



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lago (Suing on his own behalf and/or as the personal representative  
of the late Stella Alago Odindo) v Lago (Succession Cause 168 of 1997)  
[2022] KEHC 15695 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15695 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 168 OF 1997  
JN KAMAU, J  
NOVEMBER 28, 2022**

**IN THE MATTER OF THE ESTATE OF ROBERT LAGO AWUONDA (DECEASED)**

**BETWEEN**

**SAMSON AUMA LAGO ..... OBJECTOR**

**SUING ON HIS OWN BEHALF AND/OR AS THE PERSONAL  
REPRESENTATIVE OF THE LATE STELLA ALAGO ODINDO**

**AND**

**AMOS ONYANGO LAGO ..... PETITIONER**

**RULING**

**Introduction**

1. In his amended summons for revocation or annulment of grant dated June 11, 2021 and filed on June 16, 2021, the objector herein sought orders that the grant of letters of administration intestate made to the petitioner on June 26, 1997 be revoked and/or annulled and the confirmation of the said grant on May 7, 1998 and/or the two(2) certificates of confirmation of grant issued be revoked and/or annulled and that a fresh grant of letters of administration intestate in respect of the estate of the deceased be made to him and one Pamela Akinyi Lago.
2. He also sought that the changes in the proprietorship and issuance of new title deeds of land parcel numbers Suna East/Wasweta I/4364, Suna East/Wasweta I/4366, Kisumu/Kochieng/225, Kisumu/Kochieng/254 and Kisumu/Kochieng/396 (hereinafter referred to as the “subject properties”) from the deceased’s name to the petitioner and to other persons on various dates be set aside and/or revoked or annulled.
3. He swore an affidavit in support of his application on June 11, 2021. He averred that he was a son to Stella Alago Odindo who died on January 24, 2017 and that together with his sister, one Pamela



Akinyi Lago, they became the joint administrators of her estate pursuant to letters of administration intestate that were issued to them on March 9, 2020 in Kisumu Chief Magistrate Court succession cause No 571 of 2019.

4. He averred that on or around January 17, 2017, his mother instructed one Michael Okelloh advocate to file an application to revoke the grant that was issued and confirmed in favour of his brother, the petitioner herein, which application was filed on January 31, 2017. He stated that unbeknownst to the said advocate, his mother had died a week earlier. He contended that the said application was never fixed for hearing or prosecuted as a result of his mother's death whereupon he took over the said application in his capacity as an administrator of his mother's estate.
5. He asserted that the petitioner travelled to the United States of America (USA) in 2005 and had been residing there till present. He stated that during the sixteen (16) years, he had not visit Kenya even when their mother died in the year 2017 and when his wife and son died in 2020.
6. He further contended that upon perusing the grant of letters of administration and certificate of confirmation of grant and other documents relating to the deceased's estate that the petitioner had left with their sister, one Hellen Nyonga, they were surprised to learn that the petitioner had secretly instituted and completed succession proceedings in respect of the deceased's estate in the year 1997 and 1998 without their or their mother's consent and/or participation. He said that it was also disheartening that the petitioner was listed in the aforesaid certificates of confirmation of grant as the sole heir and beneficiary of the deceased's estate to the exclusion of their deceased mother and other siblings.
7. He added that they also discovered documents which showed that the petitioner had transferred Suna East/Wasweta 1/364, Suna East/Wasweta 1/4366 and Kisumu/Kochieng/225 belonging to the deceased into his name.
8. He pointed out that the deceased's home was situated within land parcel number Kisumu/Kochieng/225 at Nyando sub-county in Kisumu county and that he and his brother, Willis, still lived on the said parcel of land. He further averred that the petitioner and his other brothers namely, Gilbert Oluoch and Gilbert Oyamo, had established their homes on different parcels of land.
9. He further stated that they were shocked to learn that the petitioner secretly sold and transferred parcel No Suna East/Wasweta I/4364 to one Silvanice Otieno around December 2003 and further sold land parcel number Suna East/Wasweta I/4366 to William Owino Omollo and Iscar Atieno Oluoch who then subdivided the said parcel into two (2) parcels namely, Suna East/Wasweta I/21690 and Suna East/Wasweta I/21691, which were registered in their names as joint proprietors in the year 2016. He was emphatic that the petitioner kept to himself all the proceeds of the sales and did not share with his mother and siblings.
10. He further stated that the petitioner only listed five (5) parcels of land as forming the estate of the deceased and failed to disclose four (4) other parcels of land namely, Kisumu/Kochieng/634 measuring approximately 0.29 hectares, Kisumu/Kochieng/737 measuring approximately 3.1 hectares, Kisumu/Kochieng/762 measuring approximately 1.3 hectares and Kisumu/Kochieng/4047 measuring approximately 0.43 hectares.
11. It was his contention that the bulk of the deceased's estate was situated within Kisumu county and thus it was strange that the petitioner chose to institute the succession proceedings at the High Court of Kenya at Kisii instead of the High Court in Kisumu. He asserted that he did that to forum-shop for a court which was far away from his aged mother and siblings in order to lock them out from finding out



