



In re Estate of Kemunto Omandi (Deceased) (Probate & Administration Appeal E005 of 2023) [2024] KEHC 12788 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PROBATE & ADMINISTRATION APPEAL E005 OF 2023
WA OKWANY, J
OCTOBER 17, 2024
IN THE MATTER OF THE ESTATE OF KEMUNTO OMANDI (DECEASED)**

BETWEEN

JONES MORISI CHORO APPELLANT

AND

SIBIA KENANDA OMBASA 1ST RESPONDENT

TRUSILLA KWAMBOKA KEA 2ND RESPONDENT

(Being an Appeal from the Ruling in the Chief Magistrate's Court at Nyamira in Succession Cause No. 93 of 2020 delivered by Hon. C.W. Waswa Senior Resident Magistrate on 17th August 2023)

JUDGMENT

Introduction

1. The Appellant filed an Application dated 8th June 2023 before the trial court seeking orders to revoke the Grant issued in Nyamira Succession Cause No. 93 of 2020. The Respondents however opposed the Application while arguing that the Appellant was not entitled to inherit the Estate of the deceased because he was a step-grandson to the deceased and therefore not an immediate beneficiary.
2. In a ruling rendered on 17th August 2023, the trial court held that the Appellant had not presented proper grounds for revocation of grant and that he did not tender any evidence to support the assertions in the Application.
3. Aggrieved by the trial court's said Ruling, the Appellant filed the present Appeal vide Memorandum of Appeal dated 28th August 2023 seeking to set aside the said Ruling and a retrial in the primary suit so as to enable him present his case afresh.



The Appeal

4. The Appellant listed the following grounds of Appeal in the Memorandum of Appeal: -
 1. That the Learned Magistrate erred in law and in fact by failing to find that the Appellant had adduced the concealed material facts which the Respondents failed to disclose in their Application for Letters of Administration.
 2. That the Learned Magistrate erred in law and in fact in failing to find that the Respondents obtained the Grant fraudulently by using a forged Certificate of Death of the deceased. The Applicant did adduce a true copy of the Certificate of Death marked as 'JMC1' which showed the date of registration as 04.01.2014. The Applicant also adduced a copy of the forged certificate of Death used by the Respondents which was marked as 'JMC4' and the same having a registration date of 08.02.2019.
 3. That the Learned Magistrate erred in law and in fact by allowing the Respondents to file their submissions without giving the Applicant a chance to file their submissions hence denying the Applicant a fair playground to air their issues.
 4. The Learned Magistrate erred in law and in fact by unprocedurally considering the Respondents' Replying Affidavit that was filed after the Ruling date had already been set. The Applicant's Application dated 08.06.2023 was filed on 8/6/2023 and mention date set on 24/07/2023, during when a Ruling date was set to be on 17/08/2023, and the Petitioners had not responded to the Application by then. Thus denying the Applicant the opportunity to file full submissions and therefore violating the Applicant's right to a fair hearing as enshrined in the [Constitution of Kenya](#) at Article 50.
 5. The Learned Magistrate erred in law and in fact by failing to find that the Applicant was entitled to the Estate of the beneficiary as he falls within the confines of Section 29 of the Laws of Succession Act i.e. the Applicant being a grandson to the deceased and a son to one of the beneficiaries stated therein Mr. Choro Omandi, a position backed up by a chief's letter adduced by the Applicants in his Application as exhibit 'JMC3'.
 6. The Learned Magistrate erred in law and in fact by erroneously finding that the Respondents were children of the deceased as no evidence was adduced by the Respondents to prove that they were children of the deceased i.e. they did not produce any chief's letter.
 7. That the trial court erred in law and fact in failing to find that the Respondent herein had already intermeddled with the Estate of the deceased by selling North/Mugirango/bokeira 1/624 which formed part of the Estate of the deceased before letters of administration were issued i.e. the Respondents had sold North/Mugirango/Bokeira 1/624 on 11.06.2012 and a title deed was issued on 05.11.2014, way before letters of Administration were taken out on 28.02.2022. This was in contravention with Section 82 (b) (ii) of the [Law of Succession Act](#).
 8. That the trial court erred in law and fact by not considering that the Petitioners in their Replying Affidavit dated 24.07.2023 did not dispute the Chief's letter adduced by the Applicant as Exhibit 'JMC3', the Sale Agreement adduced as Exhibit 'JMC2', the two Death Certificates adduced as 'JMC1' and 'JMC4' respectively and the issuance of Title Deed dated 05.11.2014 as stated by the Applicant in his Application.
 9. That the trial Magistrate erred in law and fact in dismissing the Applicant's Application against the Respondents with costs on the fact that the evidence produced was water-tight.



5. The Appeal was canvassed by way of written submissions which I have considered. I find that the main issues for this court's determination are: -
- i. Whether the Respondent's Replying Affidavit should have been expunged from the record.
 - ii. Whether the Appellant has *locus standi* to institute the proceedings.
 - iii. Whether the Grant should be revoked.

(i) Repying Affidavit

6. The Appellant submitted that the trial court should have expunged the Respondents' Replying Affidavit dated 24th July 2023 from the record because it was filed on the date the Ruling date was issued, which meant that it was filed out of time without leave. The Appellant argued that the end result of allowing the said affidavit was the violation of his right to a fair hearing as enshrined in the [Constitution of Kenya](#) at Article 50, because he was denied an opportunity to respond to the said Affidavit.
7. I have considered the Appellant's submissions as against the trial court's Ruling and noted that the trial court did not refer to the contents of the said Replying Affidavit in its ruling. I therefore find that this ground of appeal is unfounded. This court is also reminded of the principles espoused by the Court of Appeal in the case of [Trust Bank Ltd v. Amalo Co. Ltd](#) (2002) KLR 63 where it was held thus:-

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.

