



Ogola & 2 others v Odenyo (Legal Representative of the Estate of Odenyo Opuodho) & another (Succession Cause 16 of 2016) [2022] KEHC 11536 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 16 OF 2016**

RPV WENDOH, J

JULY 29, 2022

IN THE MATTER OF THE ESTATE OF THE LATE ODENYO OPUODHO (DECEASED)

AND

IN THE MATTER OF REVOCATION OR ANNULMENT OF GRAN

BETWEEN

BEATRICE ADHIAMBO OGOLA 1ST APPLICANT

ALEXANDER UGALA ODENYO 2ND APPLICANT

MARTIN NYAWAJO ODENYO 3RD APPLICANT

AND

LEWNIDA OKELO ODENYO (LEGAL REPRESENTATIVE OF THE ESTATE OF ODENYO OPUODHO) 1ST RESPONDENT

LAWRENCE ODOYO ODEYO 2ND RESPONDENT

JUDGMENT

1. This matter relates to the Estate of the Late Odenyo Opuodho who died intestate on 28/4/1976. Martin Nyawajo Odenyo, Alexander Ugala Odenyo and Beatrice Adhiambo Ogola (the 1st - 3rd applicants) filed the instant proceedings for summons for revocation or annulment of the confirmed grant dated 3/4/2017. The application is supported by affidavit of the 1st applicant sworn on 16/7/2020. The estate is comprised of Land Parcel No. Kamagambo/Kameji/15 measuring approximately 3.8 Ha. The application is further supported by a supplementary affidavit of the applicant dated 14/10/2020 and written submissions dated 25/10/2021. The applicant is seeking for the following orders: -

1. Spent.



2. Spent.
3. The Certificate of Confirmation of Grant dated 3/4/2017 issued to the 1st Respondent herein Lewnida Okelo Odenyo in the Estate of the Late Odenyo Opuodho be annulled/revoked forthwith.
4. Cost be provided for.

The applicants brought this application as the children of the deceased and Lewnida Okelo Odenyo the 1st respondent herein. It was deponed that the deceased had two wives, the 1st respondent and the Late Margarita Agengo Odenyo; that after the demise of the deceased, the two wives with the help of the Assistant Chief one Charles Oyier Omburo and the Elders, agreed that Land Parcel Number Kamagambo/Kameji/15 (suit land) was to be sub divided into two; that unfortunately Margarita Agengo Odenyo the respondent's co-wife died in 1980 and her only son Joseph Abich Odenyo together with his wife also died and they had no children; that the 1st respondent being a matriarch of 87 years old, is being misled by the 2nd respondent to leave out other beneficiaries. The beneficiaries of the estate were listed to be: -

- a. Martin Nyawajo Odenyo - Son
 - b. Lawrence Odongo Odenyo - Son
 - c. Clement Rumbe Odenyo - Son
 - d. Alexander Ugala Odenyo - Son
 - e. Beatrice Adhiambo Ogola - Daughter.
2. It was also stated that one of the beneficiaries Alexander Ugala Odenyo was included in the proceedings without his knowledge but he never participated; that the Chief's letter of 12/1/2016 conveniently omitted the 1st and 3rd applicant's names as beneficiaries a material fact which was concealed from the court; that the confirmed grant of 3/4/2017 omitted the interests of the 1st and 2nd applicants in the share of the estate of the deceased whereas they are beneficiaries within the meaning of section 29 (a) of the *Law of Succession Act*.
 3. The applicant admitted to owning a part of the ancestral land next to the suit land but he contended that it does not lock him out from owning a share of his Late father's estate; that the demarcation order of the suit land which was issued on 17/12/2019 is yet to be effected but the notices for the intended demarcation was not served upon the applicant and his sister; that the 1st respondent stated her wish to have all the children included in the succession proceedings through letters dated 9/6/2020 and 24/6/2020; that the portion of land the applicants seek to be redistributed belonged to their step - mother Margarita Agengo Odenyo who died in 1980 and her son and daughter in law equally died leaving the land vacant.
 4. In opposing the application, Lawrence Odongo Odenyo the 2nd respondent, filed a replying affidavit dated 6/8/2020. He admitted that the deceased had two wives, the 1st respondent and the late Margarita Agengo Odenyo who did not leave any children behind; that it was true that the deceased left the suit land as his estate; that it was also true that the deceased and the 1st respondent had children as listed by the 1st applicant.
 5. The 2nd respondent denied that there was ever an agreement that the suit land would be divided into two with the help of the Assistant Chief and the Elders; that before the succession proceedings started, the 1st respondent called all her children and asked all of them to participate in the succession; that



