



REPUBLIC OF KENYA



**In re Estate of Elkana Ochoro Osuka (Deceased) (Succession Cause
252 of 1994) [2024] KEHC 4066 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 252 OF 1994
RE ABURILI, J
APRIL 4, 2024**

IN THE MATTER OF THE ESTATE OF ELKANA OCHORO OSUKA (DECEASED)

BETWEEN

MESHACK OWIRA OSUKA 1ST ADMINISTRATOR

PETER OMONDI 2ND ADMINISTRATOR

AND

BERTHA ANYANGO ADERA APPLICANT

RULING

1. In this very old Succession Cause, a grant of letters of administration intestate dated 13th July 2017 and confirmed on the 6th November 2017 was issued in favour of the administrators herein Meshack Owira Osuka and Peter Omondi, to administer the estate of their late father Elkana Ochoro Osuka. The applicant Bertha Anyango Adera is the daughter to the former sole administrator Patrick Adera Choro, who died upon which the current administrators were appointed to continue with the administration of the estate. Vide Summons for Revocation of grant dated 2nd December 2020 and filed on the 14th December 2020, the applicant sought for revocation of the said grant on the grounds that the same was issued without inclusion of all persons entitled to the deceased's state.
2. The applicant further averred that the administrators moved the court for confirmation without disclosing the interest of other beneficiaries like herself and that there was need to include other beneficiaries to the state and have their interests protected.
3. It was the applicant's case that the administrators herein deliberately concealed from the court the fact that some of the beneficiaries therein signed for the others who were alleged to have consented to the same.



4. The applicant further averred that the deceased's widows ranked higher than the administrators in entitlement to administer the deceased's estate and that the said administrators failed to file consent for confirmation of grant.
5. It was further averred that the grant of letters of administrators disinherited all other beneficiaries and has resulted in the transfer and takeover of the said properties by the administrators.
6. The said Summons for Revocation of grant were grounded on the affidavit sworn by the applicant as well as the grounds on the face thereof.
7. In response, the 1st administrator filed a replying affidavit sworn on the 21st March 2022 opposing the application for revocation of grant. It was his contention that the administrators herein were the legitimate administrators of their late father's estate and that all beneficiaries had been taken care of. He reiterated that the applicant was a daughter of their step-brother, the deceased Patrick Adera Choro, and therefore his niece.
8. It was deposed in contention that the applicant was a stranger to this matter and had no locus standi to commence the instant proceedings as her deceased father was a listed beneficiary and had got his fair share of the deceased's estate which the applicant ought to pursue.
9. The administrator contended that the applicant's father had other children who were not complaining and had not elected the applicant to represent them and that he was assigned an even bigger portion of the estate than the other beneficiaries
10. It was further deposed that the deceased's estate had already been distributed and that therefore there was nothing to be distributed afresh. The 1st administrator further deposed that the confirmation of grant was not done clandestinely as alleged and that all legitimate beneficiaries were present as is evident from the court records.
11. The applicant filed a supplementary affidavit on 7/7/2022 sworn on 4th July 2022, reiterating the depositions in her earlier supporting affidavit and asserting further that the administrators failed to include other assets of the estate being Butsotso/Shikoti/1378 and Kakamega Municipality/Plot No. 136 while they subdivided the former parcel, that the six months period never lapsed before the confirmation of the issued grant, that since a single administrator, her father had died, then there ought to have been a fresh petition and not a substitution of administrators, that one of the parcels of Land Kakamega Municipality Block 1/53 comprises rentals and that the administrators were collecting rent from the said house but refused to share with other beneficiaries or account for the proceeds therefrom; that they even interfered with boundaries of Kisumu/Karateng/1389; that the administrators are of questionable character and have approached this court with unclean hands hence the grant issued to them should be revoked and reissued in the names of four administrators.
12. The parties agreed to file submission to canvass the Summons. Only the applicant filed written submissions.

The Applicant's Submissions

13. It was submitted that the proceedings to obtain grant of letters of administration by the Petitioners/ Respondents were defective in substance and were fraudulently obtained because the Petitioners/ Respondents forged signatures to mislead the court that they had acquired the consent of the beneficiaries to distribute the estate in the manner and style they had proposed to the court as was evident from the petitioners who purported to have secured the consent of one Eunis Okuku Okoth



in 2017, when the said Eunis Okuku Okoth died sometime in 2001; a fact which the Petitioners/ Respondents knew but concealed from the Court.

14. The applicant further submitted that the Petitioners/Respondents were aware that Patrick Adera Choro who was a beneficiary of the estate of Elkana Choro Osuka was deceased at the time of applying for grant of letters of administration, and was survived by the Objector herein, among others but that they failed to include her name among others in the list of beneficiaries.
15. It was submitted that the Petitioners/Respondents left out some of the property of the deceased such as land parcel known as Butsotso/Shikoti/1378, yet they proceeded to subdivide it into multiple parcels with the aim of concealing its existence and disinheriting the rest of the beneficiaries including the Applicant and further that the Petitioners/Respondents failed to include all the beneficiaries of the estate of Elkana Choro Osuka while applying for grant of letters of administration.
16. The applicant submitted that the Petitioners/Respondents were engaged in the distribution of the estate of the deceased before the conclusion of the succession process.
17. It was submitted that the grant as was issued to the Petitioners/Respondents has become useless and inoperative, a position buttressed by the Petitioners'/Respondents' own Application seeking rectification of the said grant and thus, under such circumstances, it would be proper to nullify the grant and issue another one either in the name of the applicant objector herein solely or with the inclusion of other administrators that the court would find fit to administer the estate of deceased.
18. The applicant submitted that she is a beneficiary of the estate of Elkana Choro Osuka (deceased) in two respects: first, she is the first granddaughter of the deceased and secondly, her rights proceeds from the rights of her father (Patrick Adera Choro) who was the first son of Elkana and survived him.

Analysis & Determination

19. I have considered the Summons for Revocation of grant, the replying and supplementary affidavit and submissions by the applicant. The issue for determination is whether the Applicant's application meets the threshold for the revocation of a grant within the meaning of Section 76 of the [Law of Succession Act](#).
20. Section 76 of the [Law of Succession Act](#) provides:

“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.”

21. The above 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.”

22. The Applicant invited the court to revoke the grant of letters of administration dated 13th July 2017 and confirmed on the 6th November 2017 essentially for material concealment of beneficiaries and assets of the deceased’s estate as well as fraud in the terms including signatures for already deceased beneficiaries.

23. I have considered all the pleadings herein and note that the administrators herein never originally petitioned for a grant of letters of administration intestate but rather, that the same was done by the applicant’s father, the late Patrick Adera Choro and following his passing on the 24th April 2016, the administrators herein, who are step-brothers to the applicant’s father and sons of the deceased Elikana Choro Osuka, vide an application dated 15th June 2017 applied to be substituted as administrators of



the deceased's estate. The court vide an order dated 13th July 2017 went on to issue a new grant in the name of the administrators herein. there was no objection to that application and neither has the order made by the Judge then, appointing the Respondents herein as administrators been set aside.

24. Accordingly, the allegations by the applicant that the administrators failed to include assets or beneficiaries whilst making the application for grant cannot stand. If there was any default, then it was by the applicant's own father who was the administrator and who was simply being substituted by the Respondents herein hence the respondents cannot carry the blame of the applicant's father.
25. Further, the applicant's allegation that the administrators fraudulently obtained the grant with forged signatures specifically that of Eunis Okuku Okoth in 2017, when the said Eunis Okuku Okoth died sometimes in 2001 similarly fails as the consent for confirmation of grant filed on 14th December, 2020 does not even contain the name of Eunis Okuku Okoth as alleged by the applicant.
26. The applicant also alleges fraud on the part of the respondents and laments that they had the grant confirmed in their favour before lapse of six months. However, as I have stated above, the Respondents were only substitutes to a dead administrator and no law bars the court from confirming a grant before lapse of six months from date of issue, as long as the beneficiaries re ready to distribute the estate.
27. On alleged questionable character of the respondent administrators, including the land boundary issues as well as the alleged non accountability of the rental income, on the rental income, all the applicant and other beneficiaries ought to have done was to demand for accounts under section 83 of the *Law of Succession Act* and it is for that reason that this court did on its own motion direct the respondents to file accounts, after dismissing the applicant's application herein before it was reinstated to hearing on merit.
28. On allegations that some assets of the estate were left out, again, as it was the applicant's father who petitioned for the grant, all assets of the estate ought to have been listed at that time of petitioning and if he left out some assets, the respondents herein cannot bear liability. All that the applicant can do is to demand that the administrators apply to court to include those assets since there can be no piecemeal succession proceedings and an asset which is not subject of administration cannot be distributed without an order of the court, especially if it is a fixed asset like land. In other words, there are no short cuts to succession proceedings in fixed assets.
29. On alleged fraudulent activities by the respondents/administrators, again, accounts would reveal the extent of the alleged fraud and in addition, it is trite that the standard of proof in allegations of fraud is slightly above that in civil cases and slightly below beyond reasonable doubt and in the instant case, the applicant failed to specifically plead and prove the alleged fraud.
30. In the circumstances, I find that the instant Summons for Revocation of grant dated 2nd December 2020 lacks merit and the same is dismissed.
31. However, as earlier stated, the administrators are under a statutory duty to account for the distribution of the estate of the deceased to all the eligible beneficiaries as per the confirmed grant. Accordingly, I order that the administrators have ninety days of today to file into this court true and accurate accounts on the estate administration.
32. As the parties are family members, I order that each party to bear their own costs of the dismissed Summons.
33. This file is closed to allow full distribution of the estate and subject to the giving of accounts under section 83 of the *Law of Succession Act* as stated above.



34. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE

