



**In re Estate of Magdalena Oluoch Omollo (Deceased) (Succession Appeal
E008 of 2023) [2025] KEHC 10940 (KLR) (2 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION APPEAL E008 OF 2023**

JM OMIDO, J

JULY 2, 2025

IN THE MATTER OF THE ESTATE OF MAGDALINA OLUOCH OMOLLO (DECEASED)

AND

IN THE MATTER OF AN APPLICATION GRANT BY

BETWEEN

JOSEPH ONYANGO OTUOMA APPELLANT

AND

BONIFACE OTIENO ONGUKO RESPONDENT

(Being an appeal from the ruling and order of Hon. B. Omollo, Senior Resident Magistrate, delivered on 25th April, 2023 in Kisumu CMCC Succession Cause No. E332 of 2021, In the Matter of the Estate of Magdalena Oluoch Omollo (Deceased))

JUDGMENT

1. This appeal emanates from the ruling and order of Hon. B. Omollo, Senior Resident Magistrate delivered on 25th April, 2023 in Kisumu CMCC Succession Cause No. E332 of 2021, In the Matter of the Estate of Magdalena Oluoch Omollo (Deceased).
2. A brief history of the matter before the lower court is that a grant of letters of administration intestate was on 7th December, 2021 issued to Boniface Otiemo Onguko, the Respondent herein, as administrator of the estate of Magdalena Oluoch Omollo (Deceased), who met her demise on 15th May, 1991.
3. The Appellant herein, Joseph Onyango Otuoma, filed a summons for revocation of grant dated 25th July, 2022, seeking an order that the lower court revokes the grant on the ground that the same was obtained fraudulently by the making of a false statement or by concealment from the court of other beneficiaries.



4. The main ground upon which the Appellant relied in his application was that he became a step son to the Deceased when he was 3 years old and ought therefore to have been included as a beneficiary of the Deceased's estate.
5. The Respondent resisted the application by filing a replying affidavit sworn on 25th July, 2022 in which he stated that he followed all requisite legal avenues in obtaining the grant. He stated that the Appellant did not have any consanguinity or transanguinity relationship with the deceased and hence did not qualify as a beneficiary of her estate.
6. The application before the lower court proceeded by way of written submissions and the court rendered its ruling on 25th April, 2023, dismissing the same with a reservation as to costs, the matter being one of a family nature.
7. Aggrieved by the ruling and order of the trial court, the Appellant preferred the present appeal vide the memorandum of appeal dated 22nd May, 2023, on the following grounds:
 - i. That the Honourable Magistrate erred in dismissing the Appellant's application dated 25th July, 2022.
 - ii. That the Honourable Magistrate erred in law and in fact in finding that the Appellant was not a beneficiary and dependant of the Deceased.
 - iii. That the Honourable Magistrate erred in law and in fact in failing to consider the evidence from the chief that the Appellant lived with the Deceased since he was 3 years old and as such was a dependant of the Deceased.
8. The Appellant proposes that the appeal be allowed, the ruling and order of the trial court dated 25th April, 2023 be set aside and be substituted with an order allowing the summons for revocation of grant dated 25th July, 2022. The Appellant also seeks costs for the appeal.
9. This being the first appellate court, I am required under Section 78 of the Civil Procedure Act and as was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions. (See also *Peters v Sunday Post Limited* [1958] EA 424).
10. The Appellant's application before the lower court was premised on the grounds that he was the biological child of the late Magdalena Oluoch Omollo, the Deceased and therefore a beneficiary of her estate. He however contradicted that position when he stated that he became a step son to the Deceased when he was 3 years old, when his biological father Aloice Otieno Omungi inherited the Deceased.
11. The application was opposed by the Respondent who stated that the Appellant was not a biological issue of the Deceased and that his biological father did not sire any children with the Deceased. He stated that at the time the Appellant's biological father inherited his mother, the Deceased was 75 years old.
12. The Appellant thus proffered the position that the Respondent excluded him in the succession proceedings before the trial court and that he was a beneficiary of the estate and ought to have been included as such. He stated that the Respondent concealed the information that the Appellant was a beneficiary of the Deceased's estate.
13. I have considered the grounds of appeal presented herein, the submissions by the parties and the record of the lower court and I deduce the issues that I am now tasked to determine as follows:
 - a. Whether the Appellant is a beneficiary of the estate of the deceased.



