



REPUBLIC OF KENYA



KENYA LAW
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**Oketch v Mawere (Succession Cause 5 of 2020)
[2025] KEHC 207 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
SUCCESSION CAUSE 5 OF 2020**

DK KEMEL, J

JANUARY 17, 2025

BETWEEN

KERINA OKETCH APPLICANT

AND

BARACK AWUOR MAWERE RESPONDENT

RULING

1. The Applicant/Objector's Summons dated 14/11/23 seek the following reliefs:
 1. Pending the hearing and determination of the Summons, this Court be pleased to issue a prohibitory order of injunction restraining the petitioners/respondent herein from disposing off, selling and/or appropriating the assets of Mawere Nyambara Alias Opiyo the deceased herein and more particularly land parcel number Sakwa/Maranda/1123, 1125, 1136 and Sakwa/Nyawita/1210, 1211 in any manner whatsoever and/or howsoever.
 2. The Court be pleased to revoke and/or annul the grant of letters of administration intestate issued to the Petitioner/Respondent herein Barack Awuor Mawere on 18.11.2020 and confirmed on 18.11.2020 in respect of the estate of *Mawere Nyambara Alias Opiyo vide Siaya HCC. Succession No. 5 of 2020*.
 3. Upon prayer 3 above being granted, this Court do order that the Applicant together with other family members do take out in a separate cause or be made in this cause, administrators of the estate of the late Mawere Nyambara Alias Opiyo.
 4. The Court be pleased to order that the register in respect of land parcel No. Sakwa/Maranda/1123, 1125, 1136 and Sakwa/Nyawita/1210 be rectified and the name of the Petitioner/Respondent herein be rescinded and/or deleted therefrom and the same be reverted and/or registered in the name of the deceased and do form part of the estate of the deceased herein.



5. Costs of this application be borne by the Petitioner/Respondent.
2. The application is premised on grounds inter alia; that the administrator did not disclose/include all the legal beneficiaries to the estate of the deceased; that the Objector herein is the 3rd wife and the widow to Mawere Nyambara Alias Opiyo but was not included as a beneficiary of the deceased; that there is discrimination on how the administrator is distributing the deceased's property as her two co-wives were given shares of their deceased husband's estate and that she was left out; that the Petitioner is misappropriating and/or abusing the assets of the deceased to the detriment of the objector/Applicant and other beneficiaries as he has subdivided part of the said estate without consent /inclusion of other beneficiaries; the Petitioner failed to disclose to this Court that he had disposed of part of the deceased's estate and misused the said funds in pretext of using the said monies amounting to up to Kshs 1,500,000/= for the purposes of succession of the said estate which monies he cannot account for.
3. The Applicant urges this court in the interest of justice to have the Grant of Letters of Administration issued to the Petitioner be revoked and/or annulled. The application is supported by her affidavit sworn on even date. She has requested this Court to recall all the titles registered in the deceased's name from the Petitioner so that they can sit down and agree on a fresh mode of distribution and appoint other administrators who are ready to distribute the property equally among all the beneficiaries.
4. In opposing the application, the Petitioner has filed his replying affidavit sworn on 5th December, 2023 wherein he avers that the application is res judicata as the same Applicant filed a similar application dated 8th December, 2021 seeking revocation of the Grant on similar grounds now in the instant application. He avers that when the application came up for hearing, Lady Justice Aburili directed the parties to mediate over the matter. He avers that a meeting was set up involving all the beneficiaries including the Applicant and advocates for the Applicant and Petitioner on 5th February, 2022 whereby a consensus was reached proposing amendments to the mode of distribution. He avers that a rectified grant was issued on 21st November 2022. He avers that the Applicant should not raise any complaint since she was present in the discussions that led to the grant being rectified. He avers that the grounds advanced by the Applicant do not meet the threshold in Section 76 of the *Law of Succession Act* to warrant revocation of the grant. He avers that the Applicant is keen to ensure that the estate is not wound up and that the same has made him to come back seeking the court to compel the Applicant to sign documents for the estate to be wound up, thus the application is an abuse of the court process and only aimed at delaying the matter. He avers that the application should be dismissed with costs.
5. The application was canvassed by way of written submissions. The Applicant/Objector submits that she is challenging the process of obtaining the grant issued by this Court on 18/11/2020 and confirmed on 18/11/2020 and the pleadings as filed in this Court. According to the Applicant, she is a wife of the deceased but she was left out of the whole succession process with the aim of disinheriting her as a widow and as beneficiary as defined under Section 29(a) of the *Law of Succession Act*. The Applicant submits that she has been denied her entitlements to the estate contrary to the provisions of Section 35(1) (a) and (b) of the *Law of Succession Act*. It is submitted that no individual has challenged the legitimacy of the Applicant as being a widow to the deceased. The Applicant submits that she is entitled to benefit from the estate as per the provisions of Section 40(1) and (2) of the *Law of Succession Act*. The Applicant submits that the conduct of the Petitioner is illegal and a total disregard of the law and can only be viewed as an abuse of the judicial system. The Applicant urges this Court to revoke and or annul the grant or in the alternative supervise a proper mode of distribution to ensure that the Applicant benefits from the estate of her late husband.
6. The Petitioner submits that the application is res judicata since the Applicant together with other objectors filed a similar application dated 8th December 2021 seeking revocation of the grant. According