- his secretive succession proceedings. He added that they learnt of his fraudulent succession proceedings seventeen (17) years after they were concluded and after the petitioner had left Kenya for the USA.
12. He stated that Kisumu Chief Magistrate Court succession cause No 571 of 2019 in respect of his mother's estate which consisted land parcel number Kisumu/Kochieng/225, previously part of the deceased's estate, was pending hearing and determination but that it had reportedly been registered in the petitioner's name.
  13. He asserted that the impugned grant ought to be annulled under section 76 of the Law of Succession Act cap 160 (Laws of Kenya) on the grounds that the proceedings were defective in substance as the beneficiaries to the deceased's estate did not properly consent to and/or participate in the proceedings, that the proceedings were tainted by fraud for instance the Kenya gazette notice No 2521 of 16/5/1997 which indicated that the deceased died in Kochieng Suna in Migori district yet he died within Kisumu district, giving a wrong impression that the petitioner was the sole heir/beneficiary of the deceased's estate of the deceased.
  14. He pointed out that there were two (2) certificates of confirmation issued which listed the Suna East/Wasweta 1/364, Suna East/Wasweta 1/4366 and pension in the ministry of works as the deceased's assets while the second certificate of grant added land parcels numbers Kisumu/Kochieng/225, 254 and 396. He added that the petitioner concealed four (4) parcels from the list of the deceased's assets.
  15. It was also his contention that if the beneficiaries consented to the said confirmation, then their signatures were forged by the petitioner herein.
  16. He further said that the grant that was issued to the petitioner had become inoperative and/or he had failed to diligently execute his duties as an administrator as he left Kenya for USA and had no sign of returning to Kenya any soon. He stated that it was in the interests of justice that his present application be allowed.
  17. In opposition to the objector's summons of revocation of grant, the petitioner herein swore a replying affidavit on May 4, 2022. The same was filed on May 6, 2022.
  18. He averred that his consent was not sought before the filing of succession cause No 571 of 2019 in respect of the estate of his late mother despite the fact that he was the first born. He added that he was not aware that his deceased mother had instructed a lawyer to file an application to revoke the grant he had been issued with and argued that if at all that was true, then her deceased mother would have sworn an affidavit in support of the application.
  19. He explained that he had not travelled back to Kenya due to the covid restrictions but that he had been in constant communication with his family and supported them financially. He admitted having not travelled in the year 2020 to attend his wife and son's burial because of the said covid restrictions.
  20. He pointed out that he left the documents with the sister because he had nothing to hide and that he filed the succession cause after family consultations. He added that her deceased mother gave him consent to be the administrator as the first born. He added that he was instructed by his deceased mother to succeed (sic) parcels number Suna East/Wasweta I/4364 and Suna East/Wasweta I/4366 situated in Migori since they had no capacity to develop the property or put them to good economic use. He stated that after succeeding them (sic), his mother instructed him to sell them, which he did and gave her the proceeds.
  21. He added that there were plans to transfer land parcel number Kisumu/Kochieng/225 to their late mother to hold in trust for the family but he did not transfer the same. He said that he did not know how the objector registered it in her name.



