



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**In re Estate of Andrew Adhiambo Obonyo (Deceased) (Succession Cause 03 of 2021) [2022] KEHC 13343 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13343 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 03 OF 2021  
PJO OTIENO, J  
SEPTEMBER 27, 2022**

**IN THE MATTER OF THE ESTATE OF ANDREW ADHIAMBO OBONYO (DECEASED)**

**BETWEEN**

**COLLETTAH ADHIAMBO BWIRE ..... PETITIONER**

**AND**

**WILLIAM OBAMBO MBAYI ..... OBJECTOR**

**JUDGMENT**

1. This appeal is from the judgment of the lower court by which the court in determining an objection proceedings revoked the grant issued to and confirmed in favour of appellant and directed that fresh grant be issued to both the objector and petitioner jointly.
2. In coming to its conclusion the trial court found and held that where there was no full disclosure of the estate assets, beneficiaries and liabilities, a grant thereby issued cannot stand. It was not disclosed what material facts were concealed but it is inferable that that fact could only be alleged sale to the respondent.
3. That decision has provoked the current appeal initiated by the memorandum of appeal setting out seven (7) grounds of appeal and making a prayer that the decision dated March 5, 2021 be set aside and in its place be substituted an order dismissing the summons for revocation of grant.
4. Even though the grounds are set out as seven, a reading thereof reveal that grounds 1, 3, 5 and 6 address same issue of burden and standard of proof while grounds 2 and 4 question the standing of the respondent in the succession cause and question the legality of the documents of sale put forth to found his claim as a purchaser of a property of the estate.
5. From the foregoing appreciation, I discern the issues for determination to be:-
  - a. Whether the respondent as an objector had established his claim to the requisite standards.



- b. Whether the respondent was a person entitled to claim in the estate.
6. I propose to start with the standing of the respondent but before then the summary of the facts:-

**Summary of facts:**

7. By summons for revocation of grant dated 05/12/2019, the Respondent sought the revocation of the grant on the basis that the same had been obtained by concealment of the fact that prior to his death the deceased had sold the entire parcel of land, Marama/Shiatsala/1605 together with the homestead, to the respondent at a price and consideration of Kshs 25,000/= In support of such transaction, the respondent exhibited an agreement made on the July 28, 2007 to evidence payment of a total sum of Kshs 16,000/= as at 5/7/2009.
8. Over and above the said agreed purchase price, the respondent deponed that it was equally agreed that he would take possession of the property, save for the homestead, that he would take possession upon the death of both the deceased and the administrator and that he would take care of the deceased, who was then in bad terms with the administrator, then not living together, and also meet the costs of burial rites and expenses, which he later met in the sum of Kshs 49,000.00
9. After being served with a response in opposition to the application for revocation, the respondent filed what he called a replying affidavit and denied the existence of any liability to the estate save for his claim adding that the alleged purchaser, Isaac Pinno Oduor, himself was aware of the respondent's interests in the land.
10. The application was opposed by the appellant by the affidavit titled petitioner's further affidavit in support of the petition. The gist of that affidavit was to effect that the deceased only beneficiaries and liability were Colletta Adhiambo Bwire - widow, Pelesia Maloba - daughter and Isaac Pinno Oduor - liability. She denied the claim of the respondent as purchaser, terming it untrue because by the date disclosed in the alleged agreement, the deceased was already ailing and under the care of the administrator and no such agreement could have been negotiated, entered into and executed without her knowledge and in fact none was so executed.
11. The affidavit further challenged the jurisdiction of the court to handle the matter insisting that the claim was the kind that needed to be canvassed before the Environment and Land Court and not in a Succession Cause and further that any cause of action sought to be pursued was in any event statute barred as much as there having been no consent of the land control board, the agreement had become null and void, and incapable of enforcement.
12. Thirdly, the appellant took the position that the mandate of a probate court was limited to ascertaining the beneficiaries, assets and liabilities of the estate and overseeing transmission but not to resolve dispute between the estate and third parties and insisting that the respondent was a third party to the estate.
13. As directed by the trial court the parties filed written submissions in canvassing the matter, which submissions and the record of appeal I have duly perused and appreciated.
14. In the ruling now subject of the appeal, not much has said to demonstrate that the very strenuous contention by the appellant regarding jurisdiction of the court and the capacity of the respondent to object to the grant was given any due regard.
15. The brevity with which the judgment was structured call for a reminder to all civil courts that there is a prescribed structure of judgment provided by Order 21 rule 4. The obligation of a civil court is



to set out brief facts of the case including the evidence led and based on the pleadings; the issues for determination, thereby arising and the determination by the court on each of such issues.

