



**In re Estate of Joshua Fredrick Ogola (Deceased) (Succession Cause 5 of 1982) [2025] KEHC 1892 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1892 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 5 OF 1982  
JRA WANANDA, J  
FEBRUARY 21, 2025**

**IN THE MATTER OF THE ESTATE OF JOSHUA FREDRICK OGOLA (DECEASED)**

**BETWEEN**

**MILCA JEPKOECH OGOLA ..... PROTESTOR**

**AND**

**TOM FELIX OGOLA ..... 1<sup>ST</sup> ADMINISTRATOR**

**THOMAS ODHIAMBO OGOLA ..... 2<sup>ND</sup> ADMINISTRATOR**

**DICKSON OMONDI OGOLA ..... 3<sup>RD</sup> ADMINISTRATOR**

**RULING**

1. This Succession Cause filed 43 years ago in 1982 was long concluded but keeps “popping back” thanks to the numerous successive Applications being filed herein every now and then. Now before the Court for determination, the latest in a series of Application filed over the years, is an Affidavit of Protest said to be challenging a Confirmation of Grant concluded in this matter in the year 2016, itself 8 years ago.
2. This is a very old file but from what I can decipher, the deceased, Joshua Fredrick Ogola, died intestate on 9/10/1981 at the age of 51 years old. He was alleged to have been a polygamous man who had about 7 wives and left behind over 40 survivors. Thereafter, pursuant to the Petition filed herein on 13/05/1982 through Messrs A.G.N. Kamau & Co. Advocates, a Grant of Letters of Administration in respect to his estate was issued on 11/08/1992 to one Peter Adoyo Ogola described as the eldest son of the deceased, as the sole Administrator, and which Grant was then confirmed on 1/11/1999. By virtue thereof, a portion measuring approximately 102.5 acres of the parcel of land known as L.R. No. 11041/Growel Farms Ltd, which portion was said to be the share of that parcel of land owned by the deceased, as a shareholder in the company owning the parcel of land, was distributed amongst about 45 beneficiaries, and also some portions reserved for settlement of some expenses.



3. Subsequently however, the Cause then degenerated into protracted and lengthy litigation involving and arising from disagreements between family members, alleged purchasers of portions of the said property and other claimants. Several Applications seeking, inter alia, revocation of the Grant, rectification, review of the distribution, re-distribution, amendments to the Grant, and replacement of deceased beneficiaries and/or substitution of parties, were regularly and consistently filed.
4. Of relevance to this Ruling however is that on 11/09/2016, the said Peter Adoyo Ogola (then the sole Administrator) having reported to have died on 13/10/2007, the current 3 joint Administrators, namely, Tom Felix Ogola, Dick Omondi Ogola and Thomas Odhiambo Ogola, were appointed to take over the administration of the estate. Thereafter, the estate was on 31/10/2016, redistributed amongst 6 beneficiaries and a fresh Certificate of Confirmation issued. There is however no mention of the fate of all the other beneficiaries who had been listed in the initial Confirmation of Grant given earlier on 1/11/1991.
5. Be that as it may, subsequently, on 21/02/2019, the distribution was reviewed further ostensibly to provide for road reserves that had been overlooked in the earlier Grant, and the Certificate of Rectification of Grant issued on 28/03/2019. It is the above re-distribution conducted on 31/10/2016 as read with the Rectification done on 21/10/2019 as aforesaid, that seems to have triggered the current Protest filed by one Milca Jepkoech Ogola Adoyo, the subject of this Ruling.

