



**In re Estate of Indakwa Odera (Deceased) (Succession Cause  
539 of 2006) [2025] KEHC 8219 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8219 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 539 OF 2006  
AC BETT, J  
JUNE 11, 2025**

**BETWEEN**

**EMMANUEL ODERA OMUMASABA ..... APPLICANT**

**AND**

**SILAS ODERA INDAKWA ..... 1<sup>ST</sup> RESPONDENT**

**HELLEN OMUSOTSI KOKOLA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a ruling dated 12<sup>th</sup> May 2015, Said J. Chitembwe J, made an order of confirmation of Grant issued to the 1<sup>st</sup> Respondent in which the estate of the deceased which was comprised in L.R No. EAST/WANGA/ISONGO/6X8 was distributed as follows: -
  - a. Emmanuel Odera Omumasaba ..... 5 acres
  - b. Silas Odera Indakwa ..... 5 ½ acres
2. The said Grant was confirmed after the Applicant, who was the Objector, successfully filed an application for revocation of Grant that had been issued earlier to the Respondent. In his ruling, the Honorable Judge directed that the Certificate of Confirmation of Grant would issue to the Applicant. Consequently, the court issued a Rectified Certificate of Confirmation of Grant in terms of the court's aforesaid ruling on 22<sup>nd</sup> July 2015.
3. It appears from the record that the 1<sup>st</sup> Respondent was dissatisfied with the ruling of the court and promptly lodged a Notice of Appeal. However, there is no indication whatsoever that the 1<sup>st</sup> Respondent ever pursued the appeal. It further appears that the Applicant who was now the administrator, filed several applications seeking to have the five (5) acres that the court had ruled he was entitled to devolve to him as he was neither able to conduct survey and subdivision of the property, nor to secure occupation of the land.



4. Armed with a certified true copy of the register that proved that he and the 1<sup>st</sup> Respondent were entitled to 5 acres and 5 ½ acres respectively of L.R No. EAST/WANGA/ISONGO/6X8 on transmission, the Applicant opted to file MUMIAS PM ELC Case No. 25 of 2020 against the 1<sup>st</sup> Respondent seeking orders to compel him to execute subdivision and transfer forms of the 5 acres to himself and for a permanent injunction against the 1<sup>st</sup> Respondent restraining him from interfering with the Applicant's quiet enjoyment of the 5 acres.
5. By summons dated 30<sup>th</sup> July 2020, the 2<sup>nd</sup> Respondent prayed for the revocation of the Grant issued to the 1<sup>st</sup> Applicant on the ground that as a daughter of the deceased, the 1<sup>st</sup> Respondent ought to have disclosed her interest when he filed his petition for representation and as a result, she was disinherited at Confirmation of Grant. After hearing the objection proceedings brought by the 2<sup>nd</sup> Respondent, Musyoka J, wisely declined to revoke the Grant as he found that the Applicant was innocent of any misfeasance and in any event, Chitembwe J. had already made a determination that the estate of the deceased was entitled to 5.5 acres in L.R No. EAST/WANGA/ISONGO/6X8 while the father of the Applicant was entitled to 5 acres. He therefore ordered that the share of the deceased being 5 ½ acres, be divided equally between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. The court thereafter issued an amended Certificate of Confirmation of Grant on 23<sup>rd</sup> March 2021 reflecting the court's decision.
6. Once again, the 1<sup>st</sup> Respondent filed a Notice of Appeal but was not diligent in pursuit of his appeal and failed to file the Record of Appeal within the required sixty (60) days and therefore according to Rule 83 of the Court of Appeal Rules, his appeal was deemed to have been withdrawn. His attempt to revive the appeal by seeking extension of time was dismissed by Musyoka J. on 22<sup>nd</sup> July 2022.

### **The Application.**

7. By an application dated 26<sup>th</sup> August 2024, the Applicant acting in person, made the following prayers: -
  - a. THAT this Honourable court authorize the OCS Shianda Police Station to provide security during survey and demarcation of the estate EAST/WANGA/ISONGO/6X8.
  - b. THAT this Honourable court authorize the County Surveyor to demarcate and effect the Certificate of Confirmation amended on 21<sup>st</sup> March 2021.
  - c. THAT this Honourable court compel the 1<sup>st</sup> Respondent to remove his structures on the Applicants share(s).
  - d. THAT the costs be in the cause.
8. The application was premised on the fact that 1<sup>st</sup> Respondent had refused to uphold and execute the court's ruling, had encroached and erected the structures on the Applicant's share in the estate and that court orders cannot be made in vain.
9. In reply, the 1<sup>st</sup> Respondent contended that the present application is sub judice as the Applicant had sued the 1<sup>st</sup> Respondent in Mumias SPM MCLE No. 25 of 2020 in which the court had entered judgement in favor of the Applicant and where the 1<sup>st</sup> Respondent was ordered to complete and sign forms of subdivision and transfer of the 5 acres to the Applicant, and was further restrained from interfering with the Applicant's quiet possession of the 5 acres comprised in L.R No. EAST/WANGA/ISONGO/6X8.
10. The application was argued orally after which the Applicant and the 1<sup>st</sup> Respondent filed written Submissions. The 2<sup>nd</sup> Respondent is reported to be deceased and although her son sought time to file an appropriate application for purposes of replacing her, he failed to do so. Be that as it may, since



the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are both beneficiaries of the estate of the deceased, no prejudice will be occasioned to her estate as her interests will not be affected by this ruling.

