



REPUBLIC OF KENYA



KENYA LAW

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In re Estate of Hallon Okwaro Magaga (Deceased) (Succession Cause 11 of 2005) [2022] KEHC 16653 (KLR) (19 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 11 OF 2005**

JN KAMAU, J

DECEMBER 19, 2022

IN THE MATTER OF THE ESTATE OF HALLON OKWARO MAGAGA (DECEASED)

BETWEEN

MARY ASIKO OBJECTOR

AND

JOYCE OKWARO 1ST ADMINISTRATOR

ROSEMARY OKWARO 2ND ADMINISTRATOR

RULING

1. In her summons for revocation or annulment of grant dated and filed April 25, 2017, the Objector herein sought for orders that the Grant of Letters of Administration intestate made on September 9, 2008 be revoked and/or annulled on the ground that the same was obtained fraudulently by the making of a false statement or by the concealment from the court of other beneficiaries.
2. Her said Summons was supported by Supporting and Further Affidavits that she swore on April 25, 2017 and October 31, 2017 respectively. The said Further Affidavit was filed on October 31, 2017.
3. She averred that the impugned Grant was confirmed and issued to the 1st and 2nd Administrator on September 9, 2008. She asserted that she was the biological sister of the deceased and that they were both children of John Maganga Okwaro (deceased). She contended that the estate herein having devolved to the deceased herein from their deceased father, she was therefore a lawful beneficiary to the deceased's estate.
4. It was her further contention that her deceased father was polygamous and that distribution was done per house. She averred that Kisumu/Municipality Block 6/47(hereinafter referred to as the "subject property") was thus to be shared between her and the deceased herein which was never done. She admitted that she was allocated a posho mill from her deceased's father's estate at Apwoyo Market.



5. She stated that the 1st and 2nd Administrators never informed her of the Succession proceedings herein and that she only got to know of their existence through the proceedings of her deceased's father's estate to wit P & A No 109 of 1987 In the matter of the Estate of John Mganga Okwaro. She pointed out that the subject property did not form part of her deceased's father's estate and therefore wondered how the said subject property transferred to the deceased's name.
6. She denied ever having suggested that the said subject property be sold by way of public auction and urged this court to ignore the typographical error in the said Summons for Revocation and/or annulment of the Grant as there was no dispute as to who the administrator of the deceased's estate was.
7. In opposition to the said Summons, the 1st Administrator swore a Replying Affidavit on June 5, 2017 on her own behalf and on behalf of the 2nd Administrator. The same was filed on 9th June 2017. She also swore a Further Affidavit on November 22, 2017. The same was filed on even date.
8. She asserted that the subject property belonged to the deceased's father wherein after his death, a family meeting was held where it was unanimously agreed that the subject property would be allocated to the deceased herein as the sole proprietor. She added that during the deceased's lifetime he took a loan of Kshs 6,000,000/= with Kenya Industrial Estate and placed the subject property as security for the loan.
9. She contended that after the deceased passed on in 2004, his wife called for a family meeting on November 20, 2004 to discuss the way forward with regard to the said loan as the subject property was about to be sold by way of public auction. She stated that during the said meeting, the Objector did not show any interest in the said subject property and in fact advised her to let it be sold by public auction as there would be no loss to the family.
10. She contended that their mother struggled to prevent the said auction from taking place by asking for contribution from relatives and friends so as to pay the outstanding amount but the Objector did not take part in contributing towards the same. She added that in the year 2005, they instituted Succession proceedings to be made administrators of the estate of the deceased in which the Objector was aware of but she never raised any objection to the listing of the subject property as part of the deceased's asset.
11. She further stated that they only administered what belonged to the deceased which was included the subject property. She pointed out that after the death of the deceased's father, the deceased gave the Objector herein the posho mill at Apwoyo as an outright (sic) gift which she moved to Sinaga as she found Apwoyo Market not to have been conducive for posho mill business.
12. She explained that the deceased's father's estate was distributed in three (3) stages through part confirmation. The first confirmation was on October 19, 1988 and involved only two (2) properties. The second confirmation was on May 7, 2002 and involved forty one (41) properties wherein the subject property devolved to the deceased herein. She stated that the third confirmation was done on June 15, 2004 and involved five (5) properties.
13. She said that when the administrators of the estate of the deceased's father passed away, on September 30, 2016 the court appointed three (3) fresh administrators in P & A No 109 of 1987 In the matter of the Estate of John Mganga Okwaro with the Objector being one of the Administrators but that she did not move the court in the said Succession proceedings to redistribute the property and in particular to re-distribute the subject property. She pointed out that the Objector was therefore in the wrong forum and urged this court to dismiss her application with costs.
14. She added that the objector's summons was bad in law as she had not expressly stated which beneficiaries were concealed or what information amounted to false statement. She also stated that the



said Summons was incompetent because the name of the administrator shown in the said Summons and the Supporting Affidavit were different.