#### **Affidavit of Protest**

6. The Affidavit of Protest is filed through Messrs Mukabane & Kagunza Advocates. In the Affidavit, the Protester deponed that she is a daughter-in-law of the deceased, Joshua Fredrick Ogola, being a widow of a son of the deceased, the initial Administrator, the late Peter Adoyo Ogola, and that she is also his legal representative. She deponed that she is opposed to the Confirmation of Grant that was conducted on 31/10/2016 because it prejudices the heirs and disinherits a large proportion of the estate herein, including her late husband, her children and herself. She then deponed that at the time of his death, the deceased left behind 6 dependents (I notice the names given are the same 6 listed in the impugned Certificate of Confirmation), that however, not all beneficiaries consented to the mode of distribution adopted by the Court. According to her, the Petition for Letters of Administration was secretly and fraudulently filed without her knowledge or consent of all beneficiaries, included strangers as beneficiaries, and also failed to disclose all properties of the estate. She urged further that the Petition failed to disclose that her late husband, Peter Adoyo Ogola, was the son of the deceased and thus a beneficiary, that she learnt of these proceedings when strangers started laying claim to properties that were being utilized by her late husband, that the Administrators have been intermeddling with the estate by wasting and secretly selling estate land to third parties, including to one Vitalis Kibiwott Ngelechei, and leasing other portions, and that she craves to be appointed a co-Administrator of the estate of the deceased to protect the estate of her late husband.
7. She urged further that she should be included in the distribution, that her late husband did not consent to the distribution, there is need to take accounts and all assets to be included, and that the current Administrators are unfair, discriminatory and unacceptable to majority of the beneficiaries. In conclusion, she deponed that she should be declared to be entitled to a share of the estate and that the Certificate of Confirmation of Grant be amended to apportion to her a share of 32.5 acres of the property.



## **Administrators' Replying Affidavit**

8. In response to the Affidavit of Protest, the 3 Administrators each handed over to the Court separate "Replying Affidavits" when this matter came up for taking of further directions on 8/10/2022. I will say more about these Affidavits in a little while.
9. The 1<sup>st</sup> Administrator, Tom Felix Ogola, in his Affidavit sworn on 29/05/2024 and filed in person, deponed that his late brother, Peter Adoyo Ogola, was the Administrator of the estate herein since 1982, and settled on the property herein till his demise in 2007. He then deponed that the earlier distribution as relates to Peter Adoyo Ogola was made in error as a result of false information that Peter Adoyo Ogola had sold 14 acres forming part of the land, which information turned out to be untrue. According to him therefore, the distribution adopted was not fair or accurate as it locked out the Protester. He added that the late Peter Adoyo Ogola had been allocated 32.5 acres and 22.5 acres held in trust for purported purchasers who turned out to be non-existent, and which portion is being occupied by third parties. From this narrative, it appears, though not very clearly, that the 1<sup>st</sup> Administrator is supporting the Protester's case.
10. As regards the 2<sup>nd</sup> Administrator, Thomas Odhiambo Ogola, upon perusing the "Replying Affidavit" that he handed over to the Court as aforesaid, and which indicates to have been drawn by Messrs G.O. Obudho & Co. Advocates, I note that it is neither commissioned nor dated. It also does not appear in the Judiciary Case Tracking System (CTS) as required under current rules and procedure, and does not, at least, even bear the Court stamp. For the said reasons, I will not consider it, and I proceed to expunge it from the record.
11. In respect to the 3<sup>rd</sup> Administrator, Dickson Omondi Onyango, I note that it is a complete replica, word by word, of the Replying Affidavit sworn by the 1<sup>st</sup> Administrator. Upon perusing the same however, I note that, although it is sworn and commissioned on 29/05/2024, it, too, does not appear in the CTS and neither does it also, at least, bear the Court stamp. For similar reasons as above, I will also not consider it, and I similarly expunge it from the record.

## **Hearing of the Protest**

12. When the matter came up in Court on 22/7/2024 for the taking of initial directions, it was agreed that the Protest would be canvassed by way of written Submissions. However, when the matter came up again on 8/10/2024, the Administrators informed the Court that they would not be filing any Submissions afterall. On his part, the Protester's Counsel filed his Submissions dated 3/10/2024.

## **Protester's Submissions**

13. Counsel for the Protester, after wholly repeating and reproducing the same contents of the Supporting Affidavit, submitted that there are two angles to the Protest, the first being that the Protester and her children are entitled to a share of the estate of the deceased in their respective capacities as daughter-in-law and grandchildren, and the second, that they are in line, as heirs, through the late Peter Adoyo Ogola. He then introduced a fresh fact, not pleaded in the Protester's Affidavit, that the Protester, at the time of her wedding, was given 10 acres by the deceased. He added that the portion that is due to the Protester's late husband is 22.5 acres, but that the same was, instead, allocated to one Vitalis Kibiwott Ngetich, who is a stranger to the estate of the deceased, who is not entitled to any share from the estate. He submitted further that the 2<sup>nd</sup> Administrator has not filed any response to the Protest and that by virtue of Section 107 of the *Evidence Act*, the Protest is uncontroverted. He cited various authorities in support of this contention. Regarding the right of the Protester (as daughter-in-law) and her children to inherit, he cited Section 66 of the *Law of Succession Act* and also various



authorities. He then reiterated that the Protester was never consulted nor her consent sought to the mode of distribution. He urged further that the Protester and her children also qualify as “dependents” under Section 35 of the Act.

### Determination

14. The issue for determination herein is “whether the Protester has made out a case to be recognized as being entitled to share in the estate of her father-in-law herein, and thus, whether the distribution and confirmation of the Grant conducted herein on 31/10/2016 should be set aside and the estate re-distributed”.
15. It is evident that the Affidavit of Protest is filed to challenge and/or seek the setting aside of the order made herein on 31/10/2016 whereof the Grant herein was confirmed and the estate distributed. What therefore the Protester is technically seeking is re-distribution of the estate and which, she prays, should include her as the legal representative of her late husband (son of the deceased) and also by virtue of being a daughter-in-law of the deceased.
16. The law behind the filing of a Protest in Succession matters and the effect thereof, is contained and expounded upon in Rule 40(6) of the Probate and Administration Rules, as read with Rule 40(1) thereof, which provide as follows:  

“40. Application for confirmation of grant

  - (1) Where the holder of a grant which has not been confirmed seeks confirmation of the grant he shall apply for such confirmation by summons in Form 108 in the cause in which the grant was issued, supported by an affidavit in Form 8 or 9 exhibiting the grant together with an estate duty compliance certificate or other satisfactory evidence that no estate duty is payable and setting out the full names of the deceased person to whose estate the grant relates, and he shall satisfy the court that no application under Part III of the Act is pending.  
.....
  - (6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.”
17. From the foregoing, it is clear that the filing of a Protest is an avenue that only arises during Confirmation of Grant proceedings. In other words, an Affidavit of Protest is to be filed where a person is challenging a Summons for Confirmation of a Grant. Is that therefore the case herein?
18. In this case, as aforesaid, the initial Petitioner who filed this Cause in the year 1982 and who was then 10 years later, in the year 1992, appointed the sole Administrator of the estate, was the Protester’s husband, the late Peter Adoyo Ogola. He is the same one who then caused or applied for the Confirmation of the Grant that was conducted in 1999. It is after he died in the year 2007, that the current Administrators took over.
19. It is therefore evident that Confirmation of Grant proceedings was initially conducted and finalized in this matter on 1/11/1999 when the said Peter Adoyo Ogola was still alive and was the sole Administrator. As further stated, after his death, a fresh Confirmation of Grant proceedings was conducted and finalized on 31/10/2016, upon which a fresh Certificate was issued. This Certificate of Confirmation of Grant was then later rectified on 8/03/2019. To this extent therefore, it is clear that, as regards the Affidavit of Protest, the Court is long functus officio. The “horse bolted” a long time ago.



20. If therefore the Protester is seeking the remedy of re-distribution of the estate, what she needed to do was to apply for Revocation of the Grant, or for some sort of Review, or even lodge an Appeal, not by filing an Affidavit of Protest. That stage of “protest” was long passed and the door closed when the Grant was confirmed on 31/10/2016.

21. In ruling as above, I find company in the decision of A.K. Ndungu J, made in the case of In re the Estate of Simon Kariuki Maina (Deceased) (Succession Cause 3 of 2020) [2024] KEHC 9781 (KLR) (25 July 2024) (Ruling). Faced with a similar situation as the one herein, he held as follows:

“

“23. The application is also beset with legal headwinds in that there is no jurisdiction conferred on this court by law to entertain a protest in a succession cause after the confirmation of grant.

24. Protests are provided under Rule 40 of the probate and administration Rules which is couched in the following words;

.....

25. My reading of the law clearly sets out the lodging of a protest as the only legal avenue through which a party can oppose confirmation of a grant and this is before, not after confirmation of grant.

26. The only recourse for a party aggrieved with the confirmation of a grant is to seek revocation of the grant or to lodge an appeal. ....” (emphasis mine)

22. In light of the foregoing, I will strike out the Protest, rather than dismiss it.

23. Having found as above, I could have still, nonetheless, perhaps provided closure on the matter by also interrogating the claim on merits. I will however not do so. This is because the Protester may possibly wish to return to Court with a competent Application. Commenting on the merits of her claim may therefore prejudice the Application that may be brought subsequently. I also consider that I have expunged the “Affidavits” filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators and which means that I do not have the benefit of their side of the story. It is also not very clear whether the Administrators are in support of the Protester’s claim or not. They have not come out expressly. In view thereof, if a fresh competent Application is filed, the Administrators may, in response thereto, also wish to file proper Affidavits deponed with clarity.

24. There is a further reason why I will desist from commenting on the merits of the Application. My understanding of the Protester’s prayer is that one Vitalis Kibiwot Ngelechei, one of the beneficiaries listed in the Certificate of Confirmation herein, be dispossessed of the 22.5 acres of the property allocated to him vide the Certificate, and that the same be, instead, re-allocated to her (Protester). Under the rules of natural justice, the said one Vitalis Kibiwot Ngelechei, no doubt needs to be notified of the claim, and be also invited to respond to the prayer made or participate in the proceedings. Litigating on the share long allocated to him without his knowledge is against rules and procedure. Unfortunately, I have not come across any evidence to demonstrate that he has been served with any notice to respond to the claims made against him. Apart from the said Vitalis Kibiwot Ngelechi, I have also not come across any evidence that the rest of the beneficiaries were also served. Being named as beneficiaries, they may be affected parties.



25. For the said reasons, I will refrain from commenting on the merits of the Protester's claim lest I prejudice or pre-judge proceedings that may still be brought here.
26. One issue that may I wish to touch on before I pen off, is that in the event that the Protester will return with a proper and competent Application, then it will be necessary for the parties to address the Court on the fate of the initial distribution of the estate that was conducted and adopted on 1/11/1999. This was during the "reign" of the Protester's husband, the late Peter Adoyo Ogola, as the sole Administrator. This is the Certificate of Confirmation of Grant that had more than 40 beneficiaries. This issue needs to be addressed because the beneficiaries appearing in the current Certificate of Confirmation are only 6 yet none of the parties has addressed this question. What happened to that distribution of 1/11/1991? Did the beneficiaries take possession of their shares as given therein? Was the subsequent distribution adopted on 10/11/2016 a review of the distribution made on 1/11/1999? What informed the reduction of the beneficiaries from more than 40 to now just 6? This being a very old file, the answers to these questions are not apparent from the Court file and the parties would need to bring the Court to speed.

### **Final Orders**

27. In light of the foregoing, I make the following orders:
- i. The Protest herein brought by way of the Affidavit of Protest sworn on 24/04/2024, being incompetent, is hereby struck out.
  - ii. The Protester is at liberty to file a fresh and competent Application in accordance with the applicable rules and procedure.
  - iii. Each party shall bear his/her own costs of the Protest.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 21<sup>ST</sup> DAY OF FEBRUARY 2025**

**WANANDA J.R. ANURO**

**JUDGE**

Delivered in the presence of

Mr. Kagunza for the Protester

Petitioners/Administrators acting in Person: Tom Felix Ogola, Thomas Odhiambo Ogola and Dickson Omondi Ogola

Court Assistant: Brian Kimathi