- b. Whether the learned trial Magistrate erred in dismissing the Appellant’s summons for revocation of grant.
 - c. A determination as to costs of the appeal.
14. I will proceed to determine issues (a) and (b) together.
15. Under the *Law of Succession Act*, Cap 160 Laws of Kenya, a person who is not a blood relative of a Deceased person generally does not qualify to be a beneficiary of the estate of the Deceased who dies intestate unless the person falls within specific exceptions. The estate of an intestate Deceased person is generally distributed to the spouse of the deceased person and blood relatives.
16. My understanding of Section 29 of the *Law of Succession Act* is that a dependant can only be a beneficiary of the estate of a Deceased person, even though the dependant is not a blood relative of the Deceased, where the dependant can prove that he was being maintained by the Deceased person immediately prior to his death.
17. Section 29 of the *Law of Succession Act* provides as follows:
 29. Meaning of dependant
For the purposes of this Part, “dependant” means
 - a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - b. such of the deceased’s parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
18. Thus then, on an application by a dependant who proves dependency, the court may order for reasonable provision from the estate, even though the person is not a spouse or blood relative, where the person alleging such dependency proves that he was being maintained by the Deceased immediately prior to his demise.
19. The question as to who qualifies to be a dependant was discussed by Musyoka J in the case of *Okello v Onyango* (Succession Appeal E002 of 2022)[2023] KEHC 22828 (KLR)(28 September 2023) (Judgment) where the learned Judge held as follows:

“Being a brother is one thing, being dependent on the deceased is another. A brother of the deceased would qualify to bring an application, under section 26, as a dependant, upon proof that he was dependent on the deceased during his lifetime. Dependency is gauged along the lines of depending on the deceased for his wellbeing. The best test would be whether he was dependent in the same mode as an immediate family member, a wife or child of the deceased. Did he depend on him for food, shelter, clothing, medical care, educational or schooling needs, among others? If the alleged dependency was within that mode, then he would fit the definition of a dependant.”
20. It is not in dispute that the Appellant is not a blood relative or spouse of the Deceased. That then means that he could only be considered as a beneficiary of the estate of the Deceased if he demonstrated that



he was a dependant of the Deceased, immediately prior to her death. Did the claim by the Appellant fall within that mode? I do not think so. I say so for the reasons I will discuss below.

21. From his application, affidavit in support thereof and submissions before the trial court, the only basis that the Appellant presented upon which he moved the trial court seeking revocation of the grant is that his father inherited the Deceased as his wife. I have carefully gone through his affidavit in support of the summons and it is clear that he did not claim that the deceased provided him with food and shelter, or was responsible for his healthcare and educational needs. He did not claim that he was in any way dependent on the deceased immediately prior to her death. He therefore did not qualify to be considered to be the Deceased's dependant. His application was therefore unmerited and the learned trial Magistrate cannot be faulted for dismissing it.
22. Having said so much, I reach the result that the Appellant was not a dependant and is therefore not a beneficiary of the Deceased's estate. I proceed, on the basis of that persuasion, to dismiss the instant appeal. I uphold the learned trial Magistrate's ruling and order of 25th April, 2023.
23. The nature of this matter demands that I make no orders as to costs of the appeal.
24. This file is hereby closed.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 2ND DAY OF JULY, 2025.

JOE M. OMIDO

JUDGE

For the Appellant: Mr. Ojuro.

For the Respondent: No appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