22. It was his contention that he never concealed or left out any asset of the deceased deliberately but that what he disclosed was what he was aware of at the time of filing the succession cause. He averred that if his siblings had discovered other assets, they could proceed and administer them so that every beneficiary could get their rightful share.
23. He contended that he filed the succession cause in Kisii High Court since the properties he was succeeding were situated in Migori and the nearest High Court at the time was in Kisii. He urged the court to allow them attempt an out of court settlement as he was ready and willing to engage the objector to enable them resolve the issues amicably at a family level and record a consent.
24. It was his case that pursuant to section 93 of the *Law of Succession Act*, properties that were sold after full administration of the estate could not be challenged legally.
25. In response to the petitioner's averments, the objector swore a supplementary affidavit on May 10, 2022. He averred that the petitioner's replying affidavit ought to be struck out for contravening the mandatory provisions of section 5 of the *Oaths and Statutory Declaration Act* Cap 15 (Laws of Kenya). He pointed out that the affidavit showed that the petitioner swore it while in Kisumu yet he knew that the petitioner had been living continuously in the USA from year 2015 and had never visited Kenya. He pointed out that as such his affidavit should have been attested by a notary public in the USA where he resides.
26. He reiterated his averments in his supporting affidavit and contended that the petitioner though ranked in equal priority with him and other siblings, he did not seek their consent before instituting succession proceedings. He added that section 93 of the *Law of Succession* did not shield assets sold to third parties on the strength of an irregularly obtained grant, whether or not it had been confirmed.
27. The objector's written submissions were dated and filed on March 28, 2022. He further filed supplementary written submissions dated and filed on May 10, 2022. The petitioner's written submissions were dated and filed on May 6, 2022. This ruling is based on the said written submissions which both parties relied upon in their entirety.

### **Legal Analysis**

28. This court dealt with the issues that had been raised herein in the distinct and separate headings shown hereunder.

#### **I. Competence Of The Replying Affidavit**

29. As a preliminary issue, this court deemed it prudent to address the question of the competence of the petitioner's replying affidavit as a determination of the same would determine whether or not the present summons for revocation and/or annulment of grant was opposed.
30. The objector submitted that the petitioner's replying affidavit had not been regularly signed and/or attested and that it was therefore a false document. He submitted that the petitioner had admitted in paragraphs 5 and 6 of his replying affidavit that he had been absent continuously since 2005/2015 (sic) as he had been residing in USA.
31. He argued that the said replying affidavit ought to have been notarised in the USA and not commissioned before a commissioner for oaths in Kisumu as he was not present to appear before the said commissioner for oaths to sign the replying affidavit. He thus urged the court to expunge the said replying affidavit from the court record.



32. Section 5 of the *Oaths and Statutory Declaration Act* cap 15 (Laws of Kenya) provides that:-
- “Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made (emphasis court).”
33. An affidavit is an oath. it must be sworn and executed in the presence of a commissioner for oaths and/or notaries public. The petitioner did not rebut the objector’s assertions that he did not appear before the commissioner for oaths in Kisumu and/or submit on this issue.
34. Notably, although this court was not an expert in handwriting and signatures change over time, it noted that the petitioner’s signature in the petition for grant of letters of administration intestate and in the replying affidavit were as different as day and night.
35. In the absence of the petitioner’s rebuttal on the place of executing his replying affidavit and/or his submissions on this issue, this court was persuaded by the objector’s arguments that the replying affidavit was defective, incompetent and null and void ab initio for not having been executed before a notaries public and could not form the basis of a rebuttal to the assertions the objector had made in his supporting and supplementary affidavits that he swore on June 11, 2021 and May 10, 2022 respectively.
36. Accordingly, the petitioner’s replying affidavit that was filed on May 6, 2022 be and is hereby expunged from the court record as this court could not verify whether or not the same was executed by the petitioner herein rendering the amended summons for revocation and/or annulment of grant dated June 11, 2021 and filed on June 16, 2021 technically unopposed.
37. Be that as it may, the petitioner still had a right to raise any points of law to argue his case. The court therefore considered his written submissions with a view to ascertain if the objector had met the threshold for the revocation and/or annulment of the grant of letters of administration intestate that had been issued herein.

