



REPUBLIC OF KENYA



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**Odhiambo v Ooko (Family Appeal E003 of 2023)
[2025] KEHC 4576 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
FAMILY APPEAL E003 OF 2023
WM MUSYOKA, J
APRIL 8, 2025**

BETWEEN

BENEDICT OTIENO ODHIAMBO APPELLANT

AND

FREDRICK ONYANGO OOKO RESPONDENT

(an appeal arising from orders made in the ruling of Hon. Lucy Ambasi, Chief Magistrate, CM, in Busia CM CSC No. 151 of 2017, of 15th November 2022)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CM CSC No. 151 of 2017, of 15th November 2022. The grounds of appeal revolve around the trial court not appointing an administrator in place of the previous administrator; cancelling title deeds of persons who were not party to the proceedings; entering into the domain and jurisdiction of the land court; addressing the issue of customary law rights without jurisdiction; and not appreciating that the estate had been distributed after due consideration to the interests of the grandmother of the respondent.
2. The cause, in Busia CM CSC No. 151 of 2017, was in the estate of Philip Ondus Titus Odhiambo, who had died sometime in 2002. The cause was at the instance of Benedict Otieno Odhiambo, the appellant herein, who styled himself as a son of the deceased. He listed 8 individuals as the survivors of the deceased, being himself, Enos Oluoch Omuok, Johanes Omuok Apondi, Martin Ogonda Oluoch, Paulo Ratula, Jackim Oduor Nyambal and Ramlus Ahenda Owino. Their relationship with the deceased was not disclosed. The deceased was said to have died possessed of Samia/Butabona/579.
3. Letters of administration intestate were duly made on 28th February 2018, to the appellant, and a grant was subsequently issued, dated 12th March 2018.
4. The appellant sought confirmation of the grant, vide an application, dated 15th October 2018, where Samia/Butabona/579 was proposed for distribution amongst 10 individuals, being himself,



Enos Oluoch Omuok, Johanes Omuok Apondi, Martin Ogonda Oluoch, Paulo Ratula, Jackim Oduor Nyambalu, Ramlus Ahenda Owino, Onyango Obeyi, Fredrick Onyango Ooko and Patrick Otieno Oduory. Benedict Otieno Odhiambo, Enos Oluoch Omuok, Johanes Omuok Apondi, Martin Ogonda Oluoch, Paulo Ratula, Jackim Oduor Nyambal and Ramlus Ahenda Owino were identified as son and grandsons of the deceased, while Fredrick Onyango Ooko and Patrick Otieno Oduory were categorised as dependants. The grant was confirmed on 11th April 2019, for the estate to be distributed in the manner proposed, and a certificate of confirmation of grant was issued, dated 11th April 2019.

5. A summons for revocation of grant was mounted, dated 26th October 2020. It was at the instance of the respondent herein. He complained that his consent was not obtained for the purpose of having Samia/Butabona/579 distributed. The appellant was accused of conducting the administration of the estate in a manner which was not inclusive. He explained that his grandfather, Onyango, was a brother of the father of the deceased, called Ogonda. He identified the brothers of Onyango as Ogure, Ogonda and Owino. He explained that he, the respondent herein, represented the family of Onyango, while Patrick Otieno Oduory, who was the grandson of Ogure, represented that family. The appellant was from the family of Ogonda, and represented that family; while Ramlus Akhenda Owino, a grandson of Owino, represented the family of Owino.
6. He asserted that the said 4 individuals, being Onyango, Ogure, Ogonda and Owino had a stake in the 22 hectares, which made up Samia/Butabona/579, and each family was entitled to equal share, and, therefore, 5.5 hectares each. He explained that when the grant was being sought, there was consultation, but none was extended when confirmation of the grant was being sought. As a result, Samia/Butabona/579 was distributed in a skewed manner, so that the family of Ogonda got the lion's share, of 18.2 hectares, with the other 3 families sharing the balance of 3.1 hectares. He stated that the family of Onyango got 0.4 hectare, while that of Ogure got 0.8 hectare. He averred that there was fraud and concealment of matter in the manner the distribution was obtained.
7. The appellant responded to that application, by an affidavit that he swore on 22nd February 2021. He accused the respondent of lying, for he was not related to the deceased by blood or in any way. He averred that the 4 individuals named by the respondent, Onyango, Ogure, Ogonda and Owino, were not blood brothers, and came from different clans, some being from the Abasiranga clan, while others were Abaramogi. He explained that the family of the respondent came from Masati, Ugenya, and that the father of Onyango was called Sewe, and Onyango was the father of Ooko, the father of the respondent. He explained further that Onyango and Sewe were buried in Misati, Ugenya, where their land was. He asserted that the Onyangos were not related to the Ogondas, and the only connection between them was friendship, based on which the family of Ogonda had given refuge to a wife of Onyango, called Lusia, after her husband chased her away from Ugenya. As Onyango was unwilling to have Lusia back, Ogonda decided to allocate to her a small portion of land to build a house, and that was how that family ended up on Samia/Butabona/579, 2 sons of Lusia also built houses. One of those sons was Ooko. He explained that the brother of Ooko went back to Ugenya, died there, and was buried there, but Ooko remained on Samia/Butabona/579, with his mother, and he was the father of the respondent.
8. The appellant said that he had proposed to distribute the property as occupied on the ground. He asserted that he obtained the grant properly, following the laid down processes. He stated that the respondent was aware of the succession proceedings, and he had actively participated in the survey exercise, and was present until the process was completed. He asserted that the respondent thereafter refused to sign the affidavit in support of the confirmation process, arguing that he needed to consult his mother. He argued that the case by the respondent was a land case and should have been mounted at the Environment and Land Court. He submitted that the same had been overtaken by events, as the



respondent had an opportunity at confirmation to file an affidavit of protest. He further averred that nothing had changed on the ground, as everyone retained the size of the land, they occupied prior to confirmation. He cited the decision of the Samia Land District Tribunal. He asserted that the process in fact favoured the respondent, and he was issued with his own title deed, being Samia/Butabona/2645.

9. The appellant attached, to his affidavit, documents to support his case, being a certificate of death in respect of the deceased, a greencard for Samia/Butabona/579, an excerpt from the judgement of the Tribunal, a letter from the Chief of Bwiri Location, the pleadings filed in the cause, the certificate of confirmation of grant of 12th March 2018, and the title deed for Samia/Butabona/2645.
10. The revocation application was disposed of viva voce, where only 3 individuals testified, being the parties herein and a third. The respondent testified that the succession cause was filed without his knowledge, and that he learnt of it when the land was being subdivided. He asserted that he did not own Samia/Butabona/2645, as he had not seen the title deed for it. He rooted for equal distribution of the property. The respondent called his mother as a witness. The appellant testified that the respondent had been involved in the succession process, inclusive of the survey exercise done prior to confirmation. He said that the respondent did not sign on the consent on distribution, and he was unaware if he was unhappy.
11. The trial court delivered its ruling, on 15th November 2022. The revocation application was allowed, on the basis that the estate comprised of clan land, and the confirmation of grant was revoked.
12. The appellant was aggrieved, and brought the instant appeal, founded on the grounds that I have set out in paragraph 1 of this judgement.
13. Directions were taken, on 24th June 2024, for canvassing of the appeal by way of written submissions. Both sides have complied. I have read through the submissions, and noted the arguments made.
14. The first ground faults the trial court for revoking the grant and not appointing an administrator in the place of the previous administrator. 2 issues arise from this ground, which I shall deal with separately.
15. In the first place, the mandate given in section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya, to courts to revoke grants, does not require the court, upon revoking a grant, to appoint fresh administrators. Section 76 does not even suggest to the court the sort of orders that the court may make. The procedure for filing and disposing of applications for revocation of grant is in Rule 44 of the Probate and Administration Rules. There is nothing in there which directs the court, upon revoking the grant, to appoint administrators. In fact, there is no provision there which proposes the kind of orders that a court may make upon deciding to revoke the grant.
16. Of course, the court has discretion to make ancillary orders, together with the revocation orders. It may set aside the confirmation orders, order cancellation of the certificate of confirmation of grant, order reversion of any transactions made pursuant to the confirmation order, appoint new administrators or allocate a date for mention of the matter for the purpose of appointing administrators. There is no provision which commands the making of such supplementary orders, and the court makes them in exercise of the inherent power, saved in Rule 73 of the Probate and Administration Rules, as part of case management. The failure to make such orders cannot possibly be a ground of appeal, and an order by the trial court to have the grant revoked cannot be interfered with on appeal on that account. The remedy available, where a grant is revoked, and new administrators are not appointed, in the ruling revoking the grant, is for the parties to file a formal application, within that cause, by a summons general, for appointment of fresh administrators.
17. Appointment of administrators is made by the court. However, it will be noted that there are various considerations that may cause a court to refrain from appointing administrators after it has revoked



a grant. One, a person cannot be forced to be an administrator, and a court should not appoint an administrator where the revocation application does not propose any, as was the case here. An administrator, imposed by the court, could be rejected by the parties, or may not get the necessary cooperation from the survivors and beneficiaries, or may reject or turn down the appointment. Two, according to the [Law of Succession Act](#) and the Probate and Administration Rules, there are guidelines on who may be so appointed, and the consensus of the survivors and beneficiaries is critical. A revocation application only involves only 2 parties, the applicant and the administrator, and appointing an administrator from within that circle, without giving a chance to other survivors and beneficiaries of the estate, would be undemocratic, and, very often, makes it very difficult to obtain concurrence in the administration of the estate thereafter.

18. Secondly, the trial court did not revoke the grant. The appellant did not read the ruling carefully. The penultimate paragraph of the impugned ruling reads, “... I hereby uphold the objection and revoke the confirmation of grant as prayed.”
19. A grant and a confirmation of grant are 2 different things. The grant appoints administrators. The confirmation of the grant is an order confirming the appointment of administrators and approving the proposed distribution of the estate. What was revoked was not the grant that had appointed the administrator, but the orders which had confirmed that grant. Revocation of the orders of confirmation cannot possibly lead to a revocation of the appointment of administrators. The grant remained intact. The revocation of the confirmation of grant only vacated the orders made at confirmation, which paved way for a fresh application to be filed for confirmation of the grant.
20. Of course, I have issues with the confirmation orders being revoked under section 76 of the [Law of Succession Act](#), for the discretion, given under that provision, has nothing to do with what happens at confirmation of grants. Revocation of grants, under section 76 of the [Law of Succession Act](#), is not a remedy for those who are unhappy with the outcome of confirmation proceedings. Indeed, there should be nothing like revocation of a confirmation of grant, for revocation of grant does not target the confirmation orders, but the grant itself.
21. Confirmation of grant is only relevant, so far as revocation is concerned, where the administrator fails to apply for its confirmation within the set timelines. It is only in that limited respect that revocation of grant can be sought in connection with the confirmation process. The relevant portion of that law is in section 76(d)(i), which provides that “a grant of representation of letters of administration, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by the interested party or of its own motion – that the person to whom the grant was made has failed, after due notice and without reasonable cause either – to apply for confirmation of the grant within one year from the date therefore, or such longer period as the court has ordered or allowed ...”
22. In view of the above, a court ought not interfere with the confirmation orders in an application for revocation of grant, by way of vacating the confirmation orders, for the discretion in section 76 does not extend to that, unless the order to vacate the confirmation is supplementary or ancillary to, or consequential upon a substantive order revoking the grant.
23. However, as that issue has not been raised in this appeal, that is on the propriety of the said order, I shall not interfere with it on that account.
24. The second ground is about the court cancelling title deeds already issued to individuals, without affording those individuals a hearing. I note, from the impugned ruling, that the trial court did not order cancellation of title deeds. I have very closely and scrupulously perused the said ruling, and noted the words “title deed” were not used anywhere in the entire ruling. The application was disposed of in the last paragraph of the ruling, which reads: “In the circumstances, I hereby uphold the objection



and revoke the certificate of confirmation of Grant as prayed. Each party to bear their costs.” There is nothing in there about cancellation of title deeds.

25. The third ground is about the trial court entering the domain and jurisdiction of the land court when the matter was a succession cause. I suppose this has something to do with the ground above, around cancellation of title deeds. I reiterate, that the trial court did not make any order for cancellation of title deeds. There would be no foundation, therefore, for the argument that the court trespassed into the jurisdiction of another court.
26. The fourth ground is about the trial court addressing the issue of customary land trusts, which, he argues, fall outside its jurisdiction. Indeed, it is true that the trial court concluded that that estate comprised of clan land. It was both sides who brought it up. The respondent, at paragraph 7 of his affidavit, sworn on 26th October 2020, talked of the land being held in trust. The appellant, in his replying affidavit, sworn on 22nd February 2021, relied on a determination by the Samia District Land Tribunal, and placed a copy of it on record, through that affidavit, and it was in that determination that the issue of clan land came up. The trial court discussed those issues, because they were raised by the parties, and relied on material that the appellant himself placed before the court. The appellant cannot now turn away from his own evidence, and turn around to blame the trial court, as if that material was imported into the record by the trial court on its own motion.
27. For avoidance of doubt, paragraph 7, in the affidavit of the respondent, reads:

“ That due to the privileged position that Philip Ondus Titus Odhiambo (deceased) enjoyed by virtue of being the most educated in the family, the 4 brothers agreed that the above land be registered in the name of Philip Ondus Titus Odhiambo, the last born son of Ogonda to hold the same in trust for the families.”
28. While the appellant averred, at paragraphs 24, 25 and 26 of his affidavit, of 22nd February 2021, as follows:
 - “ 24. That, nothing has changed on the ground and all beneficiaries including the Objector Applicant has just remained with their size of the land as it was partitioned by the Elders long time ago and no new boundaries has been created as result of my administration.
 25. That, in the Judgment delivered on 2/11/1990 by the land Tribunal Samia District, it was declared that:.. The land in dispute should be shared on clan basis adopting the boundaries which are existing that separates the Abasiranga clan and Abaramogi clan.....After adopting the said boundaries then the Abaramogi and Abasiranga clans will share among their clan families.
 26. That, during the confirmation of the land boundaries, we called all the people from both parties above mentioned clans and in the presence of our area Chief, assistant chief and all our Village leaders.”
29. The fifth, and final, ground of appeal is that the trial court failed to recognise that the estate was distributed considering the share of the grandmother of the respondent. The trial court was determining a revocation application, which turned on issues around how the grant was confirmed, specifically with respect to the interests of the house from which the respondent hailed. The revocation proceedings revealed that there were various interests at play, of either brothers of the deceased or various clans. Those interests appear to have been critical to the distribution of the estate. The appellant



did not bring them to the fore, in his summons for confirmation of grant, dated 15th October 2018, which gave rise to the orders that were “revoked.” The said “revocation” was meant to pave way for consideration of those interests, now that they were disclosed or established during the hearing of the revocation application.

30. There can be no merit at all in the appeal herein, for the reasons that should emerge from the above discussion. I hereby dismiss it. This appeal file shall be closed. The trial court file shall be returned to the trial court registry. This being a family matter, each party shall bear its own costs. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 8TH DAY OF APRIL 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Marisio Luchivya, instructed by Marisio Luchivya & Company, Advocates for the appellant.

Mr. JV Juma, instructed by JV Juma & Company, Advocates for the respondent.

