



REPUBLIC OF KENYA



**In re Estate of Joyce Truphosa Apiyo (Deceased) (Succession Cause E010 of 2022) [2025] KEHC 8799 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8799 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE E010 OF 2022**

**A MABEYA, J**

**JUNE 20, 2025**

**IN THE MATTER OF THE ESTATE OF JOYCE TRUPHOSA APIYO (DECEASED  
AND**

**IN THE MATTER OF APPLICATION BY JANE A. OTIENO,  
WILLYS O. ONYONYI AND BENSON O. OGONDA– PETITIONERS**

**RULING**

1. Truphosa Joyce Apiyo died intestate on 25/11/2018 at Kaloleni – Pembe Tatu Estate Kisumu. She left behind 10 children and 16 properties as her assets as set out in Form P&A 5 dated 31/3/2022.
2. On 17/5/2023, a Grant of Letters of Administration Intestate was granted to Willys Otieno Onyonyi, Benson Ochiengo Ogonda and Jane Atieno Otieno. On 20/12/2023, they lodged an application for the confirmation of that Grant. However, the consent to the mode of distribution was executed by only 2 beneficiaries whereby, on 20/5/2024, Willys Otieno Onyonyi lodged a Protest to the mode of distribution.
3. In the said affidavit of protest, Willys Otieno Onyonyi, ('the Protestor') swore that he had the consent and authority of his co-petitioner (Benson Ochieng Ogonda) to protest the mode of distribution. However, there was no evidence on record to show consent or authority.
4. On 3/6/2024, Aburili J directed that the Protest be heard by way of viva voce evidence and fixed the hearing thereof for 31/10/2024. On the said 31/10/2024, the record shows that Mr. Mwang'wo appeared for the applicants (petitioners) while there was no appearance for the Protestor whom the Court indicated to be 'respondents'. Mr. Mwang'wo indicated to the Court that his clients (the applicants) were on their way and prayed that the matter be placed aside.
5. The following is the extract of the Court proceedings for that day: -

“Mr. Mwang'wo:

The date was taken by consent. My clients are on the way. The file can be placed aside.



Court: It is 9.03am. File placed aside until 10.00am.

R. E. Aburili

Judge

Court:

It is now 10.05am. None of the respondents are present. I have called out all the parties and only the applicants are present. Accordingly, the Protest dated 20/5/2024 is dismissed for want of prosecution. Consequently, as there is no Protest to the Summons for confirmation of grant dated 20/12/2023, and the mode of distribution proposed, the grant issued to the petitioners/administrators herein Willys Otieno Onyonyi, Benson Ochieng Ogonda and Jane Atieno Otieno on 17/5/2023 is hereby confirmed and the Certificate of Confirmation to issue. Subject to filing of accounts as stipulated in section 83 of the *Law of Succession Act*, the file is closed. I so order.”

6. Pursuant thereto, a Certificate of confirmation of grant was issued on the same day. The assets of the estate were distributed as follows: -



Name(s)	Assets	Shares
George Onyango Obunde	Kisumu/nyalenda 'b'/1127 Near Pendeza Kisumu/manyatta 'a'/2254 Near Love Bar	Whole ½ Share
Jane Atieno Otieno	Kisumu/manyatta 'a'/719 Corner Mbuta	Whole
Benson Ochieng Ogonda	Kisumu/manyatta 'a'/4241 Near Corner Mbuta	Whole
Beatrice Mercy Adhiambo	North Gem Malanga/1501 Malanga School Kisumu/manyatta 'b'/1824	Whole ½ Share
Millicent Wasonga Ogonda	Municipality Block 5/188 Pembe Tatu (365)	Whole
Grace Oduor	North Gem Malanga/893 Malanga School Kisumu Manyatta 'a'/2254 Near Love Bar	Whole ½ Share
Susan Amondi Obunde	North Gem Ludha/930 Misembe School Kisumu Manyatta 'a'/721 Near Corner Mbuta	Whole Whole
Mary Achola	Kisumu/manyatta 'a'/2650 Near Manyatta Market	Whole
Nicodemus Kennedy Odongo	North Gem Lundha/952 Misembe School Kisumu/manyatta 'b'/1824 Kisumu/manyatta 'a'/2219	Whole ½ Share Whole
Willys Otieno Onyonyi	Kisumu/manyatta 'a'/2253 Near Love Bar Municipality Migosi Gem Lundha/953 Misembe School	Whole Whole Whole



7. On 28/11/2024, the Protestor and Benson Ochieng Ogonda took out a Motion on Notice under a Certificate of Urgency under Article 159 of the Constitution, Order 12 Rule 7 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. They sought to set aside the proceedings of 31/10/2024.
8. When the matter was placed before Aburili J on 29/11/2024 for certification, the good Judge declined to certify the same as urgent and observed as follows: -

