



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Tom Auma Ongola (Deceased) (Succession Cause  
128 of 2009) [2022] KEHC 11650 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 128 OF 2009  
JO NYARANGI, J  
JULY 29, 2022**

**BETWEEN**

**CATHERINE ADHIAMBO ONGOLA ..... APPLICANT**

**AND**

**GEORGE ONG'ARO AUMA ..... RESPONDENT**

**RULING**

1. The deceased herein died intestate on 16<sup>th</sup> July, 2007 leaving behind the following as survivors;
  - a. Catherine Adhiambo Ongola (widow)
  - b. Teresia Auma Ongola (widow)
  - c. John Otieno Ongola (son aged 16 years)
  - d. Martin Hongeo Ongola (son aged 11 years)
  - e. Joseph Auma Ongola (father) and
  - f. Rael Adoyo Auma (mother)
2. On 20<sup>th</sup> April 2009, Teresia Auma and George Onga'ro Ouma (brother to the deceased) petitioned for a grant of representation. According to form P&A 5, the deceased's estate comprised of;
  - a. Four houses without land at Likoni co-owned with Teresia Ouma Ongola
  - b. Money in Co-operative Bank of Kenya Ltd
  - c. NKR Road A/a 0113579315900
  - d. Money in Family Bank - Mombasa Branch a/c 0124308227300
  - e. Shares in the Central Depository & Settlement Corporation Ltd (CDSC)



3. However, before the grant could issue, Catherine Adhiambo lodged an objection /caveat challenging George Ong'aro's capacity in petitioning for the grant jointly with Teresia Auma Ongola without seeking consent from her and the children of the deceased as beneficiaries. That the petitioners had omitted some assets from the list of assets.
4. Upon hearing the objection, the court delivered its ruling on 25<sup>th</sup> June, 2010 thus recognizing that both Catherine and Teresia were widows to the deceased hence appointed the two as joint administrators. Consequently, a grant of letters of administration intestate was issued to the two on 3<sup>rd</sup> September, 2010.
5. Later, one Beatrice also claiming to be a widow to the deceased filed an application dated 30<sup>th</sup> March, 2012 seeking to revoke the grant made on 25<sup>th</sup> June, 2010 on grounds that she was not consulted and that her name be included as a joint administrator. The court through its ruling of 22<sup>nd</sup> September 2017 dismissed Beatrice's application thereby holding that there was no proof of marriage between her and the deceased. The court went ahead to direct Catherine and Teresia to apply for confirmation of the grant.
6. Vide a summons for confirmation dated 20<sup>th</sup> September, 2019, the two administrators applied for confirmation of the grant. Subsequently, Catherine Adhiambo Ongola filed a summons application dated 17<sup>th</sup> January 2022 seeking orders directing George Ong'aro Auma to produce in court documents in respect of all parcels of land and bank accounts belonging to the deceased.
7. The application is anchored on grounds set out on the face of it and averment contained in the affidavit sworn on 17<sup>th</sup> January, 2021. She deposed that the respondent being a brother to the deceased is in possession of all ownership documents to the properties comprising the estate hence an order to compel him to surrender them to her to enable her prosecute the application for confirmation of the grant. According to the applicant, the respondent had the documents when they first applied for a grant of letters of administration which was revoked hence should be able to produce them..
8. In response, the respondent denied being in possession of the said documents save for a sale agreement in which he and his deceased brother jointly bought a plot from one Salim A. Mwanalika. That after sharing the plot equally, he (respondent) developed his portion.
9. In her rejoinder, the applicant averred that the respondent is fully aware of the extent of the deceased's estate but was uncooperative because he was stripped off the role of administration of the estate. That a private investigator she had engaged had compiled a report reflecting several properties owned by the deceased.
10. During the hearing, Mr. Odhiambo for the applicant and M/s Kayatta for the respondent literally adopted averments contained in their respective client's affidavits in support of or in reply to the application.
11. I have considered the application herein and the response thereto. It is trite law that property comprising an estate must be free and ascertainable property of a deceased person. A court cannot distribute property is not ascertainable. It is incumbent upon the applicant/petitioner to list the assets comprising the estate with supporting documents or evidence establishing that the deceased possessed such assets during his life time and that he had the capacity to dispose them if had survived.
12. In the instant case, the applicant does not know the extent of the deceased's estate. It is her duty to carry out investigations to ascertain their location and seek help where necessary to be facilitated to access such property together with their documentation.



13. The applicant listed various bank accounts. She should apply for a partial confirmation of the grant to access such accounts and if the bank ignores, then the court can be moved to issue an order for compliance. For immovable property, she should get records from the lands office or transfer of ownership from the people who sold them to the husband.
14. This court cannot force the respondent to produce what he does not have. The fact that he petitioned for a grant originally does not automatically mean that he had ownership documents. To the contrary, she also petitioned for the same grant without ownership documents.
15. There is no cogent evidence adduced to prove that the respondent has those documents. Courts do not make orders in vain. There is no convincing reason given to persuade this court to issue an order to compel the respondent to produce the documents in question.
16. In my view, the applicant is shifting her responsibility to the respondent. She should look for the documents through the relevant sellers or seek lands office's assistance. In a nutshell, do not find any merit in this application as it amounts to a fishing expedition in search of evidence or information. For the above stated reasons, it is my finding that the application is not tenable hence dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29<sup>TH</sup> DAY OF JULY, 2022.

.....

J. N. ONYIEGO

JUDGE