(21) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so. In the instant case, this Court would be reluctant to strike out a suit just because authority under seal has not been filed. This is because the Plaintiff can be allowed time within which the authority can be filed failing which the Court can then take that drastic action of striking out the pleadings.”

8. Similarly, in [Central Bank of Kenya v. Uhuru Highway Development Ltd & Others](#) [1998] eKLR Hon. Justice Bosire (Retired) observed as follows:-

“I am therefore, unable to subscribe to the view expressed by Mr. Rebello that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind a Court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so. Besides, the learned Judge in the Court below fell into error when he said that a failure to file grounds of opposition automatically entitles the Applicant to orders ex-parte.”

9. I find that not only was the contested Affidavit not the basis for the determination by the trial court in its Ruling, but that it was also material in advancing the Respondents' case in this Application.

(ii) Appellant's locus standi to institute the proceedings.

10. It was not disputed that the deceased herein Kemunto Omandi, whose estate is the subject of these succession proceedings, was the second wife of one Omandi Mongiti and that they had five (5) children,



four of whom were now deceased. It was also not disputed that Sibiah Kenanda, the 1st Respondent herein, is the only surviving daughter of the deceased. The uncontested evidence also revealed that the Appellant herein is the grandson from the said Omandi Mongiti's first household and that his father was Choro Omandi. The Appellant is therefore the step-grandson of the deceased—Kemunto Omandi, while the Respondents are her biological daughters.

11. The *Law of Succession Act* is clear on the persons who are legally empowered to take out Grant of Letters of Administration in the Estate of a deceased. Section 66 provides as follows: -

66. Preference to be given to certain persons to administer where deceased died intestate.

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- a. surviving spouse or spouses, with or without association of other beneficiaries;
- b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. the Public Trustee; and
- d. creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

12. Section 29 of *Act* further provides for the meaning of a dependant: -

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.

13. The Appellant contended that he was a grandson of the deceased hailing from the deceased's son, Choro Omandi and that he was therefore entitled to inherit from the Estate under Section 29. He relied on the Chief's letter dated 17th April 2012 (marked 'JMC3') which listed Oroo Omandi and Choro Omandi - the Appellant's father - as the only sons of the deceased Kemunto Omandi. I however not that the trial court's record also contains the same Chief's letter dated 23rd September 2013 wherein it is stated that the deceased was survived by only two daughters Trusila Kwamboka Kea and Sibia Kenanda Ombasa. This Court is therefore unable to verify the true facts concerning the deceased's surviving children.



14. The Appellant was therefore required to present more cogent evidence such as the testimony of other relatives to prove that his father was indeed a son of the deceased and that there were no other surviving children so as to justify his plea, as a grandson, to be the one entitled to inherit from the Estate.
15. I further find that even if it was established that the Appellant was a grandson of the deceased, as he alleged, he was required to seek and obtain the consent of all the other surviving children of the deceased, that is, his aunts and uncles, to move the Court on their behalf to seek a revocation of the Grant as he did because the law stipulates that grandchildren can only inherit from the deceased's Estate through their parents.
16. The court record does not also show that the Appellant was a direct dependent of the deceased prior to her death so as to entitle him to be listed as her beneficiary. Having found that the Respondents were the deceased's biological daughters, I find that they were the rightful persons to take out Grant of Letters of Administration as her surviving heirs and not the Appellant who was her step-grandson. I therefore find that the Appellant lacked the *locus standi* to institute the Application for revocation of grant.

Whether the Grant should be revoked.

17. Section 76 of the [Act](#) provides for the circumstances under which the court may revoke a grant 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.



18. *In Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] KEHC 6553 (KLR), Musyoka J. held as follows: -

“ 8. 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.”

19. The Appellant’s prayer was that the court should revoke the grant on the basis that the Respondents fraudulently made a false statement by concealing material facts from the court, that they made untrue allegations and that the beneficiaries who ranked in priority did not give them authority to take out the Grant. The Appellant further averred that he was the one in occupation of the suit land and that he had been taking care of the deceased before she passed on. He further averred that the Respondents had forged the deceased’s death certificate and that they were likely to disinherit the other family members.

20. I have considered these arguments in light of the fact that the Appellant stated that his father Choro Omandi and his uncle Oroo Omandi were the only sons of the deceased. If that was to be believed, then he ought to have obtained consent from all the other surviving children of the deceased because he was a grandson, so that he could institute this suit on their behalf. He instead presented himself as the only heir seeking a revocation on this basis that he was likely to be disinherited.

21. The Appellant also alleged that the Respondents fraudulently obtained the grant but he did not tender any evidence of fraud save for the claim that there were two death certificates. I find that the mere fact that there were two separate death certificates does not connote fraud. Moreover, this court does not have the ability to determine the authenticity of the death certificates in the absence of the testimony from the issuing authority, in this case, the Registrar of Births and Deaths.

22. The Appellant did not also present any evidence to show that he was the one taking care of the deceased prior to her death or that he was her dependant. He did not also demonstrate the material facts were intentionally concealed by the Respondents when obtaining the Grant. I am not satisfied that the Appellant’s application for revocation of grant fulfilled the conditions set under Section 76 of the Law



of Succession Act for the revocation of a grant. I therefore find that the appeal is not merited and I dismiss it with no orders as to costs.

23. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE

