



REPUBLIC OF KENYA



In re Estate of Eliakim Osano Ongow (Deceased) (Family Cause 118 of 2016) [2025] KEHC 5890 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
FAMILY CAUSE 118 OF 2016**

OA SEWE, J

MAY 9, 2025

**IN THE MATTER OF THE ESTATE OF ELIAKIM OSANO ONGOW (DECEASED)
IN THE MATTER OF AN APPLICATION FOR REVOCATION OF GRANT**

BETWEEN

KENNEDY OKOTH OTIENO APPLICANT

AND

KENNEDY OGALO OSANO RESPONDENT

RULING

1. Before the Court for determination is the Chamber Summons dated 10th February 2024. It was filed by Kennedy Okoth Otieno (hereinafter, “the applicant”) pursuant to Section 76 of the [Law of Succession Act](#), Chapter 160 of the Laws of Kenya and Rules 44, 49 and 73 of the Probate and Administration Rules. The applicant thereby prayed for the following orders:
 - (a) Spent
 - (b) Spent
 - (c) That the Grant of Letters of Administration Intestate issued to the petitioner/respondent, Kennedy Ogalo Osano on 11th December 2023 be revoked.
 - (d) That the Court does grant such orders as it deems fit in the circumstances.
 - (e) That the costs of the application be provided for.
2. The application is premised on the grounds that the Grant was obtained through fraud and material non-disclosure, thereby ignoring the interests of the other beneficiaries of the estate of the deceased. The applicant further contended that the respondent did not disclose that Susan Arwa Ogwen, O



the mother of the applicant, died before the Grant was confirmed; and therefore the Summons for Confirmation of Grant ought to have been amended to include her heirs, all of whom are sui juris.

3. It was further the contention of the applicant that it was neither proper nor legal for the Grant to be confirmed in favour of Eliud Odhiambo Otieno as a beneficiary in trust for Kennedy Okoth Otieno, Santos Ogweno Otieno and Fredrick Owino Otieno, all of whom are adults whose consent ought to have been sought at the time of confirmation of Grant.
4. In support of the application, the applicant relied on his affidavit sworn on 12th February 2024. He averred that he is the biological son of Susan Arwa (now deceased); and that his mother was named as one of the beneficiaries of the estate of the deceased, Eliakim Osano Ongow. The applicant also deposed that his mother, Susan Arwa, passed away on 26th May 2018 before confirmation of the Grant issued herein. He was aggrieved that, without notifying the Court, the respondent illegally proceeded to have the Grant confirmed in favour of himself; and included the name of Eliud Odhiambo Otieno as a beneficiary who was to hold the portion of his share of the suit property in trust for his brothers.
5. The applicant conceded that Eliud Odhiambo Otieno is one of his siblings but added that his inclusion as a beneficiary was done without his knowledge, involvement, consultation or notice at all and was therefore in breach of his constitutional right to be heard. He explained that he was an adult of sound mind at the material time and so were his other siblings, Santos Ogweno and Fredrick Owino. He therefore posited that their consent ought to have been obtained beforehand. Consequently, the applicant averred that the Grant was obtained in contravention of Section 76 of the [Law of Succession Act](#) and therefore ought to be revoked.
6. Section 76 of the [Law of Succession Act](#), is explicit 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 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;
- (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 assist 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.”
- (7) Commenting on the import of the above provision, Hon. Mativo, J., in *Re Estate of Wahome Mwenje Ngonoro (Deceased)* [2016] eKLR, Hon. Mativo, J., took the following view, with which I entirely agree:
- “...A close look at Section 76 shows that the grounds can be divided into the following categories:- the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances...”
8. Thus, the only question to pose for determination herein, based on the grounds set out by the applicant in his application dated 2nd February 2024 is whether the Grant was obtained through fraud or concealment of material facts.
9. Section 66 of the *Law of Succession* provides that:
- “When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-
- a. surviving spouse or spouses, with or without association of other beneficiaries;
 - (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
 - (c) the Public Trustee; and
 - (d) creditors.”
10. Accordingly, on the 1st March 2016, the respondent filed this cause in respect of the estate of his father, Eliakim Osano Ongow. There is no dispute that the deceased died on 4th April 1993 at Oyugis in Homa Bay County. The Simplified Resource Tool on Inheritance and Related Family Practice in Kenya, published by the Judiciary, offers guidance, at Paragraph 7.3 thereof, as to the documents that must accompany a petition for Grant of Letters of Administration Intestate. They include:
- (a) Form P&A 5, (Affidavit in Support of Petition)
 - (b) Form P&A 11, (Affidavit of Justification of Proposed Sureties)
 - (c) Form P&A 12 (Affidavit of Means)
 - (d) Form P&A 57 (Guarantee of Personal Sureties)
 - (e) Original Death Certificate or certified copy, or an order of presumption of death;
 - (f) Full inventory of assets and liabilities of the deceased at the time of death, including estimated value,
 - (g) List of heirs
 - (h) Letter from the Area Chief introducing the petitioner and heirs
 - (i) Consents, where applicable.



