



REPUBLIC OF KENYA



**In re Estate of James Opuge Owuor (Deceased) (Succession Cause 1692 of 2000)
[2022] KEHC 14894 (KLR) (Family) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1692 OF 2000
MA ODERO, J
OCTOBER 28, 2022
PREVIOUSLY SUCCESSION CAUSE NO. 1107 “A” OF 2000
IN THE MATTER OF THE ESTATE OF JAMES OPUGE OWUOR (DECEASED)**

RULING

1. Before this Court for determination is the summons for substitution of Administrator dated November 26, 2019 by which the Applicants Lucy Tracy Opuge And Brenda Akinyi Opuge seek the following orders:-
 - “ 1. Spent.
 2. That the letters of administration intestate jointly made to Florence Anyango Opuge (Deceased) and FERdinard Ochieng Opuge on July 25, 2006 be revoked and/or annulled.
 3. That a new grant of letters of administration be made to Lucy Tracy Opuge And Brenda Akinyi Opuge.
 4. That pending the hearing and determination of this application inter parties, a preservatory order do issue restraining the remaining administrator from intermeddling with the estate or in any manner adverse to the estate deal with assets of the estate.
 5. That the costs be in the cause.”
2. The Application which was premised upon Rules 49 and 73 of the *Probate and Administration Rules*, and Sections 45, 47 and 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya and all other enabling provisions of the Law was supported by the affidavit of even date and the supplementary affidavit dated May 31, 2022 both sworn by the two Applicants.



3. The Respondent/Administrator Ferdinand Ochieng Opuge opposed the application through his Replying Affidavit dated March 29, 2022. The matter was canvassed by way of written submissions. The Applicants filed the written submissions dated 31st June 2022 whilst the Respondent relied on his written submissions dated June 23, 2022.

Background

4. This Succession Cause relates to the estate of the late James Opuge Owour (herein after 'the Deceased') who died intestate on April 25, 1996. The Deceased was survived by the following persons:-
 - a) Mary Auma Ogutu – 1st widow
 - b) Ferdinand Ochieng Opuge – son
 - c) Lucy Atieno Opuge – Daughter
 - d) Florence Nyagowa Anyango – 2nd Daughter
 - e) Dornata Akinyi Opuge – Daughter
 - f) Brenda Akinyi Opuge – daughter
 - g) Gavin Onyango Opuge – son
5. The Deceased's estate comprised of the following assets:-
 - (i) House in Buruburu Phase Plot No 218
 - (ii) Pand Pini Plot
 - (iii) Kasula Plot
 - (iv) Personal effects
6. Grant of letters of Administration in respect of the estate of the Deceased were on August 9, 2000 issued to Mary Auma Ogutu (the 1st widow) and her son Ferdinand Ochieng Opuge (the Respondent herein). One of the Administration Mary Auma Ogutu passed away on March 7, 2003 and was substituted by Florence Anyango Opuge (the 2nd widow) vide the rectified Grant issued on July 25, 2006.
7. Thereafter the said Florence Anyango Opuge also passed away on December 19, 2019, leaving the Respondent as the only Administrator of the estate.
8. The Applicants aver that the rectified Grant issued on issued on July 25, 2006 has been rendered useless and inoperative as a consequence of the demise of one of the Administrators. They further aver that the remaining Administrator (the Respondent herein) has intermeddled with the estate leading to wastage and dissipation of the same.
9. The Applicants seek a preservatory order to preserve the estate from any further intermeddling. They Applicants also pray that the Grant issued to the Respondent be revoked and/or annulled and that a fresh Grant be issued to the two applicants. They state that all the other beneficiaries have given their consent to this application.
10. As stated earlier the summons was opposed. The Respondent confirms that vide the rectified Grant dated July 25, 2000 he and the late Florence Anyango Opuge were appointed as Administrators of the estate. The Respondent further confirms that his co-Administrator passed away on December



19, 2019. However, the Respondent denies that the Grant became inoperative upon the demise of his co-Administrator. He asserts that under the Law of Succession he is entitled to proceed with the Administration of the estate as a sole Administrator.

11. The Respondent states following the demise of his co-administrator the beneficiaries have never sat down to select another Administrator to replace her. The Respondent categorically denies the allegation that he has intermeddled with and/or wasted the estate. He urges the court to dismiss this summons in its entirety.

Analysis and Determination

12. I have carefully considered this summons, the Replying Affidavit as well as the written submissions filed by both parties. It is common ground that following the demise of one of the initial administrators of the estate a rectified Grant was issued on July 25, 2006 appointing the Respondent and Florence Anyango Opuge as joint Administrator. A copy of the rectified grant is annexed to the Replying Affidavit dated March 29, 2022 (Annexure 'F00-2').
13. It is also not in dispute that Florence Anyango Opuge the co-administrator passed away on December 19, 2019. This left the Respondent as the only surviving administrator of the estate. The issues which arise for determination in this matter are as follows:-
- (i) Whether the Grant held by the Respondent ought to be revoked.
 - (ii) Whether the Applicants should be appointed as joint administrators of the estate.
 - (iii) Whether injunctive orders to preserve the estate ought to issue.

