



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ogol v Umara (Civil Appeal E039 of 2023)
[2025] KEHC 6733 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E039 OF 2023
A. ONG'INJO, J
FEBRUARY 20, 2025**

BETWEEN

PAMELA ATIENO OGOL APPELLANT

AND

SUSAN ADHIAMBO UMARA RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. R. K. Langat-PM delivered
on 19th May 2023 at Rongo in SRM Succession Cause No. E022 of 2021)*

JUDGMENT

Background

1. Vide summons for revocation or annulment of grant dated 8th February 2023, the Appellant sought the following orders against the Respondent in the lower Court;
 1. That this application be and is hereby certified urgent and the same be heard ex-parte in the first instance.
 2. That pending hearing and determination of this application inter partes an order be and hereby issued stopping the Respondent (Administrator herein) from any further administration of the Estate of Eliud Onyango Obunga (Deceased) including making any withdrawal of funds among others, pension proceeds, which are part of the Estate of the Deceased.
 3. That the Grant of Letters of Administration Intestate made in Rongo SRM Succession Cause No. E022 of 2021, In the Matter of the Estate of Eliud Onyango Obunga (Deceased) to the Respondent, Susan Adiambo Umara, on 21st June, 2021 and confirmed on 30th July, 2021 be and is hereby revoked and annulled.



4. That the Respondent (the Administrator herein) is hereby directed to render accounts of the extent of administration of the Estate for the duration that she has been Administrator, covering the amount she has appropriated from the Estate of the Deceased.
 5. That the Applicant be and is hereby made a Co- Administrator of the Estate of the Deceased.
 6. That the Applicant and/or any of the Administrators to file fresh/new Summons of Confirmation of Grant containing complete and accurate list of all beneficiaries of the Estate of the Deceased.
 7. That the costs of this application be borne by the respondent.
2. The summons was predicted on the grounds on its face and supported by an affidavit of even date by Pamela Atieno Ogol, the Appellant herein. In the said affidavit, she deposed that she is a widow to Eliud Onyango Obunga (Deceased) who died on 4th April, 2020. She is aware that prior to his death, the Deceased had two wives herself being one them.
 3. She further deposed that she was married to the Deceased in 1986 under the Luo customary law and they were blessed with one child, Hillary Otieno Onyango as captured in the printout of funeral programme and eulogy prepared for the Deceased's burial. She states that after the death of the Deceased, the family convened a meeting to discuss succession matters and iron out the differences between herself and the Deceased. The Respondent refused to attend that meeting.
 4. The Respondent proceeded secretly and clandestinely to petition for Grant of Letters of Administration Intestate in respect to the Estate of the Deceased in the cause serialized as Rongo SRM Succession Cause No. E.022 of 2021, In the Matter of Estate of Eliud Onyango Obunga (Deceased) on the false and fraudulent allegations and premises that she was the only wife to the Deceased and that her children were the only children of the Deceased.
 5. The Applicant avers that the Respondent fraudulently misled the area chief that she was the only widow to the Deceased and as a consequence the chief issued her with a letter to that effect dated 9th April, 2020. Upon realization that the Respondent obtained the said letter fraudulently by concealing the fact that she was not the only widow to the Deceased and that her children were not the only children of the Deceased, the said area chief immediately revoked the said letter by another letter dated same day dated 8th March 2021.
 6. According to the deponent, as a result of the said false allegations made to court through the aforesaid petition for Letters of Administration, the Honourable Court on 21st June, 2021 issued Grant to the Respondent which was subsequently confirmed on 30th July, 2021. She earnestly believes that the Grant of Letters of Administration Intestate herein was obtained fraudulently by making of a false statement and/or by concealment from the court of some material to the case and/or by means of an untrue allegation of a fact essential in point of law.
 7. The Applicant contended that the Grant of Letters of Administration Intestate made to the Respondent on 21st June, 2021 and subsequently confirmed on 30th July, 2021 was issued in circumstances defined under Section 76 (b) and (c) of the *Law of Succession Act* thus deserves to be revoked forthwith. She is also aware that the Respondent commenced the process of appropriating the Estate of the Deceased as confirmed by a letter dated 6th February, 2023, from the National Police Service indicating that the Respondent already initiated processing of the Deceased's pension.
 8. She believed that unless the application filed seeking to revoke Grant issued is urgently heard and orders sought granted, the Respondent will proceed to quickly dissipate the Estate of the Deceased



