the tribunal's proceedings vide LDT Act no 18 of 1990 Claim no Bon/35/2006 and judgment of the court adopting that decision of the tribunal, dated September 11, 2009 vide Bondo SRM Court Land Case no 10 of 2009 between Stephen Oiro Ondeje and Alphonse Nyando Omogo and Pascalina Okech.
14. The appellants herein opposed the summons for revocation of grant. They filed a Replying affidavit sworn by Pascalina Amolo Okech on July 15, 2021 maintaining that the respondent's father being born out of an inherited woman, had been provided for by allocation of land parcel no South Sakwa/Migwena/546 hence he was not entitled to a share in the land subject of these succession proceedings.
15. The objection/summons for revocation proceedings were canvassed by way of oral testimonies and in the said oral testimonies, the parties adopted their sworn affidavits in support of their respective positions and were cross examined.
16. In his judgment delivered on December 9, 2021 and which is impugned herein, the trial magistrate Hon J P Nandi agreed with the objector's position and revoked the grant issued on February 24, 2017



in favour of the appellants herein and confirmed on April 5, 2018 in their favour. He also cancelled all registrations done on the subject parcel no 249 pursuant to the confirmed grant and directed that the title be reverted back to the deceased's name. He further ordered that a new grant be issued to the appellants herein jointly with the objector/respondent herein as administrator of the estate of the deceased.

17. Further, that any of the parties was at liberty to file for the grant and include all the deceased's beneficiaries for distribution of the estate. Each party was ordered to bear their own costs of the application.
18. It is the above judgment which the appellants herein were aggrieved by and as a result, they lodged this appeal expeditiously on December 24, 2021 setting out the following grounds of appeal:
  1. The learned magistrate erred in law and in fact in making a finding that the objector has proved his case.
  2. The learned magistrate erred in law and in fact in failing to appreciate that the respondent's father, the late Ondeje Omogo, had been allocated land by the deceased herein for fear that he is a son from an inherited woman and could be dethroned of a position of the deceased's estates.
  3. The learned magistrate erred in law and in fact in failing to make a finding that the respondent herein had a land that had been allocated to his father by the deceased herein.
  4. The learned judge failed to appreciate that the respondent's remedy (if any) would have been over the estates of his father who had been allocated land by the deceased.
  5. The deceased's (Omogo Nyando Alias John Omogo Nyando) estate having been succeeded, would have ended with the issuance of a Certificate of Confirmation of Grant in favour of the appellants.
  6. The learned magistrate erred in law in fact in wholly ignoring the evidence/exhibits adduced by the appellants.
  7. The learned judge erred in law and in fact in giving the submissions by the appellant.
19. Having laid out the historical foundation to this appeal as contained in the trial court record, I now proceed to determine its merits.
20. As earlier stated, the appeal was argued orally with the appellants insisting that the Respondent's father having been born of an inherited woman was given his own parcel of land separate from the estate subject of this appeal hence he is not entitled to this estate.
21. On the other hand, Mr. Okello advocate for the Respondent submitted briefly that the appeal is premature as the matter is not yet due for distribution of the estate for the appellants to raise such a claim or objection.

## **DETERMINATION**

22. I have considered the pleadings, proceedings and evidence adduced in the lower court, the judgment which is impugned and the brief oral submissions by the parties in this appeal. In my humble view, the main issue for determination is whether this appeal has merits.
23. The appellants claimed at the trial Magistrate failed to appreciate that the Respondent's father, the late Ondeje Omogo, had been allocated land by the deceased for fear that he is a son from an inherited woman and could be dethroned of a portion of the deceased's estate.



