



REPUBLIC OF KENYA



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**In re Estate of Peter Omondi Adoyo (Deceased) (Succession Cause
1043 of 2013) [2022] KEHC 10585 (KLR) (Family) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 1043 OF 2013

MA ODERO, J

JULY 29, 2022

IN THE MATTER OF THE ESTATE OF PETER OMONDI ADOYO (DECEASED)

BETWEEN

JOHNSON MUTISO OMONDI BENEFICIARY

AND

TRUPHOSA APONDI OMONDI ADMINISTRATOR

JUDGMENT

1. Before this Court is the chamber summons dated 11th January 2021 by which the Applicant Johnson Mutiso Omondi seeks the orders:-

- “ 1. That the Honourable court be pleased to revoke the grant issued to Elizabeth Omondi and Truphosa Apondi Omondi on the 27th August 2013 and confirmed on the 16th June 2017.
2. That this Honourable court be pleased to issue letters of Administration de bonis non in respect of the above captioned Estate in favour of Johnson Mutiso Omondi and Truphosa Apondi Omondi.
3. That the Administrator/Respondent be immediately ordered to provide up to date audited accounts of all rental income collected from all that property known as L.R. No. 36/879/1.
4. Spent



5. That the Administrator/Respondent be ordered to release to the beneficiary/Applicant Kshs 30,000/- monthly from the rental income collected from all that property known as LR. 36/879/1.
 6. That the costs of this application be provided for.
2. The summons which was premised upon sections 76(e) and 83(a) of the Law of Succession Act, Cap 160, Laws of Kenya, Rules 44 and 73 of the Probate and Administration Rules and all other enabling Laws was supported by the Affidavit of even date and the Further Affidavit dated 15th June 2021 both sworn by the Applicant.
 3. The Administrator Truphena Apondi Omondi opposed the Application through her Replying Affidavit dated 25th May 2021. The summons was canvassed by way of viva voce evidence in open court.

The Evidence

4. This Succession Cause relates to the estate of Peter Omondi Apoyo (hereinafter ‘the Deceased’) who died intestate on 12th February 2013. A copy of the Death Certificate Serial Number 0016080 is annexed to the Petition for Grant of letters of Administration Intestate dated 22nd April 2013.
5. Following the demise of the Deceased Grant of letters of Administration was on 27th August 2013 made jointly to Elizabeth Ngina Peter Omondi (the widow) and Truphosa Apondi Omondi (a daughter to the Deceased). A certificate of confirmed Grant was later issued to the two Administrators on 16th June 2014.
6. The 1st Administrator (the widow of the Deceased) passed away on 29th June 2020 leaving the 2nd Administrator Truphosa Omondi as the sole Administrator of the estate. Seven (7) years down the line the Applicant who is one of the sons of the Deceased filed this summons seeking revocation of the confirmed Grant issued on 16th June 2014
7. Given that this matter involves a dispute between blood sibling the court did refer the matter to Court Annexed Mediation in the hope that an amicable settlement would be reached. However, the Mediator filed a report dated 17th September 2021 indicating that parties were unable to reach any agreement. Accordingly, the matter proceeded for hearing.
8. The Applicant in his evidence stated that he is one of the sons of the Deceased. He confirms his mother who was the widow of the Deceased passed away in June 2020 before the administration of the estate had been concluded. According to the Applicant, the demise of one of the Administrators renders the entire grant inoperative and he therefore seeks to be appointed as Administrator ‘*de bonis non*’ to enable him complete the Administration of the estate.
9. The Applicant further avers that he was not aware of and was not involved in the succession proceedings. That the Administrator has kept him in the dark concerning the manner in which the estate is being distributed. He therefore submits that the Grant is defective and for this reason ought to be revoked.
10. The Applicant further alleges that the Administrator has failed to fairly administer the estate that he as a beneficiary has derived no benefit at all from the property known as LR No. 36/879/1 located in Eastleigh (hereinafter the ‘Eastleigh Property’) which property forms part of the estate. That the Administrator has failed to provide to the Applicant audited accounts for the estate.