- and in effect deprive her child and herself their rightful inheritance. Further, the Respondent (the Administrator herein) should be compelled by the Honourable Court to render account of her administration of the estate for the duration that she has been Administrator.
9. Lastly, she deposed that she relates to the Deceased by reason of being a widow and thus her child, Hillary Otieno Onyango and herself are beneficiaries of the Deceased's Estate.
 10. In response to the summons, the Respondent herein filed a Replying affidavit sworn by Susan Adhiambo Umara dated 15th February, 2023. In her response, she stated that the application lacks merit, is a sham, mischievous and should be dismissed with costs.
 11. According to the Respondent, the Applicant is a busy body whose main intention is to benefit from her deceased husbands benefits yet even her late husband never recognized her in his lifetime. The late Eliud Onyango Obunga (deceased) was survived by only one wife who is herself and three children.
 12. The Respondent averred that the Applicant immediately after learning of the death of the deceased came and through her rebellious in laws manufactured a funeral program that included her name, a document that is not legal and cannot be used as a proof of marriage. Her late husband got married under Luo customary law in the year 2007 and swore an affidavit to that effect on the 2nd August 2010 at Rongo Law Courts.
 13. She stated that the Applicant might have had a brief stint with her late husband way before their marriage but it did not amount to a marriage union. Prior to his death, her husband had nominated her as his wife and his records in service reflect as such including in the letter of condolence sent by the Kenya Police Service and the report made by the Narok North Sub County Police Commander to the Kenya police Headquarters after his death.
 14. The Respondent deposed that the Applicant has no proof of the customary marriage she alleges to have taken place whatsoever and is merely an imposter so much that even during the funeral and burial of her late husband she was neither recognized by the community, friends and extended family of her late husband nor featured in his eulogy.
 15. The application is made in bad faith with ill intention of frustrating her and her late husband's children by delaying their access to the estate which they are depending on for schooling and other basic needs. The Applicant is abusing the court process knowing very well that she has no right or claim in her late husband's estate.
 16. Finally, the Respondent prayed that the orders sought in the application dated 8th February 2023 be dismissed with cost.
 17. The Applicant filed a supplementary affidavit dated 6th March 2023 and a Further affidavit by Hillary Otieno Onyango dated 27th February 2023.
 18. The application was canvassed by way of written submissions. From the record, only the Appellant filed her written submissions dated 8th February 2023.
 19. The Court upon considering the application and the submissions rendered its ruling on 19th May, 2023. The Trial Court made a finding that the application is unmerited and dismissed the same with costs to the Respondent. It is the said ruling and orders dismissing the application which is now the subject of the appeal herein.



The Appeal

20. The Appellant being dissatisfied with the ruling and orders of the trial court preferred an appeal before this court vide a Memorandum of Appeal dated 12th June, 2023 setting forth the following grounds of appeal;
- i. That the Honourable Magistrate erred and misdirected himself in law and fact by failing to appreciate, sufficiently or at all, consider and correctly analyze the evidence tendered by the parties in determining the Appellant's application for revocation or annulment of Grant.
 - ii. That the Honourable Magistrate erred and misdirected himself in law and fact by suppressing and/or failing to consider crucial evidence comprised in the Further Affidavits filed by the Deceased's son Hillary Otieno Onyango and the Deceased's brother Tom Mboya Obunga which evidence had not been rebutted by the Respondent.
 - iii. That the Honourable Magistrate erred and misdirected himself in law and tact by applying wrong principles of law in determination of the Appellant's application dated 8th February, 2023 for revocation or annulment of Grant.
 - iv. That the Honourable Magistrate erred and misdirected himself in law and fact by citing but not applying the provisions of section 76 of the *Law of Succession Act* in determination of the Appellant's application dated 8th February, 2023.
 - v. That the Honourable Magistrate erred and misdirected himself in law and fact by failing to apply application law including provisions of section 3(5) of the *Law of Succession Act* in determination of the Appellant's application dated 8th February, 2023.
 - vi. That the Honourable Magistrate erred and misdirected himself in law and fact in failing to find that Appellant was a wife to the Deceased for the purposes of succession or otherwise, and who had been left out in process of application and confirmation of Grant herein.
 - vii. That the Honourable Magistrate erred and misdirected himself in law and fact, despite overwhelming and uncontroverted evidence, in failing to find that Hillary Otieno Onyango, one of the persons on whose behalf the application dated 8th February, 2023 had been filed and whose sworn affidavit was on record, was a son of the Deceased thus entitled to the latter's Estate.
 - viii. That the Honourable Magistrate erred and misdirected himself in law and fact in failing to find that leaving Hillary Otieno Onyango, one of the sons of the Deceased, out of the process of application and issuance of Grant herein and excluding him from the list of beneficiaries thereof rendered the said Grant a nullity.
 - ix. That the Honourable Magistrate erred and misdirected himself taking an affidavit purportedly sworn by the Respondent and the Deceased as conclusive proof of monogamous marriage.
 - x. That the Honourable Magistrate erred and misdirected himself in law and fact in finding that the Appellant's application was unmerited and dismissing the same with costs which was against the weight of evidence and therefore manifestly erroneous.
21. The Appellant urged this court to grant the following ORDERS that;
- a. That this Appeal be allowed.
 - b. That the Ruling and Order of the lower court dated 19th May, 2023 be set aside.