“I have considered the application dated 28/11/2024 under certificate of urgency and I find no urgency involved except falsehoods that the applicants were in Court on 31/10/2024 when the matter was called out yet the proceedings are clear that the court called out parties, placed the file aside and recalled the file and only when it was satisfied that the protestors and their advocates were absent did it dismiss the Protest for want of prosecution and proceeded to confirm the grant. The level of dishonesty exhibited in the affidavit filed cannot be tolerated by this Court as it is in bad faith and smacks of sharp practice by the parties and their counsel Mr. Odhiambo Gwada who did not attend court then for reasons known to himself. I decline to certify the application as urgent and direct the applicants to serve the respondents for interpartes directions in the new term on 27/2/2025. I decline to grant any interim conservatory orders sought in the application. I so direct.”
9. That is the Motion that was argued before me on 27/2/2025 and is the subject of this Ruling.
10. In the Motion, the applicants contended that on the material day, 31/10/2024, they were present in court. That when the matter was called, they stood up but were not allowed to testify. That their advocate was in another Court and asked to be given time but was not allowed. That their right to fair trial had been infringed. That they were condemned unheard. That the orders of 31/10/2024 were made to the detriment of 8 beneficiaries.
11. The Court has considered the record and the parties’ contestations. This is an application to set aside exparte proceedings and orders made under Order 12 Rule 3 of the Civil Procedure Rules. That sub rule provides: -
  - “(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.
  - (2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.
  - (3) If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.”
12. The principles applicable in such an application are; the reason for failure to appear, that the application should be made timeously and that the prejudice to be suffered by the opposite party should be considered.



13. On the first principle, the reasons advanced for non-attendance are two fold; that the advocate for the applicants was involved in another Court and had asked for the matter to be placed aside but denied the opportunity, secondly, that the applicants were present but were not accorded a hearing and that the applicants had been denied a hearing.
14. On the first ground, it was contended that the respondent's advocates was in another Court and had asked for the matter to be placed aside but was denied that opportunity. Firstly, there is no evidence that the applicants' advocate asked for the matter to be placed aside. It is Mr. Mwang'wo for the respondent herein who appeared and informed the Court that his clients (the respondents herein) were on their way to Court and asked for the matter to be placed aside. The Court then placed the matter aside from 9.05am to 10.00am.
15. Secondly, the applicant's advocate has not sworn any affidavit to state his whereabouts on the said day. There is no evidence to show which Court he was alleged to be in or the matter that he was conducting that he was unable to attend Court. It is also not shown at what time he finished from that Court and came only to find that the matter had been heard in his absence. No Cause list for the alleged Court matter was produced to prove those allegations or the case number.
16. In this regard, the failure to produce the said evidence, the Cause list and information regarding the Court the applicants' advocates were in, is to be inferred to have been in the applicants' disfavor if it were to be produced. Section 112 of the Evidence Act Cap 80 Laws of Kenya is apt on that point. That when evidence is in the possession of a party who fails to produce it, it is to be inferred that if it was to be produced, it would have been against him.
17. The other allegation is that the applicants were present but were denied a hearing. That they stood up when their names were called but were ignored. The record for 31/10/2024 show that, as at 9.05am, the only person present was the petitioner's advocate Mr. Mwang'wo. As at 10.05am when the matter was called out again, it is only the respondents herein who were present. The applicants were not in Court. That is why their Protest was dismissed and there was no reason to be recorded under Order 12 Rule 3 of the Civil Procedure Rules. The Court was very clear on that.
18. This is a matter where there are two competing positions, first, the Court record which shows that the applicants were not present and secondly, the averment on oath by the applicant that they were present but that they were ignored.
19. On my part, I will go with the record for two reasons; first, it is a presumption that Court record is sacred. No Judge will have any interest in a matter as to record proceedings in an inaccurate manner. There was no allegation that Aburili J had any interest to have recorded that the applicants herein were not present on 31/10/2024 when the matter was called out twice. Were court proceedings to be second guessed on an unsubstantiated averment of a litigant, then the administration of justice would be in jeopardy. It will defeat the very essence of legal proceedings which seek to uphold justice.
20. In any event, if the applicants were correct and truthful about their having been Court as they alleged, Aburili J would not have made the strong sentiments she made on 29/11/2024 when the present application was placed before her to certify the same urgent. The good Judge expressed strong sentiments about the falsehoods in the present application about the applicants' allegations that they were present at the proceedings of 31/10/2024. On the part of this Court, I would rather side with the court record.
21. Accordingly, no good reason has been advanced for the non attendance or appearance of either the applicants or their advocates in Court on 31/10.2024.



22. As to the prejudice to be suffered, the Constitutional imperative enshrined in the overriding objective set out in sections 1A and 1B of the Civil Procedure Act is that, judicial resources be prudently utilized. No evidence has been produced to show that by re-opening the proceedings, it will serve the course of justice.
23. The final limb is that of prejudice to be suffered by granting the orders. The matter is one of Succession. It has been in Court since 2022. It concerns the estate of the late Mother of the parties. To this Court's mind, the earlier the matter is settled the better for all the parties. Re-opening the matter will just but increase the costs and expenses to the parties.
24. In any event, I have looked at the Affidavit Protest sworn on 20/5/2023. It is clear that apart from the mere allegations made therein, there is no alternative mode of distribution that was suggested therein. The allegations that the property distributed to the deponent of the supporting affidavit belonged to him cannot stand. The same would have been taken into account in the distribution under section 42 of the Law of Succession Act. Litigation must come to an end.
25. In the view of the foregoing, I find the application dated 28/11/2024 to be without merit and I dismiss the same with costs.

It is so ordered.

**DATED, AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