- before the 1st respondent took out letters of administration, there was a dispute on how the estate was to be distributed; that the 1st applicant was not content with the way the estate was proposed to be distributed and the 2nd applicant was not intent to have the succession done. Further, the 2nd respondent stated that the dispute was that the 1st applicant had been given his portion of land in their father's lifetime being Land Parcel No. Kamagambo/Kameji/598 measuring 1.26HA where he moved and is still residing to date; that the dispute on the distribution was deliberated as a family with the help of the Assistant County Commissioner Rongo and it was agreed that the suit land be divided into three equal portions of 1.26HA; that in the said meeting, it was agreed that the 1st applicant be left out since he already had his share of land being Land Parcel No. Kamagambo/Kameji/598 measuring 1.26HA; that in the said meeting, the 2nd applicant was present and he agreed to the intended mode of distribution.
6. The 2nd respondent further deposed that the area chief in his letter left out the 1st applicant as a beneficiary since he already had his share; that when the 3rd applicant was married off, the 1st respondent gave her 3 cows to go with, which signified that she left her parents' home; that the 3rd applicant's home is in Gwasi and not in Kameji where the deceased resided and this was a decision by the 1st respondent. The 2nd respondent asked this court to consider summoning the 1st respondent to testify as she is still alive but old. The 2nd respondent disputed the letters dated 9/6/2020 and 24/6/2020 written by the 1st respondent as she is illiterate and old therefore, she could not have written those letters.
 7. John Agoro filed a supplementary affidavit dated 14/10/2020. He is the Chief of North Kamagambo. He deposed that he wrote a letter with regard to the Estate of the deceased on 12/1/2016. He stated that The letter which was used for the succession proceedings which omitted two beneficiaries was a forgery.
 8. The 1st applicant also filed a supplementary affidavit dated 14/10/2020. He deposed that he sent money to his deceased father to purchase Land Parcel No. Kamagambo/Kameji/598 on his behalf; that the land was transferred to his name vide proceedings in Kisii High Court Civil Case No. 43 of 1983; that he never gave indication that he was not interested to be part of the succession proceedings. The 1st applicant reiterated that the land was once divided into two by the 1st respondent and his late step mother.
 9. The 2nd applicant filed a further replying affidavit dated 19/2/2021. He stated that it is his deceased father who bought Land Parcel No. Kamagambo/Kameji/16 which is now Land Parcel No. Kamagambo/Kameji/598 from one Andericus Okiri Opuodho with his money in 1972; that the reason why his father purchased the land from the previous owner is because he had a debt to pay one Olela Oruna; that his father loaned the previous land owner the money in exchange of the land; that in his father's lifetime, he gave the 1st applicant the said land as a share of his inheritance.
 10. Further, the 2nd applicant deposed that the said parcel of land is on the right side and adjacent to where his father had built his homestead and as per the Luo customs, that land was to be given to the eldest son who is the 1st applicant; that at the time of filing the case, they sat down as a family and agreed that the 1st applicant should institute the Kisii proceedings and the land be given to him and that he contributed a bull towards court expenses.
 11. By an order dated 11/6/2021, the court directed that the application be dispensed of by way of written submissions. The applicant filed his submissions dated 25/10/2021. The 2nd respondent did not file submissions. It is also noted that the 1st respondent did not file any responses.
 12. I have carefully considered the applicants' application, the various affidavits and the annexures thereto and the submissions of the applicant.



13. One of the questions is whether the Law of Succession Act is applicable to this estate. The deceased died in 1976, before the commencement of the Law of Succession Act, section 2 (2) of the Law of Succession Act provides as follows: -

“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.”
14. This is to say that although the Law of Succession Act is not applicable to the estate, the court is to proceed with its administration in so far as possible in accordance with the Act.
15. The application basically seeks to have the confirmed Grant of 3/4/2017 set aside on grounds that some of the beneficiaries were left out of the succession proceedings in particular, the 1st, 2nd and 3rd applicants. The contention of the applicants is that the 2nd applicant even though he has a share in the estate of the deceased, did not participate in the succession proceedings. It is not in dispute that all the parties herein are children of the deceased. It is also not in contention that the estate of the deceased is comprised of Land Parcel No. Kamagambo/Kameji/15 measuring approximately 3.8 HA.
16. I find it necessary to settle the issue of Land Parcel No. Kamagambo/Kameji/598 where the 1st applicant currently resides. The 2nd respondent is of the view that in the lifetime of his deceased father, he was given a share of his land being Land Parcel No. Kamagambo/Kameji/598. Both parties agree that the transfer was via the proceedings in Kisii High Court Civil Case No. 43 of 1983. The judgement is annexed to the parties’ respective affidavits and it is the one dated 18/1/1985. I have read and understood the same.
17. In the said judgement, the 1st applicant was the plaintiff. He gave evidence how his late father and the defendant’s father (Dismas Ila Okiri) in the Kisii Case had a land transaction during their life time. The judgement that was rendered in 18/1/1985 while the deceased in this estate died in 28/4/1976. In the judgment it was observed that the 1st applicant’s father loaned money to the former owner of the land. It is not the applicant who gave money to his father to purchase for him the land. Rather, it is the deceased who loaned the money to the then owner of the land in exchange for the land.
18. The conclusion therefore is that the land where the 1st applicant resides was not purchased using his own money. It is the deceased who paid for the land, but it was transferred to the first applicant via the Kisii Case.
19. Section 76 of the Law of Succession Act outlines the grounds in which a grant of representation may be set aside as follows: -
20. 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.

