



**In re Estate of Dalmasius Okello Ong'are alias Dalmas Okello alias Dalmas Otengo - Deceased)
(Succession Cause E012 of 2023) [2024] KEHC 3740 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE E012 OF 2023**

RE ABURILI, J

APRIL 9, 2024

**IN THE MATTER OF THE ESTATE OF DALMASIUS OKELLO ONG'ARE
ALIAS DALMAS OKELLO ALIAS DALMAS OTENGO(DECEASED)**

BETWEEN

**PELEX OGOLA 1ST APPELLANT
CHRISTOPHER SANYA 2ND APPELLANT
WELLINGTON OITI 3RD APPELLANT
MAJOR OLUNGA 4TH APPELLANT
MARYL ADHIAMBO (SUING IN THEIR CAPACITY AS THE
BENEFICIARIES OF THE ESTATE OF ALFRED ONGARE OKELLO
DECEASED) 5TH APPELLANT**

AND

**MEDA OKELLO 1ST RESPONDENT
ELIZABETH OPIYO OKELLO 2ND RESPONDENT
FRANCISCA TABU OKELLO 3RD RESPONDENT
MOSES SANYA OKELLO 4TH RESPONDENT**

JUDGMENT

1. The applicants vide the summons dated 30th November 2023 sought for revocation of the grant of letters of administration issued and confirmed to the respondents herein on 13th August 2015 and further that they be included as administrators and beneficiaries of the deceased's estate.
2. The application was based on the grounds therein as well as the supporting affidavit of Pelex Ogolla.



3. It was the applicants' case that the respondents failed to disclose that the applicants were beneficiaries of the deceased's estate specifically that they were a widow and children of the late Alfred Ongare Okello who was one of the sons of the deceased Dalmas Okello.
4. The applicants averred that they were not informed by the respondents that the deceased's estate was being distributed and that they only came to this realization after the said grant had been confirmed.
5. The applicants, through the 1st applicant, further averred that in February 2023, she built a house on LR No. Kisa/Doho/639 but in July 2023 the respondents demolished the said house.
6. In response, the respondents filed a replying affidavit sworn on the 2nd January 2023 deposing that prior to his death, the deceased indicated to all his children that because the properties he had were not sufficient to distribute to each of his children, the properties ought not to be sold but held jointly held by all the children, as were the said properties to be sub-divided, none of the sub-divisions would even be fit to construct a dwelling house.
7. It was further deposed that as a result of the above, it was resolved by the beneficiaries that none of the properties were to be sold or sub-divided as it was not possible to have the title deeds extracted bearing 13 names of the beneficiaries as joint owners thus the beneficiaries incorporated a company and were in the process of commencing the transfer process.
8. The respondents further deposed that the 1st applicant forcefully encroached on one of the deceased's properties and started constructing and despite assurances that the estate of the late Alfred Ongare Okello would be considered, the 1st applicant did not listen.
9. It was deposed that the 1st applicant remarried immediately after the death of Alfred Ongare Okello and further that the 5th applicant was neither a child of, beneficiary or dependant of the late Alfred Ongare Okello and thus has no locus to make any demands over the deceased's estate.
10. It was further deposed that the administrators of the deceased's estate had no problem including the 1st to 4th applicants in sharing of the deceased's estate but not the 5th applicant.
11. The parties argued the Summons for revocation of grant orally.

The Applicants' Submissions

12. Mr. Ochanda counsel for the applicants submitted that his clients were not included in the succession proceedings yet they were beneficiaries of the deceased's estate and thus the grant was obtained fraudulently.
13. It was submitted that the applicants were grandchildren and widow to the son of the deceased and thus, beneficiaries and further that there was a need for rendering of accounts to the deceased's estate as provided for under section 83 of the *Law of Succession Act*. The applicants further submitted that section 29 (b) of the *Law of Succession Act* provided that grandchildren were dependants.
14. It was further submitted that the proposed incorporation of a company was contrary to the certificate of confirmation of grant as there was no will and thus cannot be entertained by this court.
15. It was submitted that the respondent had not demonstrated that the 1st applicant left the home of Alfred Okello and further the allegation that the 5th applicant was not a child of Alfred Okello amounted to a mere allegation.



The Respondents' Submissions

16. Ms. Mumbi counsel for the respondents opposed the application arguing that when the late Alfred Ongare Okello died, the 1st applicant left her home and did not petition for letters of grant and further that the late Alfred pre-deceased his father the deceased herein.
17. It was submitted that only the spouse and children of the deceased are dependants under section 29 of the Law of Succession Act and thus Alfred Ongare Okello was not included because he died before his father, the deceased herein.
18. The respondent submitted that the applicants herein were children and beneficiaries of the estate of Alfred Ongare Okello whereas the 5th applicant was not a beneficiary as there was no evidence that she was a child of the late Alfred Okello.
19. On compliance with section 83 of the Law of Succession Act, it was submitted that the deceased had already communicated on how he wished his estate to be distributed because he had more children than the estate.
20. The respondents further submitted that the petition was advertised and gazetted and no objection was filed and thus no case had been made for revocation of the grant.

Analysis & Determination

21. Having considered the Summons for revocation of grants and the opposition thereto as argued by both parties' counsel, I find the issue for determination herein is whether the Summons meets the threshold for the revocation of a grant within the meaning of Section 76 of the Law of Succession Act.
22. Section 76 of the Law of Succession Act states as follows:

“

- “76. Revocation or annulment of grant
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 the making of a false statement or by the 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;
 - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced



any such inventory or account which is false in any material particular; or

- (e) that the grant has become useless and inoperative through subsequent circumstances.”