to the Petitioner, the application is similar to the instant application to the extent that they are all premised on the common ground that the Applicant was not provided for in the mode of distribution. The Petitioner submitted that the Court directed parties to go for mediation whereby the Applicant and Petitioner were present and a report that was brought back in court led to the rectified grant being granted. Reliance is placed on Christopher Kenyariri vs Salama Beach (2017)eKLR and in IEBC vs Maina Kiai & Others, Nairobi CA Civil Appeal No.105 of 2017(2017)eKLR on the essential ingredients to be satisfied when determining whether a matter is res judicata. The Petitioner submits that the Applicant signed in the Petition for Letters of Administration, the consent and the Summons for Confirmation of Grant. According to the Petitioner, the Applicant was present in the meeting that led to the rectification of the Grant. It is submitted that as per the mode of distribution, all the beneficiaries of the deceased as provided for including the Applicant have been catered for. The Petitioner submits that the only widow with individual shares is Selina Aketch Mawere because she did not give birth to any child but the rest of the widows share with their children as per the rectified grant. The Petitioner asserts that the Applicant has not produced any evidence of misappropriation and disposal of part of the deceased's estate to the detriment of the beneficiaries. According to the Petitioner, he has attached searches for parcels that transmission has been done and as per the rectified grant. The Petitioner submits that the Applicant has not been cooperating with the administrator to ensure the transmission of the deceased's estate is done prompting the Petitioner to file the applications to compel the Applicant to sign the relevant documents for transmission. According to the Petitioner, the Applicant ought to have filed an Affidavit of Protest and not a summons for Revocation since her contention is about distribution. Reliance is placed on In Re Estate of Joseph Mutua Munguti (Deceased) [2018] eKLR. The Petitioner asserts that the application and the grounds adduced do not comply with the requirements of Section 76 of the *Law of Succession Act*, thus it should be dismissed with costs.

7. Having considered the evidence on record and rival submissions, i find that the issues for determinations are:
 - i. Is the application res judicata?
 - ii. Is the Applicant's application incompetent?
 - iii. Whether the grant of representation and certificate of confirmation of grant were fraudulently issued.
 - iv. Whether the Grant should be revoked and/or set aside.
 - v. Whether prohibitory orders of injunction should issue restraining the implementation of the certificate of confirmation of Grant dated 22/6/2022.
8. On the issue of res judicata, the Petitioner contends that the application is res judicata as the same Applicant filed a similar application dated 8th December, 2021 seeking revocation of the Grant on similar grounds now in the instant application. The Petitioner avers that when the application came up for hearing, Lady Justice Aburili directed the parties to mediate over the matter. The Petitioner submitted that the Applicant was present and a report that was brought back in court led to the rectified grant being granted. According to the Petitioner, the application is similar to the instant application to the extent that the applications are all premised on the common ground that the Applicant was not provided for in the mode of distribution.
9. The Applicant has not raised any objection to this ground that the application is res judicata but is challenging the process of obtaining the grant issued by this Court on 18/11/2020 and confirmed on 18/11/2020 and the pleadings as filed in this Court.



10. Section 7 of the *Civil Procedure Act* provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

11. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others*, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR the Court stated that;

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”.

12. In *Nancy Wanja Gatabaki, Josephine Beatrice Gathoni & Esther Susan Wangari Gatabaki suing as ad litem representatives of Samuel Mundati Gatabaki (Deceased) & Another vs Muga Developers Limited & 11 Others* [2020] eKLR, where D.S Majanja J. held as follows:

“27. The Plaintiffs seem to suggest that the Consent Order is not a judgment or a determination of the suit on its merits. A consent order is an order whose terms are settled and agreed to by the parties and having been sanctioned by the court, the consent order has the effect of res judicata in respect of the matters dealt with...”