16. That structure is important to the writer of a judgment for court because it gives a road map by which nothing is lost. Because that structure was not remembered or complied with the decision reached after the brief journey of facts fails to isolate issues and is wholly devoid of the reasons for the decision made. That failure only acts to underscore how important it is to have all ingredients of a judgment incorporated. That alone is a sufficient reason to fault the judgment save that this being a first appeal proceeding by retrial this court must re-appraise and re-examine the entire record with a view to coming to own conclusions.
17. On the substance, the first question is whether the court was clothed with jurisdiction to entertain and determine the claim of the respondent. It cannot be gainsaid that the mandate of a succession court is limited to determination of the beneficiaries, assets and liabilities over the estate. The court *In Re Estate of Alice Mumbua Mutua* [2017] eKLR, Musyoka J, had this to say of that mandate:-

“The *Law of Succession Act*, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets...

...Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”(Emphasis added)

18. It is not in dispute that the respondent was not making any claim as a dependant because he was indeed not one. If not one, then the question is whether as a third party to the estate, not recognized as a liability he could be entitled to object. That poses the question as to who can challenge a grant issued to a person entitled. The same case of Alice Mumbua (Supra) answered the question as follows:-

“Disputes of course do arise in the process: The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved



through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’ (Emphasis provided)

19. Section 29 of the Law of Succession Act sets out exclusively the dependants to an estate. That list excludes a claim by a purchaser. Accordingly, any claim by such purchaser does not rank in any level with those of beneficiaries. For the rights of a purchaser to be declared a claim against the estate, in the absence of acknowledgement by the dependants, such claim must be proved by a separate suit. Like in the instant case, there being a claim to land, the claim needs to be proved in the appropriate court, being Environment and Land court. It is a claim that is clearly not suited and cannot be forced to be suited into a succession court. I say it is not suited because it appears from the resistance to the application for revocation that the administrator was not only questioning the existence of any agreement with the deceased but additionally the legality hereof on the basis of the provisions of the Land Control Act, making consent to transfer mandatory as well as the defence of limitation. Those are questions that if raised and sought to be determined in the family court, would convolute the dispute and stretch it beyond the jurisdiction of the court.
20. It boils down to the fact that the respondents claim was therefore one that was beyond the courts mandate and jurisdiction. Having touched on jurisdiction, the trial court had no otherwise but to consider whether or not it had jurisdiction, first and foremost, before addressing any other point however grave. It remains the law that jurisdiction is everything and must be dealt with beforehand and in limine. To the extract that the trial court failed to consider and determine whether it was clothed with jurisdiction in the matter, it erred on an important matter of law. That is a second reason the decision by the trial court cannot be left to stand but must be set aside.
21. Of course, the respondents having raised a claim to land and title thereto, the trial court sitting as a succession court lacked jurisdiction. Had the court directed itself appropriately, it would have found so and downed its tools.
22. Therefore, the third reason the decision must be set aside is that it entertained a matter outside its jurisdiction.
23. In the end, the appeal succeeds, the decision by the trial court revoking the grant and appointing the appellants and respondent as co administrators is set aside and in its place substituted a decision dismissing the summons for revocation of grant dated December 5, 2019.
24. Even though the dispute ought to be a family dispute, the respondent is not a family member to the deceased and the appellant and therefore I do award the costs of appeal to the appellants. Such costs be agreed by parties and in absence of agreement, taxed within sixty (60) days from today be taxed.



25. For avoidance of doubt the grant of letters of administration made on February 26, 2019 and certificate of confirmation of grant issued by the trial court are reinstated and any transactions effected pursuant thereto are hereby affirmed.
26. Let the trial court file be transmitted to the court and if no other matters pends therefore, let same be closed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

No appearance for Wangatia for the Petitioner/Respondent

Mr. Achero for the Objector/Applicant

Court Assistant: Polycap