11. There are two issues to be determined in this matter:-
  - a. Whether the application is sub judice.
  - b. Whether the application is merited.
12. It is not in dispute that there is in existence a Certificate of Confirmation of Grant that is yet to be implemented ten (10) years down the line. It is also not in dispute that the Applicant had secured orders to enforce the Grant in a judgement before the Environment and Land Court. It appears that instead of proceeding to execute the judgement and decree of the said court, the Applicant opted to file the present application. It strikes me that the Applicant or his Counsel did not know what procedure to follow in order to implement the Grant and hence the multiple applications and subsequent suit in the lower court. Nonetheless, the Applicant was able to demonstrate that he filed notice of intention to act in person and notice of withdrawal of Mumias SPM ELC No. 25 of 2020 on 29<sup>th</sup> October 2024.
13. Having perused the entire record, it is apparent that as at the date the Applicant filed the present application, the same was sub judice as there was already an application seeking similar orders and stemming from the judgement in Mumias SPM ELC No. 25 of 2020. However, the Applicant later chose to withdraw the said suit notwithstanding the fact that he had already obtained a favourable judgement.
14. According to the Applicant, it is his former Advocate on record who chose to file the suit without consulting him but he submits that this honourable court has the jurisdiction to hear and determine this matter as it falls within the purview of the law of succession.
15. On his part, the 1<sup>st</sup> Respondent submits that the application is in bad faith, vexatious and an abuse of the court process and should be dismissed to abide the ruling of the court at Mumias on the prior application.
16. I have painstakingly considered the application, the parties' affidavits and the rival Submissions. I have also considered the fact that the Applicant appears to have filed his notice to withdraw the Mumias case in reaction to the 1<sup>st</sup> Respondent's objection that the present application is sub judice.
17. The effect of the Notice to withdraw dated 15<sup>th</sup> October 2024 and filed on 29<sup>th</sup> October 2024, in Mumias SPM ELC No. 25 of 2020 is to bring the said suit to an end. In *PIL Kenya Limited v Joseph Opong* [2009] eKLR, the Court of Appeal held that:-

“The effect of a notice of withdrawal is terminate the suit of course subject to costs to the opposite party.”
18. Clearly the withdrawal of the suit in the subordinate court was a pre-emptive measure that was aimed at forestalling the striking out of the current application. That there was some mischief in the entire process is not in doubt. However, the ripple effect of the withdrawal is that the application is no longer sub judice and were the court to strike out the current application, the Applicant would be left without any remedy.
19. The Oxygen Principle encoded in Section 1A, 1B and 3A of the *Civil Procedure Act* as read with Rule 73 of the Probate and Administration Rules which was later enshrined in *the Constitution* under Article 159(2)(d) enjoins the courts to be more flexible in administering justice and not to insist on



strict adherence to procedural rules in the interest of a just expeditious, proportionate, and affordable resolution of civil disputes of which succession matters are part of. Article 159(2)(d) states:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles— justice shall be administered without undue regard to procedural technicalities.”

20. The Oxygen Principle therefore gives the court more discretion in dealing with matters before it. In the case of *Abdirahman Abdi also known as Abdirahman Muhammed Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKLR, the Court of Appeal held that:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice..... In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure.”

21. Being guided by the above principle, I hold that I must “breathe life” to the instant application by allowing the same to proceed to hearing notwithstanding the fact that it was filed while another similar application was in existence. In doing so, I am being mindful of the fact that this matter has been pending since 2006 and despite the Grant of Letters of Administration having been confirmed, the estate of the deceased is yet to be transmitted.

22. Now back to the merits of the application. An amended Certificate of Confirmation of Grant was issued on 23<sup>rd</sup> March 2021 six years after the Grant had been confirmed. According to the amended Grant, the Applicant was to inherit 5.5 acres to be excised from LR No. EAST/MWANGA/ISONGO/6X8 while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were to inherit 2.75 acres each from the same land. It is the Applicant’s contention that the land needs to be surveyed and demarcated to pave way for transmission.

23. The 1<sup>st</sup> Respondent, who is the only one who responded to the application, did not deny the Applicant’s averments that he has refused or declined to uphold or execute the orders of the court and has encroached and erected structures on the Applicant’s portion of the estate. Instead, the 1<sup>st</sup> Respondent relied on technicalities to urge the court to strike out the application.

24. Courts cannot issue orders in vain. They must be obeyed by the parties, unless appealed against and in default, the court can take steps to ensure the orders are enforced. There is no evidence that the 1<sup>st</sup> Respondent has been willing to take the necessary steps to implement the confirmed Grant, which was the result of a consent order between the three parties. I can only conclude that the reason for the reluctance is because the 1<sup>st</sup> Respondent is enjoying the status quo. His reluctance even drove the Applicant to the lower court in an effort to implement the Grant. Suffice to say that there is sufficient evidence that the 1<sup>st</sup> Respondent is not keen on having the estate distributed. He is bent on denying the Applicant the fruits of the judgement made herein ten years down the line. The 1<sup>st</sup> Respondent’s defiance of the judgement and the subsequent consent order must be put to a halt.

25. The upshot is that I find the application dated 26<sup>th</sup> August 2024 to be merited. I therefore allow it and make the following orders:-

a. That the County Survey is hereby authorized to survey and demarcate the estate of the deceased as comprised in L.R No. EAST/WANGA/ISONGO/6X8 within ninety (90) days.



- b. That the OCS of Shianda Police Station do provide security during the process of survey and subdivision.
- c. That the 1<sup>st</sup> Respondent shall remove his structures from the portion determined to be the Applicant's share within 180 days from the date of survey.
- d. That the three parties shall share the costs of subdivision in proportion to their respective shares.
- e. This being a family matter, there are no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

**A. C. BETT**

**JUDGE**

**In the presence of:**

Applicant present in person

Ms. Omar for the 1<sup>st</sup> Respondent

Mr. Mondia for the 2<sup>nd</sup> Respondent

Court Assistant: Polycap

