



**In re Estate of Dornicus Odhiambo (Deceased) (Probate & Administration
E001 of 2023) [2025] KEHC 2007 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
PROBATE & ADMINISTRATION E001 OF 2023**

DK KEMEL, J

FEBRUARY 21, 2025

IN THE MATTER OF THE ESTATE OF DOMNICUS ODHIMABO (DECEASED)

BETWEEN

FREDRICK ODHIAMBO ODHIAMBO OBJECTOR

AND

JENIPHER ACHIENG ODHIAMO PETITIONER

RULING

1. The Objector/Applicant herein has filed summons for revocation of grant dated 26th July, 2024 pursuant to Section 76 of the *Law of Succession Act*, Rule 44 and 73 of the Probate and Administration Rules seeking the following orders:
 - i. That the grant issued to the Petitioner herein on 16th May 2024 be revoked.
 - ii. That the Honourable Court do issue a new grant appointing the Objector and the Petitioner herein as administrators.
 - iii. That the costs of the application be provided for.
2. The application is supported by the grounds set out on the face thereof and the annexed affidavit of the Objector/Applicant sworn on even date. The Objector's gravamen is inter alia; that the grant was obtained fraudulently by the Petitioner through the making of false statements and or concealment of material facts of the case; that the Applicant was not aware that this Succession Case had been filed without his consent as a beneficiary being obtained; that the Petitioner did not give notice to the Applicant of his intention to apply for letters of Grant of Letters of Administration Intestate yet he ranks in the same degree or in priority to file for letters of Grant; that the instant Succession was filed without Form 38 which is mandatory where the estate has several beneficiaries; that the Succession was filed wrongly and should be struck out; that the Applicant is a son of the deceased born out of wedlock;



and therefore the Petitioner should not be allowed to be the sole administrator of the estate since there is a high possibility that she might disown him as a son of the deceased as she has done in the past; that to be fair and just, a fresh grant should be issued in the name of both the Petitioner and the Applicant herein as joint administrators of the estate.

3. The Applicant upon being served with a replying affidavit by the Petitioner, he filed a further affidavit sworn on 11th November, 2024 wherein he averred inter alia; that the family had a meeting on 23/4/2022 to discuss over the estate of the deceased which is captured in page 1 and 2 of the minutes annexed by the Petitioner; that the last page of the family minutes annexed by the Petitioner are unknown to him; that the person who prepared the minutes one Yonah Odhiambo Nyawir confirmed that the alleged last part of the minute does not form what was discussed and that the said Yonah Odhiambo Nyawir has sworn an affidavit confirming the true state of affairs; that the last page of the family minutes are meant to mislead the court regarding the appointment of the Petitioner as the administrator and the proposed distribution; that he did not sign any consent as alleged by the Petitioner; that no prejudice will be occasioned to the Petitioner if the Objector is made a co-Administrator.
4. The application was vehemently opposed by the Petitioner vide an affidavit sworn on 28/10/2024 wherein she averred inter alia; that all the beneficiaries met at Kajulu in Kisumu to discuss on the distribution of the estate and that the minutes were signed by all those who attended including the Objector herein; that the application filed by the Objector is mischievous, malicious, and abuse of the court process; that the family had agreed to appoint the Petitioner as the sole administrator; that the beneficiaries of the estate signed all the requisite documents at the office of the advocate and that Form 38 was duly signed and was filed. That it is surprising that Form 38 is now missing in the Court file; that the Objector's claim is that he was not aware of this succession is misleading since he was present during the family meeting when the Petitioner was mandated to file; that she has never disowned the Objector as alleged and that his about-turn in seeking to be added as an administrator is an afterthought and full of malice and intended to frustrate succession process; that the Petitioner being a surviving spouse is entitled to apply for letters of administration; that the Objector has filed an application to advance his bargain and selfish interest; that the missing Form 38 in the court file is an administrative issue which can be sorted by the court; that no prejudice will be suffered by the Objector if the Objector's application is dismissed.
5. The application was canvassed by way of written submissions. Both parties duly complied.
6. The Applicant's submissions are dated 18th November, 2024. The Applicant raised one issue for determination namely whether the Objector has proved the grounds for revocation of grant. Learned counsel cited the provisions of Section 76 of the Laws of Succession Act which are as follows:

“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 an 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 that 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 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 paragraph (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.

7. It was submitted that the Objector has sufficient grounds to seek that the Grant be revoked for the simple reason that the Grant was defective in substance; further reliance was placed in Rule 26 of the Probate and Administration Rules which provides as follows:

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.
3. Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.

It was further noted that the provision was not complied with. As admitted by the Respondent in his further affidavit consent form 38 was never filed; that the family members did not resolve in the meeting for the Petitioner to be the administrator of the deceased's estate as it has been confirmed that the last page of the minute captured in the further affidavit was forged; that the Respondent has tried to give an explanation that consent form 38 was filed but the same is missing in the court file; the biggest question is, did the document delete itself in the Judiciary filing system? Or did the advocate who prepared the documents fail to retain his office copy? Clearly the allegation does not make sense and therefore we pray that the court do disregard the said argument. As it stands, consent of the other beneficiaries was not sought by the Petitioner/ Respondent as required by rule 26 when filing the petition and hence the it is the objector's prayer that the grant issued to the Petitioner be revoked and a new grant be issued in the joint names of the Petitioner and the Applicant. It further relied on the case of *Nanzala v Mulunda (Succession Appeal 1 of 2023 KEHC 2829 (KLR) (24 March 2023)* where Justice W. M. Musyoka held:

“I note that the trial court restricted itself to the case of appellant, and did not consider whether the law and the rules governing the process of obtaining the grant were complied with, with respect to the other persons who were entitled



to administration equally with the Respondent. The deceased had 11 children, being 5 sons and 6 daughters, going by the Chief's letter. All the 11 children had a right to administer the estate of their late father which will mean if only one of the 11 sought representation, he had to comply with rule 26 by notifying the other 10 of his petition, providing evidence of the same, by way of renunciation, consent or affidavit. He further states that the lower court file was perused keenly and that no such compliance was met and failure to comply with it renders the process defective. Compliance would have obviated the sort of challenges that the appellant is now mounting against the process, that the impression created is that the Respondent proceeded to obtain representation to the estate, alone without notifying and involving the other 11 children of the deceased, contrary to the law, which envisages an all-inclusive process."