15. She was categorical that the Objector's intention was to delay justice as she had not shown any interest in the said property for the past thirty (30) years and that allowing the present application would not further the interest of the estate but scuttle and reverse gains that had been made by all other beneficiaries who had worked together with the common intention of settling the estate.
16. Cherere, J directed that the matter proceed by way of viva voce evidence. She took the evidence of the Objector and PW 2. When the matter came before this court on November 23, 2020, the parties herein asked this court to continue from where the Learned Judge had reached.
17. The objector's written submissions were dated and filed on May 16, 2022 while those of the Administrator were dated June 20, 2022 and filed on June 21, 2022. This Ruling is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

18. The Objector submitted that the fact that she did not file objection proceedings in P & A Succession Cause No 109 of 1987 *In the matter of the Estate of John Maganga Okwaro* did not bar her from challenging the acquisition of the subject property. She invoked section 40 of the *Law of Succession Act* cap 160 (laws of Kenya) and relied on the case of Meru High Court Succession Cause No 652 of 2016 *Estate of M'mboroki M'rachi (Deceased)* (eKLR citation not given) where it was held that in a polygamous family, the distribution of the intestate was in equal shares amongst the children of the deceased.
19. She was emphatic that being a sister to the deceased herein, she was entitled to an equal share of the assets the deceased acquired from their deceased father. She urged the court to annul the Certificate of Confirmation of Grant, cancel the transfers registered on the subject property and reconfirm the said Grant giving her fifty (50%) per cent share in the property.
20. On their part, the 1st and 2nd Administrators submitted part V of the *Law of Succession Act* sets out the order of priority in entitlement to a share in the estate of the deceased wherein priority is given to the surviving spouse, children of the deceased, parents and that in the event that the deceased was not survived by a spouse or child, other relatives follow thereafter.
21. They added that section 51(2)(g) of the said *Act* further requires the petitioner to disclose all surviving spouses and children of the deceased and the same is in mandatory terms.
22. They were emphatic that in this case, the deceased was survived by his wife and children who took part in the succession proceedings and according to part V of the *Act*, they were the deceased's rightful beneficiaries. They added that the Objector was a sister to the deceased and that the subject property herein had already been allocated to the deceased hence it no longer formed part of the estate of his deceased father.
23. They pointed out that the Objector never raised any objection to the allocation of the subject property from her late father's estate to the deceased herein despite having been aware of the succession proceedings and being one of the Administrators therein. It was their submission that if she was interested in having the subject property registered in her name, then the best forum for her objection was in P & A No 109 of 1987 *In the matter of the Estate of John Maganga Okwaro* and not in the present cause.



24. It was their case that the Objector had not met the threshold for revocation of grant as stipulated in section 76 of the [Law of Succession Act](#) and thus urged the court to dismiss her Summons for Revocation of Grant.
25. The Objector testified that the subject property was allocated to the deceased in the Succession proceedings of their deceased's father estate wherein she was an Administrator therein. She admitted that she did not challenge the Grant that was issued in the said Succession proceedings. Her evidence was that the deceased had promised her during his lifetime that he would give her half (1/2) of the subject property which was initially Parcel Number 510. However, she did not produce any evidence to prove that assertion.
26. Johnstone Ombima Okwaro (hereinafter referred to as "PW 2") corroborated her evidence. He confirmed that the subject property was registered in the deceased's name. He also stated that he did not have evidence to prove that the said Block 510 was the same as the subject property and that there was no consent from Commissioner of Lands to subdivide the said property.
27. Joseph Namasala Munyendo, Land Surveyor in the Nyanza region (hereinafter referred to as "PW 3") produced a Conversion List and stated that LR No 1148/501 was the same as land parcel known as Kisumu Municipality Block 6/47, the subject property herein, based on the Cadastal Plan No 64/70. He produced in evidence a Cadastal Plan and Index Map. On being cross-examined, he stated that he did not see LR No 1148/501 in the Objector's Further Affidavit filed on 31st October 2017.
28. In her defence, the 1st Administrator reiterated the averments of her Replying Affidavit and Further Affidavit. Her evidence was that there was a family meeting in which an agreement was reached on the distribution of the deceased's property. She told this court that the deceased gave the Objector a posho mill following a meeting but was not certain whether it was her right to be given a posho mill because it was an agreement between the Objector and the deceased herein. She denied that the deceased was holding the subject property in trust for the Objector herein.
29. It was evident from the affidavit and oral evidence that was presented during trial that the deceased's father's assets in P & A No 109 of 1987 [In the matter of the Estate of John Maganga Okwaro](#) were distributed in three (3) stages. It was also clear that whereas the Objector and PW 1 referred to the subject property having been originally LR No 1148/510, PW 3 testified that the subject property was originally LR No 1148/501, a fact that he reiterated when he was cross-examined.
30. The court did not find the discrepancy in the original numbers of the subject property to have been a pertinent issue herein as the same may very well have been an inadvertent error at the time when the Objector and PW 2 were testifying. Indeed, the discrepancy did not go to the root of this matter as this court's interest was to determine whether or not the deceased herein ever held the subject property, which had an original number, in trust for the Objector herein as she had contended.
31. Notably, the Objector did not produce evidence to demonstrate that the deceased had held the subject property in trust for her. In the three (3) Certificates of Confirmations that were issued in P & A No 109 of 1987 [In the matter of the Estate of John Maganga Okwaro](#), the subject property was not listed as part of the assets in that estate.
32. A perusal of the Grant of Letters of Administration Intestate in P & A No 109 of 1987 [In the matter of the Estate of John Maganga Okwaro](#) that was issued on 30th September 2016 showed that the Objector herein was an administrator. She did not file Objection proceedings in the said Cause to protest that the subject property had not been listed therein. She did not even seek to have the said Certificate of Confirmation rectified, if at all, to include the subject property in her deceased father's estate.