23. This section was interpreted *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above 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. The first is where the process of obtaining the grant was attended by problems. The first 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. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

24. From the above provisions it is clear that a party seeking to have a grant revoked must prove either, or, all the grounds listed under Section 76 of the *Law of Succession Act*. The applicants sought for revocation of grant on grounds that the grant had been obtained fraudulently and on concealment of material facts. They also argued that they had not been involved in the succession process despite being beneficiaries of the deceased's estate by virtue of being a widow and children of the Alfred Okello, who was the son of the deceased herein Dalmas Okello.
25. On the issue of fraud, it is trite law that allegations of fraud are serious allegations which need not only be pleaded but be strictly proven. A party alleging fraud has the burden of proving such fraud and the standard of proof is higher than that in civil cases, which is on a balance of probability but lower than in criminal cases which is beyond reasonable doubt.
26. Since the deceased whose estate is in issue herein died on 22nd July 2012, the said Alfred Ongare Okello who was the deceased's son predeceased the deceased as he died on the 12th March 1997. It is trite that where a person predeceases a deceased intestate person, his family is not entitled to the deceased's estate unless it can be shown that prior to the deceased's death, the person's beneficiaries were dependant on the deceased prior to his death.
27. The record further shows that the deceased died intestate having not left behind a written will capable of taking effect. Therefore, the deceased's net intestate estate ought to have devolved in line with the rules governing intestacy under Part V of the *Law of Succession Act*.



28. The 1st applicant is not a child of the deceased. She is a daughter-in-law. In terms of rights or entitlement to a share in the estate, she had none at all. She is not in the same league with the respondents nor the son, the late Alfred Ongare Okello. It is only her children with her late husband, who have the right or entitlement to a share of the estate, by dint of section 41 of the [Law of Succession Act](#), by way of stepping into the shoes of their late father. Section 41 of the [Law of Succession Act](#) provides that:

“Property devolving upon child to be held in trust

Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”

29. The 1st applicant can therefore only agitate a claim on behalf of her late husband, and she can only agitate the same upon obtaining a grant of representation to his estate, for it only that grant that would clothe her with authority to speak on behalf of her husband. Speaking for her late husband without obtaining a grant to his estate amounts to intermeddling into his estate, which is a criminal offence under section 45(2) of the [Law of Succession Act](#).

30. Thus, the mere fact that the 1st applicant is the surviving spouse of the deceased’s late son who predeceased his father does not, whatsoever clothe her with no authority to claim that which accrues to her late husband. The 1st applicant has not provided any proof that she holds such a grant with respect to the estate of her late husband Alfred Ongare Okello.

31. With respect to the 1st applicant’s children, the 2nd - 5th applicants, it is clear that subject to proof that they are the grandchildren of the deceased Dalmas Okello, they are entitled to the deceased’s estate as stipulated in section 41 of the [Law of Succession Act](#), as their father predeceased the deceased herein, albeit they were not dependent on the deceased prior to his death. I however observe that the respondents on their part deposed that they were willing to provide for all the applicants save the 5th applicant who they alleged was not a child of their late brother.

32. In [Christine Wangari Gachenge v Elizabeth Wanjiru Evans & 11 Others](#) [2014] eKLR it was stated thus and I concur that:

“Although Section 35 and 38 of the [Law of Succession Act](#) is silent on the fate of surviving grandchildren whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law is on section 41. If a child of the intestate has predeceased the intestate then that child’s issue alive or en ventre sa mere on that date of the intestate’s death will take in equal share per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate’s death.”

33. Similarly, in [Re Estate of Veronica Njoki Wakagoto \(Deceased\)](#) [2013] eKLR, it was held that:

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own



parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

34. I note that the applicants annexed birth certificates for the 2nd to 4th Applicants showing that they are children of the 1st applicant and the deceased Alfred Ongare Okello. No birth certificate for the 5th applicant was annexed. The burden lies on the 1st and 5th applicants to prove that the 5th applicant is a child to the deceased Alfred Ongare Okello hence the grand child to the deceased Dalmas Okello and therefore his dependant. No such proof was exhibited. I say no more on that.
35. In addition, the 1st applicant has deprived this court of information as to where she has been living all these years with her deceased husband and her children herein and why it became necessary for her to get onto one of the parcels of land subject of these proceedings, with a view to constructing a house in 2023 yet her husband died in 1997 and her father in law died in July, 2012.
36. Accordingly, I find that the applicants herein have failed to prove that the respondents herein obtained the grant as confirmed by non-disclosure, as required by section 76 of the *Law of Succession Act*.
37. Further, I agree that the estate is small and that the other beneficiaries having agreed on the best mode of distribution to take care of the interests of each beneficiaries as guided by their later father Dalmas Okello, I find no reason to interfere with the arrangement, which will also benefit the three children of Alfred Ongare Okello in the same manner as the surviving children of the deceased Dalmas Okello.
38. However, as the respondents are willing to share out the estate of the deceased with the children of the 1st applicant with the deceased Alfred Ongare Okello and as there is no evidence that the said estate has been fully distributed as no accounts have been rendered to court since the grant was confirmed in 2015, I order that the respondents do make provision for the 2nd, 3rd and 4th respondents and apply for amendment/rectification of the confirmed grant to include them and their respective shares in the said estate.
39. The upshot of the above is that the summons for revocation of grant dated 30th November 2023 lacks merit and is thus dismissed with an order that each party bear their own costs of the Summons as dismissed.
40. Subject to such rectification of grant and inclusion of the 2nd, 3rd and 4th Respondents as beneficiaries and the rendering of accounts of the distribution of the estate, this file is closed.
41. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE

