



**In re Estate of Simeon Hongo Ominde (Deceased) (Succession Cause  
1757 of 1996) [2025] KEHC 927 (KLR) (Family) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 927 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 1757 OF 1996  
EKO OGOLA, J  
FEBRUARY 4, 2025  
IN THE MATTER OF THE ESTATE OF PROFESSOR  
SIMEON HONGO OMINDE (DECEASED)**

**BETWEEN**

**GLORIA MULA ADHIAMBO OMINDE ..... 1<sup>ST</sup> APPLICANT**

**ROSEMARY ATHIENO OMINDE - BARASA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ELIZABETH OMINDE OGAJA ..... 1<sup>ST</sup> RESPONDENT**

**KENYA COMMERCIAL BANK ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are two applications before this court.

**First Application**

2. The first application is dated 30<sup>th</sup> September 2022. The applicants pray for the following orders:-

- a. That the grant of Probate with Will annexed made to Dr. Elizabeth Ominde Ogaja and Kenya Commercial Bank on 5<sup>th</sup> November 1996 be revoked and/or annulled.
- b. That Gloria Mula Adhiambo, Rosemary Athieno Ominde-Barasa, and Rozalla Achieng Tapper be appointed as executors of the grant of probate of the deceased Will.
- c. That the Outgoing executors, Dr. Elizabeth Ominde Ogaja and Kenya Commercial Bank Limited be directed to provide an account and sattu report of the estate of the deceased for the period of their appointment as required under the Succession Act.



- d. That this honorable court be pleased to make such other orders as the court may deem fit.
3. The application was based on the grounds set out therein and the applicants' joint supporting affidavit. The applicants deposed that the grant was obtained fraudulently by the making of a false statement to the effect that the beneficiaries listed therein were the only beneficiaries. Further, the grant was obtained fraudulently by the concealment from the court that the deceased had other children and subsequently other beneficiaries. The applicants stated that the executors have failed to apply for confirmation of grant for the last 26 years and that they have negligently failed in their duties as administrators of the estate.
  4. The applicants deposed that the estate has suffered losses, damage, and wastage. Therefore, there is a need to appoint new executors.
  5. The applicants also stated that there is a need for making reasonable provisions from the deceased estate for dependants who were not mentioned in the Will. The dependants include the deceased daughters namely Gloria Mula Adhiambo Ominde, Rosemary Athieno Ominde-Barasa, Evonne Lindiwe Akinyi, Victoria Vihende Barasa, and the deceased granddaughter Marie Bestie Barasa.
  6. The 1<sup>st</sup> respondent opposed the application vide a Replying Affidavit dated 27<sup>th</sup> February 2024. She denied the applicant's allegations that the grant is defective in substance as it was obtained by making a false statement and concealment of material fact. She deposed that the Will is permanently attached to the Grant of Probate and it is the reference point in so far as distribution is concerned. The 1<sup>st</sup> respondent further stated that whereas the deceased directly mentioned certain legatees and bequeathed to them specific properties, the applicants are beneficiaries by virtue of the fact that they were the deceased children.
  7. The 1<sup>st</sup> respondent further deposed that the executors appointed the firm of Rachier and Amollo to register a Trust according to the Will. The same was done. However, they encountered a challenge when it came to the registration of the first trustee. This challenge is known by the applicants.
  8. The 1<sup>st</sup> respondent deposed that LR No. 13400 Karen was sold in 2021. Thereafter, alleged creditors of the estate came up. The 1<sup>st</sup> respondent deposed that the applicants were also aware of this.
  9. The 1<sup>st</sup> respondent deposed that the applicants are aware that there are some properties belonging to the deceased that were not included in the Will due to lack of Titles. She added that she has carried out her duties as executor with diligence as she has taken every step to collect and safeguard the deceased estate.

### **Second application**

10. The second application filed by the applicants is dated 29<sup>th</sup> November 2022. The applicants pray for the following orders:
  - a. Spent;
  - b. That the honorable court be pleased to review and set aside the directions of the court made on 16<sup>th</sup> November 2022, referring the case to mediation.
  - c. That the honorable court be pleased to order the firm of M/s Rachier and Amollo Advocates LLP to urgently release funds which they are holding amounting to sixty-one million Kenya Shillings (Kshs. 61,000,000/-) to the estate and beneficiaries, by way of a partial confirmation of grant.