- c. That the Appellant's application 8th February, 2023 before the lower court be allowed as prayed with costs as against the Respondent.
 - d. That the costs of this Appeal be awarded to the Appellant.
22. This appeal canvassed by way of written submissions. Both parties complied and filed their respective submissions. The Appellant's submissions dated 8th April 2024 whereas the Respondent's submissions are dated 12th April, 2024.

Appellant's submissions

23. The Appellant submitted that the learned magistrate failed to consider the evidence presented by her in support of her application thus falling into error by finding that the Appellant had not met the threshold for revocation of the Grant. The trial court had no regard to the Appellant's further affidavit by the Deceased's son Hillary Otieno Onyango dated 27th February 2024 and that of the Deceased's brother Tom Mboya Obunga dated 27th February 2024. That had the court considered the affidavits, it would have been evident that the Grant was liable for revocation or annulment as per Section 76 of the Law of Succession Act. The Appellant relied on the decision in Jackson Kaio Kivuva vs Penina Wanjiru Muchene [2019] eKLR this being the first appeal is by way of retrial. The Honourable Court is entitled to re-evaluate, re-analyze and re-consider the above evidence and draw its own conclusion.
24. The Appellant further submitted that the application for revocation or annulment of a grant was premised on Section 76 (a)-(c) and 3(5) of the Law of Succession Act. The said Section provides that;
76. 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;...
3. Interpretation
- 5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.
25. The Appellant contended that the process leading to issuance of the grant was defective on account of having left out a son of the Deceased Hillary Otieno Onyango. The paternity of the said son has never been in doubt and at no point did the Respondent cast aspersions on the fact that Hillary Otieno Onyango is a son to the Deceased. Excluding the Appellant from the process rendered the same defective as the Appellant has always been recognized by the Deceased's relatives as the first wife to the Deceased. She further contended that since her celebration of her marriage with the Deceased in 1986 until the Deceased's death on 4th April 2020, the Appellant had resided and still resides at her



matrimonial home built by the Deceased in the Deceased's land. Her marriage was celebrated under Luo traditions remained undissolved until the death of the Deceased, as corroborated by the Deceased's brother Tom Mboya Obunga in his affidavit dated 27th February 2023.

26. It was urged by the Appellant that it is evident that the Respondent's failure to disclose the facts was intended to unlawfully disinherit the two beneficiaries of the estate of the Deceased. This court should find that the grant was obtained by means of untrue allegation as per Section 76 (c) of the Act. Vide a letter dated 9th April, 2020, the area chief for North East Kamagambo location had revoked a letter used by the Respondent in obtaining Grant after discovering the same was obtained fraudulently. The act of the Deceased contracting another marriage in 2006 with his second wife, the Respondent herein, two decades into the first marriage did not render the first marriage void. The first marriage remained valid for all intent and purposes.
27. The Appellant submitted that from the evidence adduced, the further affidavit sworn on 27th February 2023 by Hillary Otieno Onyango together with annexed ID card and KRA pin details conformed without doubt that Hillary Otieno Onyango is a son of the Deceased. Additionally, the further affidavit sworn on 27th February 2023 by Tom Mboya Obunga, the Deceased's biological brother, cleared any doubt that the said Hillary Otieno Onyango is the Deceased's son. These material evidence went unchallenged by the Respondent.
28. The Appellant contends that looking at the amended certificate of confirmation of Grant, only the Respondent is included as the beneficiary of the estate of the Deceased. The Grant cannot stand as it omits a legitimate beneficiary of the Deceased's estate from the list of beneficiaries. If the Honourable Court was to uphold the lower court's ruling, the son of the Deceased will be rendered a squatter in his father's land and liable for eviction as well as his mother, the Appellant, will be liable for eviction from the said land which she has known as her matrimonial home since 1986.
29. The Appellant further submitted that the purported affidavit sworn by the Deceased and the Respondent could not vitiate the initial valid customary marriage. The Deceased did not have the power to nullify or dissolve valid customary marriage having found another relationship with the Respondent. Neither could his declaration as who he regarded as his next of kin nor a police signal be used to dissolve the first marriage and disinherit legitimate beneficiaries.
30. According to the Appellant, the trial magistrate fell in error by finding that the Appellant's application was unmerited and dismissing the same with costs. The Appellant urged the court to find that her application had clearly disclosed a basis for annulling or revoking the Grant issued. Further she urged the court to set aside the ruling of the lower court and pave way for proper succession which shall include all beneficiaries of the Deceased as well as all free estate including the parcel of land. The Appellant prayed that the appeal be allowed on the terms set out in the memorandum of appeal.

Respondent's submissions

31. In response to the Appellant's submissions, the Respondent submitted that the Deceased was a police officer at the time of his death and left behind a widow, the Respondent herein and three children. Further, he built a home for the Respondent at Kangoma sub-location where the Deceased was buried.
32. The Respondent contends that the wishes of a deceased deserves to be honoured when the person who made them is no more. The Deceased swore a marriage affidavit on 2nd August 2020. Secondly, after the death of the Deceased, a condolence letter was sent by Kenya Police Service to the Respondent and records at Kenya Police acknowledged the Respondent as the only wife of the Deceased. The Respondent submitted that people get into relationship before they settle in marriage. Therefore, the



Appellant might have had a brief relationship with the deceased before the deceased settled for the Respondent.

33. Upon death of the deceased, a section of the deceased's brothers notified the Appellant who has never been in the deceased home and she hurriedly came and after some meetings, the rebellious brothers in law of the Respondent built a structure for the Appellant so as to cement her space as a wife of the deceased.
34. The Respondent urged that the learned magistrate was very fair to rule against minutes presented by the Appellant which were drafted after the death of the deceased. The Appellant is frustrating the Respondent by insisting on being a wife of a person who never recognized her. The Respondent prays that the appeal be dismissed with costs to the Respondent.

Analysis and Determination

35. I have considered the grounds of appeal, the record of appeal and re-evaluated the affidavit evidence adduced before the trial court together with the rival submissions by both parties. I find the issue that crystalizes for determination is: -

Whether the grant of letter of administration dated 30th July 2021 issued to the Respondent should be revoked or annulled?

36. Section 29 of the *Law of Succession Act* provides that;

For the purpose of this part dependent means-

The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

Such of the deceased's parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and

Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

37. Similarly, Section 3(2) of the Act describes a child to include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
38. The Respondent started cohabiting with the deceased in 2007 and swore an affidavit on 2nd August 2020 that they got married under Luo Customary laws and practices where both parents consented to their said marriage. On the other hand, the Appellant's claim to the estate as a widow and her son Hillary Otieno Onyango as son to the deceased. The Appellant also produced a letter dated 8th March 2021 from the Chief of North East Kamagambo confirming that she was also a wife to the deceased and that her union with the deceased was blessed with one issue namely Hillary Otieno Onyango. The burial programme also indicates the Appellant was included as the 1st wife of the deceased. Whatever the Respondent believes there is a dispute as to the identity of the beneficiaries/dependants of the deceased estate and that can only be resolved by 1st annulling the grant and giving all parties concerned audience to be heard and ventilate their issues.



39. The Respondent did not deny that Hillary Otieno Onyango is son to the deceased and yet she did not explain why she did not include him as a beneficiary to the estate even if she thought that his mother just had a mere relationship with the deceased which did not amount to a marriage.
40. On whether the grant of letter of administration dated 30th July 2021 issued to the Respondent should be revoked or annulled, this court is guided by the provisions of Section 76 of the Law of Succession Act which provides as follows;
76. 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-
- that the proceedings to obtain the grant were defective in substance;
 - 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;
 - 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;
41. In consideration of the findings above this court finds that the exclusion of particularly Hillar Otieno Onyango from the list of beneficiaries renders the grant defective in substance and is therefore fit to be revoked.
42. This court has noticed that the Respondent was issued with Grant of Letters of Administration on 21st of June 2021 and in less than 2 months the said grant was confirmed contrary to the provisions of the Law of Succession Act that confirmation of grant is to be done within 6 months of the making of Letters of Administration. The Respondent did not explain the hurry in obtaining confirmation. This court therefore finds that the Appeal has merit and the Appellant's prayers are granted.
43. Since this is a matter involving parties who have family ties each party will bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 20TH DAY OF FEBRUARY 2025.

ANNE ONG'INJO

JUDGE