(i) Revocation of the Grant

14. The grounds upon which a Grant may be revoked are set out in Section 76 of the [Law of Succession Act](#) as follows:-

“76. 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.”

15. The Applicants contend that upon the demise of the Co-Administrator the Grant issued to the Respondent became useless and inoperative and ought to be revoked.
16. The Respondent on the other hand counters that the demise of a Co-Administrator does not render a Grant inoperative. That under the Law the remaining Administrator(s) may continue with the distribution of the estate without any need to revoke the Grant and/or substitute a new Administrator.
17. It is a fact that the demise of one Administrator where two or more Administrators had been appointed does not necessitate the renovation/annulment of the Grant. Section 81 of the *Law of Succession Act* which addresses this issue provides as follows: -

“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 or 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)

18. Therefore it is only in situations where there exists a sole Administrator that the demise of that sole Administrator would render the entire grant useless and inoperative (see section 76 (e) of the Act). However where as in instant case there existed two (2) Administrators then upon the demise of one Administrator all the powers and duties of Administrator will automatically vest in the remaining Administrator. There would be no need to revoke the Grant and/or substitute the deceased Administrator except where the beneficiaries consent to do so or for some other good reason.
19. In *Re Estate of George Ragui Karanja (Deceased) [2016] eKLR*, Hon Justice William Musyoka held that –

“The *law of Succession Act* does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left with one. The closest provision is Section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor of survivors of the personal representative...”



20. Further in *Re Estate of Shadrack Gitbinji Njaruiri (Deceased) [2019] eKLR*, the court held that the death of one administrator should not render a grant invalid. The remaining administrator should administer the estate as provided for by Section 81 of the *Act*.
21. Accordingly, I find that the demise of the Co-administrator Florence Anyango Opuge does not require that the Grant be revoked nor is there necessity to substitute the Deceased Administrator. The Respondent who is the surviving administrator is permitted by law to continue with the Administration of the estate. I therefore decline to revoke the Grant on those grounds –

(ii) Appointment of the Applicants as Administrator of the estate

22. The Deceased herein had three (3) wives. Mary Auma Ogutu, Anna Achieng Opuge and Florence Anyango Opuge. In the first instance, the Respondent and his mother Mary Auma Oguti were issued with Grant of letters of Administration Intestate on August 9, 2000. Upon the demise of Mary Auma Opuge in the year 1996 the Grant was rectified to include Florence Anyango Opuge as Administrator. Therefore there was representation from at least two of the Houses in the administration of the Estate.
23. The Applicants Lucy Tracy Opuge and Brenda Akinyi Opuge are from the first and 2nd Houses respectively. They now seek to be appointed as joint administrators in place of the Respondent whom they accuse of failing in his duties as Administrator.
24. An Applicants accuse the Administrator of failing to apply for confirmation of the Grant within six (6) months of its issue as required by the *Law of Succession Act*. On his part, the Respondent denies any dereliction of his duties as Administrator. He explains that he did move the court seeking confirmation of Grant but then the 1st Co-Administrator Mary Anyango Opuge died. That following the rectification of the certificate of the Grant, the parties were unable to reach consensus on how the estate ought to be distributed leading to delay in filing the summons for confirmation of Grant. After that the 2nd Co-Administrator Florence Anyango Opuge also died.
25. The Applicants further accuse the Respondent of utilizing the estate asset i.e., the house in Buruburu to his own benefit and to the exclusion of the other beneficiaries. They allege that all the rental income goes to the Respondent and further claim that the Respondent failed to pay the land rents and water bills in respect of said asset.
26. The Applicants leave annexed to their supporting Affidavit a bundle of invoices for unpaid land rates and water bill for the Buruburu House (Annexure ‘LTBA 8’).
27. The Respondent denies that he has mismanaged and/or wasted the estate. He states that no evidence has been adduced by Respondent to prove such wastage. The Respondent concedes that he has been collecting the rental income due to the estate but claims that he has been utilizing that rental income to pay debts accrued by the estate. The Respondent states that he is ready to render accounts as and when called upon by the court to do so.
28. Further the Respondent avers that the issue of the water bills was a problem even during the lifetime of the Deceased due to a technical problem, which occurred during the plumbing works. The Respondent states that he has now reached an Agreement with the County Government of Nairobi on how the outstanding bills may be cleared which agreement is currently in force.
29. Notwithstanding the provisions of Section 81 of the Act, there are instances where the court may in its discretion act in the benefit of the estate to substitute a deceased Administrator. In the case of *Re*



Estate Of Tuaruchiu Marete (Deceased) [2019] eKLR Hon Justice Gikonyo did set out the instances where an additional administrator may be appointed to replace a deceased administrator as follows: -

“(11) There are however situations where an additional administrator should be appointed. For instance where there is a resulting trust, a sole surviving administrator is required to apply for an additional administrator to be appointed which failing the court will appoint on its own motion. Similarly, where the intestate is polygamous, death of one of the administrator may require a replacement for purposes of the house he represented. Or for a good cause and in the best interest of all persons concerned the court may appoint an additional administrator of an estate. This is in discretion under section 66 of the *Law of Succession Act*. Therefore, there is no complete prohibition of appointing another administrator in addition to a surviving administrator or administrators. Nothing wrong in the appointment of the first administrator herein.” (own emphasis)