13. The fact that the Petitioner submitted that the Applicant together with other objectors filed a similar application, this application cannot escape the finding that it is res judicata.

14. In the case of *Omondi vs National Bank of Kenya Limited and Others* [2001] EA 177 the court held that ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ The Court cited Kuloba J., in the case of *Njangu vs Wambugu and Another* Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata’

15. The applications are seeking for revocation of the grant on the ground that that the Applicant was not provided for in the mode of distribution. The Applicant has not challenged the Petitioner’s claim that the parties herein went for mediation leading to a rectified certificate of confirmation of grant wherein the concerns of the Objector were fully catered for. The silence by the Objector is a clear sign that



she is aware that her present application is res judicata. The Applicant ought to cooperate with the Petitioner so that the process is concluded but not to rock the boat from within just to checkmate the Petitioner for having not recognized and included her as a widow in the administration of the estate of the deceased. I am satisfied that the Applicant's application is res judicata.

16. On the second issue, the Petitioner asserts that the Applicant ought to have filed an Affidavit of Protest and not summons for Revocation since her contention is with regard to distribution. According to the Applicant, she is challenging the process of obtaining the grant issued by this Court on 18/11/2020 and confirmed on 18/11/2020 and the pleadings as filed in this Court. The court notes that the Applicant's application is premised on grounds inter alia that there is discrimination on how the administrator is distributing the deceased's property as her two co-wives were given shares of their deceased husband's estate and she was left out. In her supporting affidavit, she avers that this Court should recall all the titles registered in the deceased's name from the Petitioner so that they can sit down and agree on a fresh mode of distribution and appoint other administrators who are ready to distribute the property equally among all the beneficiaries.
17. Khamoni, J. in *Re Estate of Gitau (Deceased)* [2002] 2 KLR 430 expressed himself as hereunder:

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”
18. In view of the foregoing observations, it is my finding that the application as filed is incompetent.
19. On the third issue, the Petitioner submitted that the Applicant signed in the Petition for Letters of Administration, the consent and the Summons for Confirmation of Grant. According to the Petitioner, the Applicant was present in the meeting that led to the rectification of the Grant. The Petitioner asserts that the Applicant has not produced any evidence of misappropriation and disposal of part of the deceased's estate to the detriment of the beneficiaries. On her part, the Applicant submits that as a wife of the deceased, she was left out of the whole succession process with the aim of disinheriting her as a widow and as beneficiary as defined under Section 29(a) of the *Law of Succession Act*. The Applicant urges this Court to revoke and/annul the grant or in the alternative supervise a proper mode of distribution to ensure that the Applicant benefits from the estate of her late husband.
20. Section 76 of the *Law of Succession Act* provides 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.”

21. While expounding Section 76, the court In re Estate of Prisca Ong’ayo Nande (Deceased) [2020] eKLR stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

22. Upon perusing the Petition for Letters of Administration, the consent and the Summons for Confirmation of Grant, the court notes that the Applicant signed the pleadings and even participated in the mediation process leading to the rectification of the grant. It is clear that the matter is at the tail end and thus the Applicant should cooperate with the Petitioner so that the distribution of the estate is finalized and that all the beneficiaries receive their entitlements under the estate. Having arrived at this finding, then it is my view that the Applicant’s request for revocation of grant as well as injunction orders against the Petitioner and cancellation of titles must be rejected. It is clear that the Objector/Applicant herein is out to scuttle and delay the process of winding up the issue of the estate. It is instructive that the Petitioner had earlier in the proceedings sought to compel the Applicant herein to sign the mutation forms so as to finalize the transmission of the titles and in default the Deputy Registrar of this court would do so on her behalf. It is thus my considered view that the Grant issued to the Petitioner should not be revoked and that the reliefs sought by the Objector/Applicant are not merited in the circumstances.



23. Accordingly, the Applicant/Objector Summons dated 14/11/23 lacks merit. The same is dismissed with no order as to costs.

It so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF JANUARY, 2025.

D. K. KEMEI

JUDGE

In the presence of:

N/A M/s Omwengafor Applicant/Objector

Ooro F for Petitioner/Respondent

MboyaCourt Assistant