8. The Petitioner's submissions are dated 2nd December, 2024. Learned counsel for the Petitioner submitted inter alia; that the failure to fill form P&A 5 to provide consent by the children is not fatal and is not a ground for revocation of grant; that the minutes of 23rd April 2022 are correct; that anything to the contrary should be proved by the Objector who has challenged the same; that the Petitioner being the person who ranks higher in priority, was procedurally nominated by the beneficiaries and that the objector signed the minutes page 1; that the clamour by the Objector to be made as an administrator is without basis since the Objector has not obtained the consent of other beneficiaries and is now using the court to get appointed; that the objector is the architect of the delay to the completion of the administration process; that the Objector has not advanced any convincing reasons for the grant of the orders sought; that the application should be dismissed with costs.
9. I have considered the application together with the rival affidavits as well as submissions. The issue for determination is whether the application has merit.
10. Revocation of grants is found in Section 76 of the [Law of Succession Act](#). The same provides as follows:

“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 an interested party or of its own motion. -

- f. That the proceedings to obtain the grant were defective in substance;
- g. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to that case;
- h. 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;
- i. That the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - a. To apply for confirmation of grant within one year from the date thereof, or such longer period as the court order or allow; or



- b. To proceed diligently with the administration of the estate; or
- c. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or
- j. That the grant has become useless and inoperative through subsequent circumstances.

“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;

11. It is noted that the Objector/Applicant’s grouse with the Petitioner is that the requisite forms in support of the petition for grant of letters of administration namely Forms P & A 5 and 38 have not been filed as the same should contain the consents of the beneficiaries which authorizes her to proceed as an administrator of the estate of the deceased. Indeed, those forms appear not to have been filed by the Petitioner. The issue that arises is whether the failure to file those documents invalidates the grant that has been issued to the Petitioner. It is not in dispute that the family of the deceased held a family meeting on the 23/4/2022 wherein they discussed on two issues namely: the appointment of the Petitioner as the administrator and the distribution of the estate. The minutes which have been annexed by the Petitioner confirms that all the beneficiaries duly signed against their names signifying their consent. It is not in dispute that the Objector herein was one of those in attendance and duly signed the family minutes. Other than the issue of the forms, the Objector seeks to be made a co-administrator to the estate. Looking at the discrepancy on the issue of the forms, it is my considered view that the anomaly does not go to the root of the succession and that the same is curable under Rule 73 of the Probate and Administration Rules which provide that nothing shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is noted that this matter involves one family and there is need to prevent a situation where issues are polarized as this will antagonize the parties and thereby delay the conclusion of the succession cause. It is in the interest of the parties to work together towards the distribution of the estate as this is the sole duty of the court. The issue of non filing of the requisite forms can be sorted by directing the Petitioner to proceed and file the same albeit out of time



as no prejudice will be caused to the Objector. The other issue of the Objector seeking to be made a co-administrator on the grounds that he is likely to be sidelined by the Petitioner, I find the same not to be a serious issue since the interest of the Objector and all other beneficiaries is about the distribution of the estate. The chief's introductory letter issued to the Petitioner has clearly mentioned all the names of the beneficiaries including the Objector herein. Further, in the family minutes of 23/4/2022, the Objector's interest is well catered for. I find the Objector's claim that the Petitioner is likely to throw him under the bus not convincing as it is clear from the family minutes that the Objector's interest has been catered for as well as other beneficiaries. Should the Objector feel that the distribution is not agreeable to him, he is at liberty to file the requisite affidavit of protest together with his proposed schedule of distribution if need be. It is instructive that the petitioner has already filed summons for confirmation of grant dated 13/8/2024 which is pending directions. Once directions are taken over the same, the Objector will have the opportunity to respond to the same. It would appear to me that the Objector herein is out to checkmate the Petitioner in these proceedings. I find that is not necessary because the interest of the parties is the distribution of the estate so that every beneficiary gets the entitlements under the estate. That should be the goal of the parties herein. The claim by the Objector that the Petitioner has intentions to disown him on the ground that he is a child born out of wedlock is not convincing because his name has been captured on the chief's letter as a beneficiary and further the family minutes of 23/4/2022 has his name as one of the beneficiaries. Therefore, it is not necessary that the Objector must become an administrator in order for him to be considered in the estate.

12. Flowing from the foregoing observations, it is appropriate for the parties to proceed with the pending summons for confirmation of grant so that the estate can be distributed. Allowing the present application will further delay the conclusion of the matter.
13. In the result, I find the Objector's summons for revocation of grant dated 26/7/2024 lacks merit. The same is dismissed with no orders as to costs. The parties are now directed to set down the summon for confirmation of grant dated 13/8/2024 for hearing as a matter of priority.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 21ST DAY OF FEBRUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

N/A Ooro F.....for Objector/Applicant

Onyata.....for Petitioner/Respondent

Ogendo.....Court Assistant

