



**Khadoro v Alegwa (Succession Appeal E007 of 2024)
[2025] KEHC 10710 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E007 OF 2024**

**S MBUNGI, J
JULY 17, 2025**

BETWEEN

EVERLYNE KHADORO APPELLANT

AND

ALLEN ALEGWA RESPONDENT

*(Being an appeal from the ruling and decision of the Hon. A A Odawo, PM
delivered on 15.5.2024 in Kakamega MC succession No.1040 of 2018)*

JUDGMENT

1. The appellant being dissatisfied with the ruling of the Hon. A. A. Odawo, PM delivered on 15.5.2024 in Kakamega MC Succession Cause No.1040 of 2018 appeals against the same on the following grounds as set out in the memorandum of appeal:-
 - i. That the trial court erred in law and fact by refusing to revoke the grant on account of the death of the petitioner.
 - ii. That the trial court erred in both law and fact by failing to hold that the death of the petitioner had rendered the grant issued to her inoperative and therefore liable for revocation.
 - iii. That the trial court failed to appreciate that part of the estate, though purportedly distributed, remained unadministered and therefore that a fresh grant to the appellant was necessary for the completion of the same.
 - iv. That the trial court erred in failing to hold that the entire process of obtaining the grant and the confirmation thereof was irregular and was vitiated by clear fraud
 - v. That the trial court erred in failing to hold that the sale of part of immovable property of the estate to the respondent before confirmation of grant was illegal and was expressly barred by law.



- vi. That the trial court completely misapprehended the effect and purport of Section 42 of the Law of Succession Act and misapplied the same.
 - vii. That the trial court erred in holding that the deceased had gifted part of the estate to the petitioner.
 - viii. That the trial court further erred by holding that the deceased had during his lifetime settled his family contrary to the evidence on record.
2. The matter concerns the estate of Haroun Majisu Magalasia - deceased who died on 28.4.2005. The deceased was survived by two widows; Loise Lungatso Machiso and Beatrice Mboga Magalasia. • Loise Lungatso Machiso had four children with the deceased namely:-
- i. Tom Abung' ana Magalasia - son - adult
 - ii. Beauty Leyah Magalasia - daughter - adult
 - iii. Everlyne Khadoro Majisu - daughter - adult
 - iv. Justus Wikunza Machisu - son - adult.
- Beatrice Mboga Magalasia did not have any child with the deceased.
- The deceased had also Joab Malenge Machayo Machisu, an adult son born out of wedlock.
3. The estate of the deceased comprised only two pieces of land namely:
- i) Isukha/Mukulusu/67- 2.6 ha. &
 - ii.) Isukha/Mukulusu/1107 - 1.64 ha.
4. By agreement dated 26.4.2021, Beatrice Mboga sold 1.30ha of land title No: Isukha/Mukulusu/1107 to the respondent. The respondent also claimed to have bought part of the said land from Joash Malenge Machayo Machisu by agreement dated 5.11.2021. A grant was made to Beatrice Mboga Magalasia on 13.3.2017. The grant was confirmed on 2.11.2022.
5. The respondent was at confirmation given the whole of land title number Isukha/Mukulusu/1107 which he registered into his name and subdivided into titles Isukha/Mukulusu/1541 and Isukha/Mukulusu/1542.
6. Title number Isukha/Mukulusu/67 was at confirmation given to Loise Lungatso Machiso and the five children of the deceased and the same is yet to be transmitted. Beatrice Mboga Magalasia, the administrator of the estate of the deceased died on 18.11.2022.

Appellants case

7. The appellant submitted that the sale of immovable property before the confirmation of the grant is expressly prohibited under section 82 of the Law of succession Act that provides that ;
- “ Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-
- (a) ...
 - (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:



Provided that:-

- (i) ..
- (ii) no immovable property shall be sold before confirmation of the grant.”