- d. That the honorable court hear and determine the applicants' application dated 30<sup>th</sup> September 2022.
  - e. The costs of this application be provided for.
11. The application is based on the grounds set out therein and the applicants' joint supporting affidavit. The applicants deposed that the court referred this cause to mediation. According to the applicants, it is not in the family's best interest to have the matter canvassed through mediation for reasons that the grant has not been confirmed for over 26 years showing a lack of good faith by the respondents who are the executors of the estate; that there has been a gross mismanagement of the estate; and that after disposal of assets in the estate, the beneficiaries are yet to receive the proceeds of the sale being Kshs. 61,000,000/-.
  12. The applicants further stated that the estate owes money to entities such as the advocates for the 2<sup>nd</sup> respondent that should be settled. It is for these reasons that the cause should not be determined through mediation and also that there be a partial confirmation of grant.
  13. The 1<sup>st</sup> Respondent opposed the application vide a Replying Affidavit dated 20<sup>th</sup> November 2023. She deposed that the applicants did not attend any of the mediation sessions and this is in contempt of the court's orders. According to the 1<sup>st</sup> respondent this application should be dismissed since the application is not a stay of the mediation proceedings or the court order and that the orders sought have been overtaken by events.
  14. With regard to partial confirmation of the grant, the 1<sup>st</sup> respondent stated that she is the co-executor of the Will, a beneficiary of the Will, and the deceased daughter. She deposed that the applicants have been aware of the dealings of the estate and have benefitted from the estate from time to time.
  15. The applications were canvassed by way of written submissions. I have read and considered them.

### **Determination**

16. I have considered the applications, the rival affidavits, the submissions and the entire record of the court.
17. So, have the applicants demonstrated sufficient grounds for the court to revoke the grant as provided for under Section 76 of the Law of Succession which provides 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 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 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 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.
18. On the ground that the grant is defective in substance on the ground that the respondents obtained it by concealment of material fact and concealment of evidence, I am not satisfied with the allegations made by the applicants. ‘Defective in substance’, as set out in Paragraph (a) of section 76 must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. Section 76 (a) properly construed means that nothing shall prevent the court from reopening the proceedings in accordance with the law and procedure if there has been a fundamental defect in the previous proceedings. If a grant was obtained fraudulently by making a false statement or by the concealment from the court of something material to the case or that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled.
19. The grant of probate was obtained by the strength of the Will. The respondents were appointed by the deceased. Whether or not there were other beneficiaries not named in the Will has nothing to do with the appointment of the executors. The applicants were at liberty to make an application to be provided for from the Will.
20. The applicants have also alleged that the executors have failed in their duties as they have not applied for confirmation of the grant within one year. The 1<sup>st</sup> respondent argues that the delay of over 26 years was due to the lack of some titles to properties not mentioned in the Will. A delay of 26 years is an exorbitant amount of time to confirm a grant. If there were challenges with part of the estate, the executors could have applied for a partial grant. Issues within the family always arise when the administrators fail to file an inventory of accounts and further confirm the grant within a reasonable time. The applicants have alleged that there has been mismanagement of the estate. While I am not sure about the alleged mismanagement of the estate, it is clear that the executors have taken too much time to conclude the administration of the estate
21. Furthermore, I am not satisfied that the applicants, even though they were the deceased daughters, are going to expeditiously administer the estate. From the proceedings, there seems to be some animosity between the beneficiaries. This would require a neutral party to assist in the administration of the estate. Such a party would be the public trustee. However, appointing the public trustee at this stage will undoubtedly further delay this process. I, therefore, give the executors a limited time of six months to conclude the administration of the estate, failure to which this court will move to appoint the public trustee as an administrator of the estate.
22. With regard to the second application, it must be noted and appreciated that Court Annexed Mediation was introduced by the Judiciary to alleviate case backlog through expeditious disposal of cases. This is in line with Article 159 (2) (c) of *the Constitution* which mandates the Judiciary to promote alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.
23. The courts have been implementing mediation as an initiative to promote Alternative Dispute Resolution (ADR) since 2016. According to the Mediation manual and The Code of Ethics for Mediators, mediation can only be successful if both parties are open to it. Furthermore, if one party is



not open to the mediation process, he or she is at liberty to go back to the courts to continue with the litigation process. That being said, prayer (b) of the second application remains spent.

24. As for the partial confirmation of grant, not all beneficiaries have consented to this. Furthermore, it is in the interest of justice that the estate be confirmed at once within six months as ordered by this court.

**Disposition**

- a. Executors of the Will herein are given six (6) months, from the date hereof to conclude the estate administration.
- b. The executors are hereby directed to provide an account and status report of the estate of the deceased for the period they have been in office. The report shall be filed in this court within 45 days from the date hereof.
- c. This matter shall be mentioned before this court on 8<sup>th</sup> April 2025.
- d. Cost be in the cause.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY 2025.**

.....

**E.K. OGOLA**

**JUDGE**

**In the presence of:**

Ms. Njangi and Ms. Josphine for the Applicants

Mr. Olalo, for the 1<sup>st</sup> Respondent

Gisiele Muthoni Court Assistant

**E. OGOLA J.**