11. The Applicant is aggrieved that he has been denied access and/or entry into the Eastleigh Property, which was the family home. He demands that he be paid a monthly sum of Kshs 30,000/- from the rental income derived from the said property.
12. The Applicant states that he is currently homeless and is living on the streets and demands that he be allocated a room in the Eastleigh property to reside in. He also states that he is currently unemployed and has a sick child yet he has been denied any portion of the rental income derived from the estate property.
13. The Applicant also rejected that the parcel of land offered to him as his share of the estate in Mumias Kakamega County was a water catchment area, swampy and would put him in conflict with villagers.
14. The Applicant called three (3) witnesses, to testify on his behalf, Harrison Ochar Kimori (PW2) Daniel Ngumbi (PW3) and Evans Owino PW4. The witnesses all stated that they were aware of the dispute between the Applicant and his siblings. They stated that the Applicant who is jobless has no abode. PW2 told the court that he has permitted the Applicant to sleep in his garage.
15. As stated earlier the summons was opposed. DW1 Truphosa Apondi Omondi confirmed that following the demise of the Co-Administrator she remained as the sole Administrator of the estate of the Deceased. The Administrator denies the contention by the Applicant that the Grant has been rendered inoperative following the death of the Co-Administrator. She avers that in any event the administration of the estate was completed even prior to the demise of her co-administrator.
16. The Administrator states that the entire estate has initially been registered in the name of their mother to hold for the benefit of all the children of the Deceased. However once their mother passed away she and all the other beneficiaries (save for the Applicant) sought to have the estate shared equally amongst the six (6) children of Deceased. That this has proved impossible due to the unreasonable demands and aggressive behavior of the Applicant who has sought to violently gain access to the Eastleigh Property which was the matrimonial home of their parents.
17. That the Applicant has harassed the workers and tenants in said property demanding to be given the rental income, causing some tenants to vacate the property to the loss of the estate and detriment of the other beneficiaries. That the matter was reported to police and guards were hired to protect the property. She states that none of the beneficiaries has ever resided in said property.
18. In response to the Applicants demand that he be paid Kshs 30,000/- monthly by the estate, the Administration counters that this would not be possible given that the rental income collected each month from the Eastleigh Property is Kshs 29,900 which income has to be shared equally amongst all six (6) surviving beneficiaries.
19. Regarding the property in Mumias the Administratrix and her witness DW1 both state that the rural matrimonial home by custom would go to the last born son of the Deceased. That the family offered the Applicant Parcel Number South Wanga/Bungasi/917 measuring 1.4 acres, which the Applicant rejected on grounds that said parcel of land was not suitable for use.
20. DW2 William Adoyo Omondi told the court that he was the eldest out of the six (6) children of the Deceased. He reiterates the evidence given by the Administrator. DW2 told the court that save for the Applicant all the other beneficiaries have full confidence in the Administrator and the manner in which the estate is being managed.
21. Both the Administrator and DW1 state that the family had wished to retain the Eastleigh Property intact due to its sentimental value in honour of their late parents. However given that the Applicant has made this impossible due to his numerous and outrageous demands it has been resolved that the



property be sold and each beneficiary be given an equal share of the sale proceeds to do with as each wishes. Both the Administratrix and DW1 urge the court to dismiss this summons entirely.

22. At the close of evidence parties were invited to file their written submissions. The Applicant filed the submission dated 5th April 2022 and the Supplementary submissions dated 19th May 2022. The Respondents relied upon their written submissions dated 6th May 2022.

Analysis and Determination

23. I have considered the Summons before this court, the Replies filed thereto, the evidence on record as well as the written submissions filed by both parties. The following are the issues, which in my view arise for determination: -

- (i) Whether a Grant ‘*de bonis non*’ ought to issue to the Applicant.
- (ii) Whether the grant should be revoked.
- (iii) Whether the summon dated 11th January 2021 should be allowed.

(i) whether a Grant ‘*de bonis non*’ should issue.

24. It is common ground that the Deceased herein passed away on 12th February 2013. It is not contested that a grant of letters Intestate was issued on 27th August 2013 to the widow and daughter of the Deceased, which Grant was confirmed on 16th June 2014.