That the sale having been on 26.4.2021 and 5.11.2021 was before 2.11.2022 when the grants was confirmed hence the same was illegal as held in the case of Re-estate of Paul M’Maria (2017)eKLR

8. The grant made to Beatrice Mboga Magalasia alone to the exclusion of her co-widow Loise Lungatso Machiso was not regular as the persons listed did not sign against their names neither was the list of beneficiaries accurate as they did not match the names of the beneficiaries as they are in the ids.
9. The grant made to Beatrice Mboga who died before completing the administration of the estate was amenable to revocation as the letters of administration intestate were made to Beatrice Mboga on 13.3.2017 and grant was confirmed on 2.11.2022. She died on 18.11.2022 before transmitting title no; Isukha/Mukulusu/67. The appellant avers that under section 76 (e) of the Law of succession Act, the court is entitled to revoke a grant if for some reason the same has been rendered useless and inoperative as was held in the case of In re Estate of Chemwok Chemitei (deseased) (2021)eKLR where it was held that “The issue of substitution of an administrator with another person should not arise. When the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the Law of Succession Act”.

Respondents case

10. The respondent submits that this being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Ltd 2000 2EA 212 wherein the court of appeal held, inter alia that;- on a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, the responsibility of the court is to rule on the evidence on records and not to introduce extraneous matters not dealt with by the parties in the evidence.”
11. The respondent avers that in the trial court, the appellant on 14th June, 2023, filed summons for revocation and annulment of grant on grounds that the deceased petitioner obtained the grant secretly without the consent of the other family members and used forged signatures and prints on both the consent to apply for grant and the consent for distribution,
12. The respondent herein filed a replying affidavit that was sworn on 28th July, 2023, opposing the said application.
13. In the response, the respondent averred that the succession herein was done by Beatrice Mboga Magalasia a widow to the deceased who later on died after confirmation of grant. He further averred that all beneficiaries to the estate were factored and got their respective shares.
14. It was his evidence that prior to the demise of Haroun Majisu Magalasia he had settled his two wives on his two pieces of land with Loise Lungatso Machiso with her children settling on LR No. Isukha/ Mukulusu/67 while Beatrice Mboga Magalasia was settled on LR. No. Isukha/ Mukulusu/110.



15. The respondent avers that the two widows lived separately and peacefully contended with their own shares as per the wishes of their late husband. The respondent herein did not gain access to the 2nd widow's share by accident. He hugely provided her with millions for medication because there was that need for treatment.
16. During confirmation of the grant the trial court ascertained the properties of the deceased and distributed them according to the mode of distribution provided. All the beneficiaries got their shares.
17. The appellant and respondent agreed to dispose of the appeal through way of written submissions.

Issues to be determined

- i. Whether the sale and grant of property Isukha/Mukulusu/1107 to the respondent was proper and sustainable in law.
- ii. Whether the making of the grant to Beatrice Mboga Magalasia and the confirmation thereof in particular was procedural and in accordance with the law.
- iii. Whether the grant made to Beatrice Mboga Magalasia who died before completing the administration of the estate was not amenable to revocation.

Analysis and Determination

18. I have looked at the application, supporting affidavit, replying affidavit of the respondent and submission file by the parties in the appeal for revocation of grant issued and making of a fresh grant with the effect of holding the transmission of land title No: Isukha/Mukulusu/67 in Limbo.
19. This being an appellate court ,it is guided by principles set out in the case of Abok James Odera t/ a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999). “Which held that this being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
20. The first issue that arises for determination is whether the sale and grant of property No. Isukha/ Mukulusu/1107 to the respondent was proper and sustainable in law.
21. As argued by the appellant, by agreement dated 26.4.2021, Beatrice Mboga sold 1.30ha of land title No: Isukha/Mukulusu/1107 to the respondent.The respondent also claimed to have bought part of the said land from Joash Malenge Machayo Machisu by agreement dated 5.11.2021.A grant was made to Beatrice Mboga Magalasia on 13.3.2017.The grant was confirmed on 2.11.2022.Thus the sale of the property was clearly done before the issuance of the grant contrary to the provision of section 45 and 82 of the [*Law of Succession Act*](#).

45.