The application for the Grant of Letters Administration Intestate were filed in court on 25/1/2016. The beneficiaries of the Estate of the deceased are named as:-

- a. Lewnida Okelo Odenyo - widow.
- b. Lawrence Odongo Odenyo-son.
- c. Clement Rumbe Odenyo-son.
- d. Alexandra Ugala Odenyo-son.

21. The *Law of Succession Act* and Rules made thereunder require that all beneficiaries be informed of the commencement of the succession proceedings. Beneficiaries have to be informed of the proceedings and their consent sought and obtained. Rule 7 (1) (e) (i) of the *Probate and Administration Rules* provides inter alia: -

- (e) in cases of total or partial intestacy-

The names, addresses, marital state and description of all surviving spouses and children of the deceased, or where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39 (1) of the Act.

22. From the above Rule, it is clear that it is not only those having an interest in the assets of the estate who should be included. Rather all surviving spouses and children have to be disclosed even if there had been a meeting of the family. What was difficult in the respondent mentioning all the beneficiaries in the petition and what was difficult in getting them to consent so that they can endorse the scheme of distribution?

23. The Summons for the Confirmation of Grant is dated 3/2/2017. On 29/3/2017, the confirmation proceedings were done before Mrima J. Lewnida Okelo Odenyo, Lawrence Odongo Odenyo, Clement Rumbe Odenyo were present. Lawrence stated that as a family they had agreed on the distribution and a share will remain with the last born who is Alexandra Ugala Odenyo.

24. There is no evidence that the 1st, 2nd and 3rd applicants who are children of the deceased were served with the Summons for Confirmation of Grant application. There is also no evidence that there was an Affidavit of consent signed by all the beneficiaries consenting to the distribution of the estate. The assertion by the 2nd respondent that the 1st applicant already had a land allocated to him by their deceased father is laudable but it does not mean that the succession proceedings should not have been served upon him. The same case applies to the argument that the 3rd applicant was already married and therefore she cannot inherit in her father's estate. This notion is long settled and there is a place for women whether married or unmarried to inherit in their late parents' estate.



25. *In Re: Estate of the Late George Cheriwo Chepkosiom* (2017) eKLR it was held that anyone who has a stake in the estate, a beneficiary, interested in the estate and is no longer interested, should renounce such interest by way of affidavit or oral evidence.
26. In *Benson Champu Kaperevo vs Rebecca Chepkuto Kiperenge* (2019) eKLR the Court of Appeal held that the exclusion of a beneficiary from succession proceedings amounted to concealment of material facts.
27. The only instance where a beneficiary cannot inherit is when they file affidavits renouncing their interest in the estate of the deceased. The same case applies to the 2nd applicant who even though he was accounted for in the estate, he ought to have appeared in court during the confirmation proceedings for the court to ascertain that he was a minor. The failure to include, serve and notify all the beneficiaries of the estate of the deceased of the on-going succession proceedings was concealment of material facts which is a ground for revocation and/or annulment of a grant under section 76 of the *Law of Succession Act*.
28. *In Re: Estate of Moses Wachira Kimotho (Deceased)* Succession Cause 122 of 2002 (2009) eKLR the court pronounced itself on the importance of disclosing all material facts before a court of Law while seeking letters of administration and confirmation thereof as follows:-

“I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The respondent knew of the applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.”

29. In the end, I find that the application for revocation and/or annulment of grant has merit. Since the applicants have demonstrated that the petitioners are keen on keeping them out of the deceased’s estate, I think that it is only fair that the 1st applicant be enjoined to the petition as one of the administrators and I grant the following orders:-
 1. The Grant of Letters of Administration intestate issued on 12/7/2016 and confirmed on 3/4/2017 are hereby revoked.
 2. The 1st Applicant be included as an Administrator of the deceased’s estate.
 3. The Grant of Representation be amended accordingly to include the 1st Applicant.
 4. Any of the Parties are at liberty to file Summons for Confirmation together with a Schedule for Distribution within 30 days.
 5. If they do not agree on distribution, each be at liberty to file and the other one file his protest within 21 days.
 6. Status quo on Land Parcel No. Kamagambo/Kameji/15 be maintained.
 7. There shall be no orders as to costs.



8. Mention on 13/10/2022 to confirm compliance.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 29TH DAY OF JULY 2022.

R. WENDOH

JUDGE

Judgement delivered in the presence of;

Ms. Otieno H/B for Mr. Odhiambo Kanyangi for the Applicants/Objectors.

N/A for the Respondents/Petitioners.

Evelyn Nyauke - Court Assistant.