25. It is further not contested that the widow of the Deceased Elizabeth Ngina Peter Omondi who was an Administratrix of the estate passed away on 29th June 2020. The Applicant submits that due to the demise of one of the Administrators the Grant, the certificate of confirmed Grant dated 14th June 2014 became inoperative, and ought to be revoked.

26. The Administrator counters this by stating that the death of a co-administrator does not render a Grant in operative. Indeed this is the correct position in law. Section 81 of the [Law of Succession Act](#) Cap 160 Law of Kenya provides as follows: -

“ 81. Powers and duties of personal representatives to vest in survivor on death of one of them

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 executors or administrators shall become vested in the survivors of survivor of them;

Provided that, where there has been a grant of letters of Administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.” (own emphasis)

27. From the above it is manifest that where there are two or more Administrators the demise of one of the Administrators does not render the entire Grant inoperative. The surviving Administrator(s) simply takes over as Administration of the estate. All that is required is that the grant be rectified to remove



Deceased as Administrator. I therefore find that this Grant has not been rendered inoperative and the question of issuing a Grant ‘de bonis non’ to the Applicant (or indeed any other person) does not arise.

(ii) Should the Grant be revoked

The grounds upon which a Grant may be revoked are contained in section 76 of the Law of Succession Act, which provides as follows:-

“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 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.”

28. The Applicant alleged that the Grant obtained was defective as the same was obtained without his knowledge and/or consent. He further claims that he has been kept in the dark regarding the administration of the estate and the mode of distribution thereof. He demands that the Administrators provide accounts in respect of the estate.

29. Let us in examine he allegation by the Applicant that he was not involved in this Succession Cause. It is not contested that the Applicant is one of the children of the Deceased and therefore a beneficiary of the estate.

30. I have perused the letter dated 27th March 2013 written by the District Commissioner of Mumias District. The letter lists the rightful heirs of the estate of the Deceased. The name of the Applicant is included as one of the beneficiaries.

31. I have also perused the petition filed by the Administrators seeking Grant of letters of Administration Intestate dated 22nd April 2013. Paragraph 3 of the petition list the survivors of the Deceased as follows

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- a. Elizabeth Ngina Peter Omondi – widow (now Deceased)
 - b. William Adoyo Omondi – son
 - c. Johnson Mutiso Omondi – son (the Applicant herein)
 - d. Truphosa Apondi Omondi – daughter
 - e. James Umira Omondi – son
 - f. Eva Kalekye Omondi – son
 - g. Joseph Oluoch Omondi - son
32. From the above it is clear that the Administrators named and included the Applicant as one of the beneficiaries of the estate.
33. Moreover, a perusal of the consent to the petition dated 22nd April 2013 reveals that said consent was signed by all the beneficiaries including the Applicant. Additionally the consent to the summons for confirmation of Grant dated 8th April 2014 was also signed by all the beneficiaries including the Applicant Johnson Mutiso Omondi.
34. The Applicant has not denied signing these consents nor has he alleged that his signature on the said consents had been forged. Given that his name was included as one of the beneficiaries and given that the Applicant signed both consents his claim of exclusion in the Succession Cause is nothing but a bold faced lie. I find that the Applicant was fully aware of these succession proceedings and that he actively participated in the same.
35. The Applicant alleged that he has not been kept abreast by the Administrators of the manner in which the estate is being managed. However, Paragraph 32 of his Further Affidavit dated 15th June 2021 the Applicant admitted that in mid-November he had a meeting with his elder brother William Omondi at the Eastleigh House. On that occasion, DW1 handed to him a bundle of documents, which related to the administration of the estate. In the circumstances, the Applicant cannot claim to have been kept in the dark regarding the administration of the estate.
36. The Applicant also claims that the Administrator has failed to effectively and fairly manage the estate. For this reason, he submits that the Administrator ought to be removed. However, from the hearing it transpired that the Applicants main complaint is that his demands to occupy the Eastleigh home and his demand to be paid Kshs 30,000/- monthly out of the estate have not been met. Further, the Applicant is aggrieved that he was allocated a parcel of land in Mumias, which according to him is water logged and not suitable for use.
37. It would appear that the only family member who is complaining against the Administrator is the Applicant. DW1 who is the eldest brother in the family told the court that all the other siblings have no complaint regarding the administration of the estate. That they are all agreed on the mode of final distribution of the estate. According to the Administrator and DW1 the only stumbling block to the final distribution of this estate is the Applicant who has continued to make outrageous and unreasonable demands.
38. The Applicant told the court that he is unemployed and wants to be paid a sum of Kshs 30,000/- per month out of the estate. The Administrator and DW1 both state that the estate is unable to afford such payment monthly to the Applicant. They both state that the rental income collected from the Eastleigh Property is only Kshs 29,900/- which income has to be apportioned equally amongst all six (6) beneficiaries not to mention that funds are required for the upkeep and maintenance of the Property.