33. Failure to have sought and obtained orders for the subject property in her deceased father's estate to prove that the deceased herein was holding it in trust for her greatly weakened her case. Her silence meant that she had acquiesced to the manner in which her father's estate was distributed. She could not therefore purport to re-open the distribution of her deceased father's estate when the subject property had already been allocated the deceased's wife and a Certificate of Confirmation of Grant issued to that effect.
34. It is important to point out that there is no legal requirement that beneficiaries must share each asset of a deceased equally or that the allocation of assets must be of the same value. They can, however, agree that each beneficiary must get properties of the same value. However, unless a beneficiary renounces his or her right to inherit a deceased's property, it is sufficient if he or she is allocated an asset. Beneficiaries are at liberty to agree on the properties to be distributed to them.
35. Section 107 of the *Evidence Act* (cap 80 laws of Kenya) stipulates as follows:-
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
36. In addition, section 109 of the *Evidence Act* provides as follows:-
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
37. The fact that the Objector herein was allocated the posho mill and she did not adduce any evidence to support her assertions that the deceased herein was holding the subject property in trust for her persuaded this court to find and hold that she was indeed allocated her share in her deceased father's estate.
38. This court noted that the said posho mill was also not part of the assets in any of the Certificates of Confirmations leading this court to take the view that the beneficiaries of her deceased father's estate may have agreed on distribution of his properties without including them in his assets in P & A No 109 of 1987 *In the matter of the Estate of John Maganga Okwaro*.
39. It was evident that the Objector did not discharge her burden of proof regarding her assertions to the standards required by the law as required under section 107 and section 109 of the *Evidence Act*.
40. Going further, this court had due regard to the provisions of section 66 of the *Law of Succession Act* which state 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.
41. Section 39 of the *Law of Succession Act* further provides that:-
1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
 - a. father; or if dead
 - b. mother; or if dead
 - c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
 - d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
 2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.
42. The deceased herein was survived by his wife and children. As the sister to the deceased, the Objector ranked lower in the persons who could inherit a deceased's estate as can be seen in Section 39 of the Law of Succession. Her argument that she could inherit from the deceased's estate when his wife and children were alive was therefore rendered moot.
43. Notably, section 76 of the *Law of Succession Act* cap 160 (laws of Kenya) states that:-
- “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
 - iv. 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.”



44. 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 *Re: Estate of L A K – (Deceased)* [2014] eKLR.
45. After carefully considering the evidence on record and the respective parties' Written Submissions, this court found and held that the Objector did not prove her assertions as required by the law. It was thus not satisfied 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 as envisaged in section 76(b) of the *Law of Succession Act* as the Objector had contended.
46. This court was therefore not persuaded that there was merit in revoking the grant of letters of administration that was issued to the 1st and 2nd administrators herein.

Disposition

47. For the foregoing reasons, the upshot of this court's decision was that the objector's summons for revocation or annulment of grant dated and filed April 25, 2017 was not merited and the same be and is hereby dismissed.
48. The objector will bear the 1st and 2nd administrators' costs of this summons.
49. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER 2022

J. KAMAU

JUDGE