11. That the respondent complied is apparent from the court record. The record further confirms that the respondent disclosed that the beneficiaries of the deceased estate were his four sons, Kennedy Ogalo Osano (the petitioner), John Otieno Osano, Malacha Ogila Osano and William Osano who was deceased as at the time of filing the Petition. He therefore included Susan Arwa Otieno, the widow of William Otieno Osano, in her capacity as the personal representative of the estate of William Otieno Osano (deceased). Apparently, the applicant did not have any objection at the time, or object to the inclusion of his mother as one of the four beneficiaries. His complaint was that, as at the time of confirmation of Grant, his mother had passed away; and in her place, the respondent included one of the applicant's brothers, Eliud Odhiambo Otieno, who was to hold his share in trust for himself and his siblings.
12. The applicant now contends that, since they were sui juris at the time, all the sons of Susan Arwa ought to have been consulted and their consent obtained for the inclusion of their brother Eliud Odhiambo Otieno. While the applicant's contention that they ought to have been consulted is reasonable, their consent was not necessary in law. This is because the estate in question is that of their grandfather, Eliakim Osano Ongow and not their father, William Otieno Osano. It is trite that grandchildren have no right to directly inherit a share of the estate. They can only do so through their parents. In this regard, the mother of the applicant had been included in place of her deceased husband William Otieno Osano. Had she not died at the time of confirmation of Grant, she would only have received through transmission, the share due to her deceased husband and nothing more.
13. This was well articulated in *Christine Wangari Gachigi v Elizabeth Wanjira Evans & 11 Others* [2014] KECA 150 (KLR) thus:

“Although Section 35 and 38 of the *Law of Succession Act* is silent on the fate of surviving grandchildren whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has predeceased the intestate then that child's issue alive or en ventre sa mere on that date of the intestate's death will take in equal share per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate's death.”
14. Similarly, in *Re Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR, that:

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”
15. In the premises, there is nothing intrinsically wrong in the share of the applicant's father, William Otieno Osano, being transmitted to Eliud Odhiambo Osano in trust for himself and his siblings. It would ultimately be the responsibility of Eliud to subdivide their father's share equally amongst the children of William Otieno Osano. In effect, I find no reason to conclude that either the respondent or Eliud Odhiambo Osano set out to defraud the applicant and his other siblings. It would have been improper for each of the sons of William to be included as beneficiaries because what they were entitled



to was the share belonging to their deceased father. It is notable that of all the sons of the deceased Eliakim Osano Ongow, the portion given to William Otieno Osano (deceased) was the largest.

16. It is also noteworthy that the Grant sought to be revoked was not issued to Eliud Odhiambo Osano so that it can be said that the Grant was obtained fraudulently. It is manifest that the applicant's complaint is in respect of the confirmation proceedings and therefore ought to have been raised by way of protest.
17. I therefore find no proof of material non-disclosure or fraud on the part of either the respondent or Eliud Odhiambo Otieno. The application dated 10th February 2024 is devoid of merit and is accordingly dismissed with an order that each party shall bear own costs thereof.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 9TH DAY OF MAY 2025.

OLGA SEWE

JUDGE