## II. Revocation And Annulment Of Grant

38. The objector was categorical that he had the *locus standi* in the deceased’s estate as had been shown in the Chief’s letter from Kochieng East location.
39. In support of his case, the objector invoked section 76 of the *Law of Succession* and argued that he had raised questions on the substantive and procedural defects in the succession proceedings including making of false statements or concealment of material things and the fact that the same proceeded without his lawful consent and knowledge of his late mother and siblings. He pointed out that he was the only one who was present during the confirmation of the grant of letters of administration intestate.
40. He also relied on the case of *Re Estate of Agwang Wasiro (deceased)* [2020] eKLR where it was held that section 51(2)(g) of the *Law of Succession Act* was couched in mandatory terms to the effect that the names of all the beneficiaries had to be listed in the petition for grant of letters of administration.
41. He also cited rule 7(7)(a)(b) and (c) of the *Probate Rules* and asserted that the petitioner was silent on whether he sought a written consent of his mother and siblings. He submitted that the rules mandated an applicant who ranks in inferior or in equal rank with other persons to prove that such other persons had renounced their right or they had consented in writing or a citation had been issued to them.
42. He reiterated that the petitioner had transmitted and/or disposed of the deceased estate to third parties and omitted other assets in the succession cause. In that regard, he relied on the case of *Monica*



*Adbiambo v Maurice Odera Koko* [2016] eKLR where the court held that the provisions of section 93 of the *Law of Succession Act* did not validate unlawful acts to disinherit a deceased's beneficiaries but that the interests of third parties would be protected where properties had been sold after a proper confirmation of grant.

43. He added that the petitioner had been absent from Kenya for about seventeen (17) years and had thus abandoned his duties as an administrator of the deceased.
44. On his part, the petitioner also invoked section 76 of the *Law of Succession Act* and submitted that he was willing to proceed with the administration of the estate. In the alternative, he proposed that the objector be made a joint administrator to the deceased's estate so as to satisfy the interests of both parties as this was a family matter that ought to be dealt with in a manner to strengthen the family ties and/or bond.
45. He asserted that pursuant to section 93 of the *Law of Succession Act*, a transfer to a third party *vide* a confirmed grant could not be impeached. In this regard, he relied on the case of *In the matter of the estate of Fredrick Ondoo Olendo (deceased)* succession cause No 610 of 2014 (eKLR citation not given) where the court held that the law protects *bona fide* purchasers under section 93 of the *Law of Succession Act* and that their titles were indefeasible and could not be set aside even if the grant was revoked.
46. He also placed reliance on the case *In the matter of the estate of James Okoth Omollo (deceased)* succession cause No 993 of 2013 (eKLR citation not given) where the court held that section 94 of the *Law of Succession Act* imposes on a personal representative the duty to account in the event of loss or damage to the estate.
47. He contended that the third parties could not be accused without being called to respond to the allegations raised against them. In this regard, he relied on article 50, 25 and 47 of the *Constitution* of Kenya, 2010. It was his case that the objector's summons for revocation had not met the threshold of section 76 of the *Law of Succession Act*. He pleaded that that this being a family matter, each party should bear its own costs to save the family bond that was already threatened.
48. Notably, section 76 of the *Law of Succession Act* states as follows:-

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.
49. An order for revocation of the grant can thus only be given if the aforesaid grounds for revocation had been satisfied. A similar finding was arrived at [\*In the Matter of the Estate of L A K – \(deceased\)\*](#) [2014] eKLR.
50. Notably, a perusal of the P & A 5 form that was attached to the petition for a grant of letters of administration herein showed that the petitioner included the objector and their mother together with his four (4) other brothers. However, other beneficiaries, especially daughters were left out of the aforesaid form. Further, the chief’s letter dated March 30, 1997 only indicated the petitioner as the sole administrator of the deceased’s estate and failed to indicate the other dependants of the deceased.
51. The objector denied that he, his mother or other siblings gave their consent for the petitioner herein to be the administrator of the deceased’s estate. The consent that was attached to the petition for letters of administration indicated that the objector, his late mother and the other four (4) brothers had signed against their names therein. Five (5) of the deceased’s daughters did not sign the aforesaid consent.
52. This consent must be obtained by a petitioner as provided in rule 25(2) of the [\*Probate and Administration Rules\*](#) which provides that:-
1. Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
  2. An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
53. The mere fact that the objector, his mother and siblings did not give their consent to the petitioner being issued with the grant of letters of administration rendered the entire process of obtaining the said grant defective and a nullity. They were persons who were equal and lesser in priority for purposes of applying for the grant of letters of administration and thus ought to have executed form 38. Had there been disclosure of the deceased’s daughters in the petition, the court issuing the said grant would definitely have required their consent.
54. Going further, the petitioner herein was the deceased’s first-born son. His argument that he only applied for the grant of letters of administration in respect of the properties in Migori because they had no capacity to develop or put them to good economic use, was irregular. He ranked lower in the persons who could apply for letters of administration in a deceased’s estate at the time as his late mother was still alive.
55. Section 66 of the [\*Law of Succession Act\*](#) provides that:-
- When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—
- a. surviving spouse or spouses, with or without association of other beneficiaries;