24. They also charged at the trial Magistrate for failing to find that the Respondent herein had a land that had been allocated to his father by the deceased herein. Further, that the respondent's remedy, if any would have been over the estate of his late father who had been allocated land by the deceased.
25. They further faulted the trial court for wholly ignoring the evidence/exhibits produced by the appellants.
26. The appellants have urged this court to set aside the judgment of the trial court and substitute it with an order dismissing the objection with costs and award them costs of this appeal.
27. Before delving into the complaints raised by the appellants herein, this being a first appellate court, I will reassess the evidence adduced in the lower court and arrive at my own independent conclusion.
28. The basis of the respondent's objection was that being a son to the son of the deceased whose estate was being administered, he could not be left out of the estate and that he was beneficially entitled to the said estate.
29. In addition, the respondent heavily relied on the Land Disputes Tribunal claim no BON/35/2006 as adopted by the magistrate's court on September 11, 2006 where the tribunal held that the respondent herein (claimant) being the grandson of Omogo Nyando, father of Ondeje Nyando, he was entitled to a share of the estate in particular, Land parcel no South Sakwa/Migwena/249.
30. There is no appeal or other decision challenging that decision of the Land Disputes Tribunal as adopted by Bondo SRM's court in Land Case no 10/2009 on September 11, 2009.
31. On that ground alone, I find that the appellants herein, with the 2<sup>nd</sup> appellant having been a party to that land case as an objector, is bound by that decision of the court to ensure that the respondent herein is included as a beneficiary of the estate of the deceased Omogo Nyando, being the grandson representing his deceased father who had an entitlement to get a share of his late father's estate.
32. I say so because under section 7(2) of the Repealed Land Disputes Tribunal Act, the court shall enter judgment in accordance with the decision of the tribunal and upon judgment being entered, a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.
33. Under section 2(1) of the said repealed Act, any party to a dispute under section 3 who is aggrieved by the decision of the tribunal may, within thirty days of the decision, appeal to the appeals Committee constituted for the province in which the land which is the subject matter of the dispute is situated.
34. In the instant case, there is no indication that any appeal was lodged to the relevant provincial appeals committee challenging the decision of the tribunal. That decision once it was adopted on September 11, 2006 became a valid judgment of the court for enforcement as a decree.
35. Section 23(3)(e) of the *Interpretation and General Provisions Act* preserves and protects decisions and awards made by the Repealed Land Disputes Tribunal. Those awards, once adopted as judgment of the court, are fully protected.
36. As was correctly held by the Supreme Court in *Florence Nyaboke Machani vs Mogere Amosi Ombui and 2 others* [2015] eKLR, accepting the holding by the High Court to the effect that where a decree emanating from the lower court's judgment was not challenged, that judgment can only be varied, vacated, set aside or reviewed by the same court or by an appellate court in appropriate proceedings, in accordance with section 8(1) of the Land Disputes Tribunal Act. In the alternative, that the plaintiff should have commenced judicial review proceedings in the nature of *certiorari* to quash the award.



37. For the above reason, the appellants having failed to challenge the tribunal's award as adopted as judgment of the court, which award was clear that the respondent's father had a right of entitlement to a share of the estate of his late father which estate is subject of these proceedings, the trial magistrate did not err when he found and rightly so, that the appellants withheld from the succession court the fact that Ondeje Omogo who was the son to the deceased was survived by the respondent herein, which material non-disclosure is covered under section 76 of the *Law of Succession Act* as a ground for revocation of grants (see *the Estate of L A K – deceased* [2014]eKLR.
38. In the matter of the Estate of L A K – deceased [2014] eKLR the court held that:
- “Revocation of grants is governed by section 76 of the *Law of Succession Act*. The relevant portions of section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”
39. In my humble view, whether the appellants believed that the respondent's father was provided for elsewhere or not, they were under a duty to disclose his existence and interest in the estate then at the stage of distribution of the estate, they would be entitled to adduce evidence to prove that he was provided for elsewhere and that therefore the court should take into account what they consider to be a gift *inter vivos* bequeathed to his late father, who was the son from an inherited woman.
40. With that disclosure, the succession court, would make appropriate orders on whether or not the respondent's father was provided for elsewhere and whether any provision should be made for him in the estate subject of these proceedings and if so, to what extent in terms of a share of the said estate.
41. Under rule 26 of the *Probate and Administration Rules*, 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.
42. In the instant case, the respondent who sought to have the grant as issued to the appellants herein revoked is the son to the son of the deceased. He was not, as a grandson, directly entitled to the estate. However, his father having died, it was incumbent upon the appellants herein to notify the respondent that they intended to pursue succession proceedings upon which he would have the opportunity to indicate his interest in the estate especially after the tribunal had made a finding in his favour way back in 2006. That finding alone by the tribunal should have informed the appellants to notify the respondent of the action that they were taking with regard to the administration of the estate of the deceased.
43. In *Re estate of the Wahome Mwenje Ngonoro* [2016]eKLR, the court stated as follows:
- “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, 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 Respondents to involve the applications at the time of filling these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in my 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”

