



REPUBLIC OF KENYA



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**Otieno v Opot (Succession Appeal E006 of 2024)  
[2025] KEHC 5416 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5416 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
SUCCESSION APPEAL E006 OF 2024**

**DK KEMEL, J**

**MAY 2, 2025**

**BETWEEN**

**JOHN OKELLO OTIENO ..... APPELLANT**

**AND**

**JERUSHA OPOT ..... RESPONDENT**

*(Being an appeal from the ruling and orders of Hon. B. Limo given at siaya on the 7<sup>th</sup> day of June in Siaya CMCSC No. E33 of 2024)*

**JUDGMENT**

1. This appeal herein arises from the from the ruling and orders of Hon. B. Limo (PM) delivered at siaya on the 7<sup>th</sup> day of June in Siaya CMC Succession No. E33 of 2024 wherein he dismissed the Appellants summons for revocation of grant dated 11/7/2023.
2. Being aggrieved by the aforesaid decision, the Appellant filed his Memorandum of Appeal dated 21/6/2024 wherein he raised the following grounds of appeal:
  - i. That the learned magistrate completely misunderstood the evidence before him, wrongly analyzed the evidence and therefore came to wrong conclusions of fact and law.
  - ii. That the learned magistrate erred in law and in fact by holding that land parcel No. East Gem/Nyawara II/402 does not form part of the estate of Otieno Muga without taking into consideration that the said land originally belonged to Otieno Muga before it was transferred to Ismael Otieno Odongi and Jesica Adhiambo Odongi whose names were to be removed after the objector herein filed a land case and that the same land was to be reverted back in the name of Otieno Muga (deceased).
  - iii. That the learned magistrate erred in fact and in law by holding that the land parcel No. East Gem/Nyawara II/402 belonged to Ismael Otieno Odongi and Jesica Adhiambo Odongi using



a search which was done on 8/7/2021 which was eight (8) months before the filing of the petition herein.

- iv. That the learned magistrate erred in fact and in law by dismissing the Appellant's objection without taking into consideration that the Respondent concealed a lot of material facts from the court which if the court would have in a position to know the same would not have issued the said grant to the Respondent herein.
- v. That the learned magistrate totally misunderstood and wrongly evaluated the evidence before him and therefore arrived at a wrong conclusion.

The Appellant therefore prayed that the appeal be allowed, the court to re-assess the evidence afresh and arrive at an independent conclusion and that the Appellant be awarded the costs of the appeal.

3. This being the first appellate court, its duty is well spelt out namely to re-evaluate, analyze the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at an independent conclusion as to whether or not to uphold the decision of the trial court. In doing so, the court has to take into consideration the fact that it did not have the benefit to see or hear the witnesses while they testified and that the court will have to provide an allowance for that fact. (See *Selle vs. Associated Motor Boat Company Limited* [1968] EA 123).
4. The lower court record indicates that the Respondent herein had petitioned for letters of grant and was eventually granted the Grant of Letters of Administration Intestate on 9/5/2023 and that while she arranged to file the requisite summons for confirmation of grant, the Appellant herein filed summons for revocation of grant dated 11/7/2023.
5. The Appellant in his said summons for revocation of grant averred inter alia; that the Petitioner had obtained the grant of letters of administration in this estate on the basis of fraudulent concealment of material facts when she failed to disclose to the court that the deceased was married to six (6) wives and that there are many beneficiaries whose consent was not sought when instituting this cause; that the estate of the deceased comprised of other parcels of land which the Respondent failed to disclose; that the Respondent is out to snatch the property of the deceased and leave the beneficiaries to go without land; that the Respondent had prior to filing this succession cause, illegally transferred the deceased's land parcel East Gem/Nyawara II/402 and thereafter transferred the same to her children namely Ismael Otieno Odongi and Jesica Adhiambo Odongi; that it is in the interest of justice that the grant herein be revoked or nullified so that a fresh process can be commenced involving all the beneficiaries.
6. The Respondent opposed the application through a replying affidavit sworn on 30/10/2023 wherein she averred inter alia; that the letters of grant were issued to her by virtue of being the widow of the deceased; that the Appellant herein had instituted Siaya ELC No. 39 of 2021 against her wherein the court directed that they should first file succession proceedings in order to establish the question of the ownership over the land before going back to the said court; that the Appellant herein became evasive as he failed to cooperate with the Area Chief who was to issue the letter of introduction for purposes of commencing the succession proceedings; that the Appellant informed her in no uncertain terms that he was not going to participate in succession terms with her; that she engaged her advocate to communicate with the Appellant's advocate on the need to commence succession proceedings as directed by the ELC Court but that the Appellant declined to cooperate forcing her to go it alone; that the Appellant was fully informed of this matter; that she resides on the parcel No. East Gem/Nyawara II/402 where she has resided since the demise of the deceased herein who was her husband; that the Appellant has engaged her in an unending litigation and therefore it is fair that the application should be dismissed so that the estate of the deceased can be distributed.