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person
- (2) Any person who contravenes the provisions of this section shall (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment;



Section 82 of the Succession Act that provides that

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- (c)
 - i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
 - ii) no immovable property shall be sold before confirmation of the grant;

- 22. Courts have said time and again that any person who without the authority of the *Law of Succession Act* or any other written law or grant of representation, takes possession or disposes of, or otherwise intermeddle with the free property of the deceased is guilty of a criminal offence and is answerable to the rightful executor or administrator of the extent of the assets he has intermeddled with as it was held in the case of *In re Estate of M’Ngarithi M’Miriti* [2017] KEHC 7904 (KLR).
- 23. the case of *Gitau And Two Others -Vs- Wandai And Five Others* (1989) Klr 231 where it was held that entering into an agreement to sell estate property before getting a grant or without such a grant is an act of intermeddling.
- 24. Therefore the respondent acquiring land before the confirmation of the grant amounts to an act of intermeddling contrary to section 45 and 82 of the Succession Act.

I therefore fault the magistrates’ reasoning that the deceased had the intention that each of his parcels of land was to be bequeathed to one house as the law is clear that unless there was a legal and valid will left by the deceased the law of succession intestate will be used.

- 25. The second issue that arises for determination is whether the making of the grant to Beatrice Mboga Magalasia and the confirmation thereof in particular was procedural and in accordance with the law.
- 26. The letter of consent sworn on the 28th day of January 2025 was addressed to both the late Beatrice Mboga Magalasia and Loise Lung’atso Majisu, each in their capacity as widows of the deceased. Accordingly, the letters of administration and the resulting grant ought to have named both widows as joint administrators of the estate, unless a fresh consent had been filed clearly indicating that one of them had relinquished her right to the other. However, there is no evidence or record on the court file to suggest that Loise ever renounced her right as co-administrator or gave her consent for Beatrice to administer the estate alone. In view of the absence of such documentation, I find and hold that the trial court erred in both law and fact by failing to recognise that the entire process of obtaining the grant and its subsequent confirmation was irregular and procedurally flawed.



27. The consents, which is mandatory, should have been sought from both the widows and the other beneficiaries as provided for by Rule 26(1) and (2) of the Probate and Administration Rules requires the consent of persons in the same or higher degree of preference.

26.

- (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to 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 renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

After Beatrice Mboga sought for the grant alone, consent ought to be sought once more from the beneficiaries; the confirmation proceeded without this crucial consent or proper notice.

28. The third issue on whether the grant made to Beatrice Mbonga Magalasia who died before completing the administration of the estate was amenable to revocation. Under section 76 of the Law of Succession Act, a court may revoke a grant so long as the grounds listed in the section are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds.

- i) The first is where the process of obtaining the grant was attended by problems.
- ii) The second would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. See the case of *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] KEHC 6553 (KLR).

29. After considering the competing arguments and the relevant law, I do find that the appeal has merit. Therefore the appeal is allowed and the ruling of the trial court is hereby set aside and is replaced with the following orders.

- i. The grant of letters of administration issued on 0n 13.3.2017 to Beatrice Mboga is hereby revoked;
- ii. The certificate of confirmation of grant issued on 2.11.2022 is hereby set aside;
- iii. The Land Registrar to cancel all entries in the title pursuant to the certificate of confirmation of grant and revert proprietorship of the land to the name of the deceased Haroun Majisu Magalasia; and
- iv. The appellant Evelerlyne Khadoro Majisu is hereby appointed as the administrator to the estate of the deceased and is given 30 days to file for summons of confirmation of grant and to make sure all the assets and liabilities of the estate are ascertained and factored for.
- v. Mention date of 8th October, 2025 for further directions.
- vi. The recourse open to the respondent is to pursue the estate of Beatrice for refund of the purchase price for the parcel of land he claims he bought if indeed there was a legal and valid sale. This can only be determined by the Environment and Land Court (ELC) for this court



has no jurisdiction to determine the validity of a sale of land Agreement as the respondent is a stranger to this court as he is neither a beneficiary nor a liability to the deceased.

vii. This being a family matter, each party shall bear its own costs of the appeal.

30. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF JULY, 2025.

S. MBUNGI

JUDGE.

In the presence of:-

Elizabeth Angong'a-Court Assistant.

Mr. Nyukuri for the Appellant present .

Mr. Otsyeno for the respondent present online.