There is no evidence to prove that the rental income realized from the estate is sufficient to meet the Applicants demands of kshs 30,000/- per month.

39. The Applicant has also asked that he be allowed to access and occupy the Eastleigh Property as he is currently homeless and has nowhere to lay his head. The Applicant called all witnesses his friends who all stated that the Applicant had nowhere to live.
40. The fact that the Applicant claims to be homeless does not mean that he should be entitled to occupy the Eastleigh Property. Moreover, the Applicant and all his witnesses told the Applicant is a family man, that he has a wife and a child. There is a very loud silence from the Applicant regarding where his family are living. All his witnesses when cross-examined state that they have no idea where the Applicant's wife and child reside.
41. It is unlikely that the Applicants family live with him in the garage of PW2. Why can't the Applicant not reside where his family lives? I am not convinced that the Applicant is homeless as he claims. The Applicant has already proved himself to be a dishonest litigant. He claimed to have been excluded from the Succession Cause, yet the evidence is clear that he actually signed the consents. I find that the Applicants claim that he has nowhere to live is merely a ploy to try to gain access to and occupy the Eastleigh Property which ought to benefit all the beneficiaries equally.
42. The underlying theme of all the issues raised by the Applicant from his demands is that he believes the estate of the Deceased ought to benefit himself. Nowhere has the Applicant put into consideration the needs, wants and/or wishes of his five (5) siblings. It is all about himself. All in all, I find that the Applicant has failed to demonstrate that the Administrator has failed to administer the estate in a fair manner.
43. Based on the above I find no grounds upon which this Grant ought to be revoked and I decline to grant the prayer for revocation.
44. The Applicant appears to be laboring under the misapprehension that he is the only beneficiary who deserves consideration in the administration of the estate. The truth of the matter is that the estate has six (6) beneficiaries all of who has an equal claim to the assets comprising the estate. The Administrator is under a duty to consider all the beneficiaries not just the one who makes the most noise.
45. The Administrator told the court that all the siblings (save for the Applicant) had desired that the Eastleigh Property be maintained intact for its sentimental value in remembrance of their late parents. However, due to the demands being made by the Applicant that he be given his share of the estate, the siblings now feel that it may be best that the Eastleigh Property be sold and the proceeds be divided equally between all the beneficiaries. I do agree that given the stand taken by the Applicant and to avoid further dispute would be best to have the Eastleigh Property sold and the proceeds shared equally between the beneficiaries.
46. Finally and in conclusion this court makes the following orders:-
 - (i) The chamber summons dated 11th January 2021 is dismissed in its entirety.
 - (ii) The parties to agree on a valuer to undertake valuation of the Eastleigh Property within sixty (60) days hereof.
 - (iii) Upon valuation the said property L.R. No. 36/879/1 to be sold at the best available price.
 - (iv) The proceeds of sale, legal costs and other expenses to be divided equally between all six (6) beneficiaries.



- (v) The Administrator to file summons for confirmation of Grant within sixty (60) days of today's date indicating the final mode of distribution of the estate.
- (vi) This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 29TH DAY OF JULY 2022.

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MAUREEN A. ODERO

JUDGE