44. I can't agree more with the above observation which is applicable to this case in all material particulars.
45. In this case, I am in total agreement with the trial court that the appellants concealed material facts in the succession cause being the existence and interest of the respondent.
46. Furthermore, the appellants lied to the succession court that they were wives to the deceased as opposed to daughters in law. The information of 'wives' being the capacity of the petitioners was also contrary to the chief's introductory letter dated July 21, 2016 written by chief, South Sakwa Location, Mr Patrick Odhiambo Obilo, who introduced the appellants herein to the court and so correctly, as daughters in laws to the deceased, surviving the deceased's sons who were also deceased.
47. The allegations made by the appellants that the deceased had allocated a separate land to the respondent's father being a son of an inherited woman can only be canvassed during distribution of the estate and where the respondent is also made a party to the proceedings leading to the issuance of the grant, giving him an opportunity to be heard.
48. In addition, I find that argument that the deceased's son and father to the respondent herein was provided for to be baseless as the deceased died intestate. No written or oral will was produced or proved during the oral hearing of the summons for revocation of the grant.
49. Further, such evidence could only be adduced for the court to determine the shares of each child or beneficiary of the deceased taking into account any proven gifts *inter vivos*.
50. In conclusion, it is important to highlight that the only time that grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. In such a case, the grandchildren step into the shoes of their parents and take directly the share that ought to have gone to their said parents.
51. In this case, although it is not clear when Ondeje Nyando died, the appellants concede that he was the son of the deceased Omogo Nyando alias John Omogo Nyando who died in 1979 and although search certificate for South Sakwa/Migwena/546 shows that the registered owner is Ondeje Omogo from June 24, 1974, the same date that Omogo Nyando became registered proprietor of South Sakwa/Migwena/249, there is no evidence to show that South Sakwa/Migwena/546 was part of the land belonging to Omogo Nyando. It is also not clear at what age Ondeje Omogo was when he got registered as the owner of that land and whether the registrations were first registrations.
52. In cross examination by Mr Okello Advocate, in the lower court, the 1<sup>st</sup> appellant conceded that she did not inform the court that the deceased had a son called Ondeje Omogo. She also conceded that she was aware of the tribunal's case only that she did not hear the tribunal award any land to Ondeje.
53. For the above reasons, I find and hold that there could have been no ground upon which the trial court could have made a finding that the respondent had land exclusively allocated to his father by the deceased and that therefore, the respondent's remedy was over the estate of his father who had been allocated land by the deceased.
54. I further find that the trial court did not ignore the evidence/exhibits produced by the applicants as the only issue which the trial court was to determine was whether the respondent had fulfilled the conditions set out in section 76 of the [Law of Succession Act](#) and once he found in the affirmative, then he had no alternative but to revoke the grant which he rightly did.



55. For the above reasons, I find this appeal not merited. I uphold the findings and holding of the trial Magistrate made on December 9, 2021. I dismiss this appeal and order that each party shall bear their own costs.
56. The parties to either agree on the mode of distribution of the estate and appear before the trial magistrate and file schedules of distribution of the estate or where there is no agreement among the eligible beneficiaries, on the mode of distribution, the trial court shall receive evidence and determine the shares of each beneficiary as shall be identified, taking into account any evidence of gifts inter vivos if any.
57. I so order.
58. This appeal file is closed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT SIAYA THIS 24<sup>TH</sup> DAY OF MAY, 2022**

**R E ABURILI**

**JUDGE**