- b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part v;
  - c. the public trustee; and
  - d. creditors.
56. Further, at the time of petitioning for the grant of letters of administration, the petitioner listed the following assets as having belonged to the deceased as at the time of his death:-
1. Plot No Suna East/Wasweta I/4364
  2. Plot No Suna East/Wasweta I/4366
  3. Pension in the ministry of public works.
57. The transfer of the parcels of land to third parties without the consent of all the beneficiaries was to the detriment of the deceased's estate.
58. The objector produced official searches of the following parcels that belonged to the deceased but were left out in the impugned succession proceedings:-
1. Kisumu/Kochieng/634
  2. Kisumu/Kochieng/737
  3. Kisumu/Kochieng/762
  4. Kisumu/Kochieng/4047
59. While this court agreed with the objector's argument that section 93 of the *Law of Succession Act* did not validate unlawful acts, it could not with certainty determine if the petitioner willingly failed to disclose all the deceased's assets because it is normal for beneficiaries of a deceased not to be aware of all his other assets at the time of lodging a petition for grant of letters of administration and hence the confirmation of grants after six (6) months to given an administrator sufficient time to collate a deceased's estate.
60. Having said so, after carefully considering the objector's affidavit evidence, which was uncontroverted and his written submissions and those of the petitioner, this court was persuaded to find and hold that the proceedings of obtain the grant of letters of administration were irregular and thus defective in substance as provided in section 76(a) of the *Law of Succession Act*.
61. This court thus came to the firm conclusion that the objector had proved that there was merit in revoking and/or annulling the grant of letters of administration that was issued to the petitioner herein as stipulated in section 76 of the *Law of Succession Act*.
62. Even so, the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process under rule 73 of the *Probate and Administration Rules*. The court was of the view that the objector's interests could be safeguarded by him being made as an administrator of the deceased's estate.
63. This court, however, found that it could not protect the interests of the third parties who purchased the parcels of land for the reason that the proceedings for obtaining the grant of letters of administration intestate were null and void ab initio.



## **Disposition**

64. For the foregoing reasons, the upshot of this court's decision was that the objector's summons for revocation and/or annulment of grant dated and filed on June 11, 2021 was merited and the same be and is hereby allowed in terms of prayer No (1) and (2) therein.
65. The grant of letters of administration issued herein on June 26, 1997 be and is hereby revoked but amended to reflect the change to the effect that the objector, Pamela Akinyi Nyago and the petitioner herein be the administrators of the deceased's estate.
66. In the interests of justice and pursuant to rule 73 of the *Probate and Administration Rules*, this court hereby orders the cancellation of any title, if at all, to parcel number Suna East/Wasweta I/4364, Suna East/Wasweta I/4366, Kisumu/Kochieng/225, Kisumu/Kochieng/254 and Kisumu/Kochieng/396 if they stand in the names of third parties and/or the petitioner and the registrar of lands be and is hereby directed to proceed accordingly.
67. For the avoidance of doubt, the ownership of the aforementioned parcels of land shall revert to the deceased for purposes of distribution of his estate in this cause so as not to disinherit the deceased's beneficiaries at the expense of third parties who acquired his properties on the basis of a grant of letters of administration intestate that had been obtained through defective proceedings.
68. Each party will bear its own costs of this application.
69. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF NOVEMBER 2022**

**J. KAMAU**  
**JUDGE**