7. The appeal was canvassed by way of written submissions. Both parties complied. The parties' submissions are a reiteration of their rival averments in their affidavits.
8. I have considered the record of the lower court and the rival submissions. It is not in dispute that the parties herein has been involved in an ELC case at Siaya whereupon they were directed to file a succession cause so as to determine the ownership of land Parcel No. East Gem/Nyawara II/402. It is not in dispute that the parties herein were unable to agree regarding the filing of the succession case as directed by the ELC court. it is not in dispute that that Respondent herein lodged the succession cause and has since been issued by a Grant of letters of Administration Intestate. It is also not in dispute that the parties herein have not involved the rest of the family members in this succession cause. I find the issue for determination is whether the summons for revocation of grant by the Appellant dated 11/7/2023 had merit.
9. It is noted that the Appellant in his application aforesaid sought for revocation of the grant issued to the Respondent on 9/5/2023 on the grounds that the rest of beneficiaries including himself were not consulted for their consent and that the Respondent had concealed material facts from the court. Revocation of Grant is provided for under Section 76 of the *Law of Succession Act*. The same provides as follows:

“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 making of a false statement or by 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.

The Appellant's application must be gauged to see whether it meets the threshold provided above. The Appellant raised concerns inter alia; that the Respondent did not obtain the consent of all the beneficiaries of the estate before instituting the succession cause; that the Respondent concealed some material particulars from the court namely that parcel No. East Gem/Nyawara II/402 was owned by the deceased yet she had already transferred it into the names of her two children; the chief's introductory letter does not contain names of all the family members as it only has names of the Respondent and her family.

10. The grounds raised by the Appellant in this application appear to have some basis since the pleadings on the file leave no doubt that the Respondent clearly left out or omitted crucial matters which are germane in this matter. The Respondent in her response seem to suggest that the Appellant refused to cooperate with her in filing the succession cause as directed by the ELC court at Siaya. However, a perusal of the court file gives a different picture. For instance, the Respondent while securing the chief's introductory letter, she failed and/or deliberately omitted the name of the Appellant and other beneficiaries and further failed to indicate those names in the requisite Form P&A 5. The failure by the Respondent to do this, is clear indication that she was out to lock out the Appellant and other beneficiaries on the estate of the deceased. The Respondent knew very well that the Appellant was a son of the deceased and in fact her stepson yet she deliberately left out his name. This was intended to fraud the Appellant of his inheritance and that she wanted to steal a match from the Appellant and eventually throw all the beneficiaries under the bus.



In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR, the court discussed circumstances when a grant can be revoked. The court observed:

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- “ 11. The circumstances that can lead to the revocation of grant have been set to in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court’s own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

Also, in the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No. 158 of 2000, Mwita J. made remarks on the guiding principles for the revocation of grant. He stated:

- “(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound ground. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke Section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice”

11. As has been noted above, the Respondent while filing the petition for grant of letters of administration Intestate was aware that the Appellant being a beneficiary was a person entitled to take out letters just like the Respondent. As provided for under Rule 26 of the Probate and Administration Rules. The same provides as follows:

“Rule 26(1) Letters of Administration shall not be granted to any applicant without notice of any other person entitled in the same degree as or in priority of the Applicant.

- (2) An application for a grant where the Applicant is entitled in a degree equal to or lower than that of any other person shall, in default of communication, or written consent in Form 38 or 39 by all persons so entitled in equally or priority be supported by an affidavit of the applicant and such other evidence as the court may require.”

12. The sum total of the foregoing analysis leads me to come to the conclusion that the Respondent concealed material particulars from the court namely failure to list all the names of the beneficiaries in the chief’s letter and Form P&A 5, falling to disclose to the court that she had already transferred the deceased’s property on LR No. East Gem/Nyawara II/402 into the names of her two children Ismael Otieno Odongi and Jesica Adhiambo Odongi as can be seen from the annexed copy of search which she filed together with the Probate forms yet went ahead to list the same property as belonging to the deceased in Form P&A 5. It is clear that the Respondent must have influenced the chief to write the introductory letter capturing only herself and her family members. Finally, the Respondent in her replying affidavit to the application, claimed that the said property had been gifted to her by her aunt and she led the deceased to register it in his name and to hold it in trust for her as he did not have an identity card at the time. The Respondent is under obligation at a later stage probably



during the confirmation of the grant to give an explanation as to how the property of the deceased was transferred to her before she transferred the same to her two children. There is therefore, a clear trail of the Respondent's footprints in this matter showing that she is out to benefit herself from the only property of the deceased to the exclusion of the rest of the beneficiaries.

13. The next issue of concern is that this court must decide on the consequences of revoking the grant. Indeed, all the other beneficiaries are yet to be reached since it is only the Appellant and the Respondent who are the protagonists currently. Further, since the duo had litigated before the ELC Siaya and were directed to file a succession case for the purposes of establishing the ownership of LR No. East Gem/Nyawara II/402, it would be appropriate to revoke the present grant and issue a fresh one in their joint names and that they would then proceed to file summons for confirmation of grant where the issue of ownership and distribution of properties will be determined. The question whether land Parcel East Gem/Nyawara II/402 forms part of the estate of the deceased as contented by the parties herein will be determined during the hearing of summons for confirmation of grant.
14. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed. The order of the trial court dated 7/6/2024 is hereby set aside and substituted with an order allowing the summons for revocation of grant dated 11/7/2023 in terms of prayer No. 1 thereof with a further order that a fresh grant be and is hereby issued in the names of Jerusha Opot and John Okello Otieno. The two administrators shall file summons for confirmation of grant within 14 days of the issuance of the fresh grant and serve the beneficiaries. The matter shall be mentioned before the trial court on 22/5/2025 for directions and further orders.

**DATED AND DELIVERED AT SIAYA THIS 2<sup>ND</sup> DAY OF MAY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

M/s Otieno.....for Appellant

Jerusha Opot..... Respondent

Okumu.....Court Assistant.