30. As stated earlier the Deceased herein was polygamous. The Respondent represents the 1st House only. The two Applicants represent both houses of the Deceased. In order to ensure transparency it would be desirable for there to be more than one Administrator to represent the interest of both Houses.
31. Accordingly, in exercise of the powers of the court provided under Rules 73 and 47 of the *Probate and Administration Rules* to make such orders as may be necessary to meet the ends of justice, I do hereby appoint Lucy Tracy Opuge and Brenda Akinyi Opuge as co-Administrators of this estate. Accordingly, I direct that the Grant issued on July 25, 2006 be further rectified to include this amendment.

Injunctive orders

32. The Applicants have complained that the estate is being dissipated as all the rental income derived from the Buruburu House goes to the Respondent. They seek orders to preserve the estate pending final distribution.
33. The duty of the Probate Court is to ensure that the estate left by the Deceased is distributed to the genuine beneficiaries. This cannot happen if one beneficiary is deriving benefit from the estate to the exclusion of the others. As an Administrator, the Respondent has a statutory duty to account to the remaining beneficiaries as well as to the court regarding his administration of the estate. There is no indication that the Respondent has ever supplied an account of his Administration of the estate following the demise of the co-Administrator.
34. It is trite law that an Executor or Administrator of an estate is a Trustee and is accountable to the beneficiaries for his/her handling of the estate of a Deceased person. Section 83 of the *Law of Succession Act* sets out the duties of Personal Representatives. Section 83(e) provides that a personal representative is required:-

“to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.”



35. The Objector who has been administering the estate must produce to the court a full Statement of Accounts regarding his dealings with the Estate. In [Re Estate of Geoffrey Mwangi Chege \(Deceased\)](#) Succession Cause No 905 of 2015, the Court stated that:-

“Beneficiaries have the statutory right to obtain an account from the executors of the estate, and at any time they may ask for estate books and documents (*In the Matter of the Estate of Anthony Gichigi Wairire (Deceased)* HC P & A No 32 of 1983 at Eldoret). This is because an executor or administrator is a trustee and is accountable to the beneficiaries for his handling of the estate administration. Further, the executor or personal representative is accountable to the court on how he deals with the estate of the deceased.”

36. Similarly in [Re Estate of Peter Muigai Rubiu \(Deceased\) \[2015\] eKLR](#) where the judge stated in part that:-

“.....financial accounting is not limited to just what was collected as rent or revenue. It extends even to how the moneys so collected have been utilized. The administrators hold an office of trust. They are in a fiduciary position to the beneficiaries with regard to the assets. They must, as trustees, account for every single cent that comes into their hands.....” (own emphasis)

37. Accordingly I do direct that the Respondent file in court within ninety (90) days a full Statement of Accounts regarding his Administration of estate from January 2020 to date.

38. In order to promote transparency and fairness and to avoid any wastage of the estate, I do deem it prudent to direct that any and all rental income collected from estate property from the date of this Ruling be deposited into an estate account opened in the names of all three (3) Administrators of the estate. I am fortified in this by the decision of my learned brother Hon Justice William Musyoka in [Re Estate of Makoha Idris Khasabuli \(Deceased\)](#) (Supra) as follows:-

“Since the administration is one and not four, the prudent thing to do should be that all the assets of the estate should be administered centrally. That would mean that all the income collected from the income-generating assets ought to be pooled together and preserved, to be applied to settle debts and liabilities, and ultimately for distribution amongst all those entitled. The best way to preserve rental income, or other income in monetary form, is to have it held in an estate account. Such estate account must, no doubt, be opened in the names of and operated by the administrators. They must identify the debts and liabilities to be cleared, and the administration expenses to be met. Joint administration, such as the one in this case, is a joint enterprise, it cannot be done by one administrator alone without involving the rest.” (own emphasis)

Conclusion

39. Finally and in conclusion based upon the foregoing this court makes the following orders:-

- (1) The prayer seeking revocation of the Grant is disallowed.
- (2) The Administrator/Respondent is hereby directed to file and serve a full and accurate inventory of the assets and liabilities of the estate of the Deceased as well as a full and accurate account of all dealings therewith including but not limited to the joint account in Co-operative Bank where rent proceeds have been saved since the year 2020 to date within sixty (60) days of today's date.



- (3) The Applicant Lucy Tracy Opuge and Brenda Akinyi Opuge are hereby appointed by the court as joint Administrator of the Estate.
- (4) The three (3) Administrators to open within thirty (30) days a joint estate account into which all rental income derived from the estate properties is to be deposited.
- (5) A preservative order be and is hereby issued restraining the Administrators from making any withdrawals from the joint account held at Co-operative Bank or any other joint estate account. The Administrators are further restrained from selling, disposing, transferring, charging or in any other manner whatsoever alienating any of the estate properties pending the final distribution of the estate
- (6) This being a family matter each side shall bear its own costs.

DATED IN NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

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MAUREEN A ODERO

JUDGE

