



**Odoro v Obilo & 2 others (Succession Appeal E2 of 2021)
[2023] KEHC 88 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 88 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION APPEAL E2 OF 2021
FA OCHIENG, J
JANUARY 17, 2023**

BETWEEN

MAURICE ONAM ODORO APPELLANT

AND

ERIC OMONDI OBILO 1ST RESPONDENT

ISAIAH OMEDO OBILO 2ND RESPONDENT

FREDRICK ONYANGO OBILO 3RD RESPONDENT

(Being an appeal from the Ruling of Hon. S. W. Mathenge (RM) dated 5th February, 2021 at Bondo Principal Magistrates Court Succession Cause No. 383 of 2018)

JUDGMENT

1. By a ruling delivered on February 5, 2021, the learned trial magistrate revoked the grant that had been issued to the appellant herein.
2. Being dissatisfied with the said decision, the appellant lodged an appeal before this court. In his said appeal, the appellant raised 8 grounds as follows:
 1. That the learned trial magistrate erred in law and facts in entertaining respondents application dated September 4, 2020 to proceed for hearing, yet it was a non-starter and prosecuted illegally.
 2. That the learned magistrate erred in law and facts to proceed with the matter on the part of the respondents and the contention was land matter/claim.
 3. That the learned magistrate erred in law and facts by overlooking the oral application by the appellant under section 74 of the *Law of Succession Act*.
 4. That the learned magistrate failed to find that the objectors application was fatal and bad in law.



5. That the learned magistrate failed to appreciate the submissions of the appellant having strong points in law and facts.
 6. That the learned magistrate misdirected her mind by relying on the submission of the objector which was filed out of time without leave of the court.
 7. That the learned magistrate failed to appreciate that the entire proceedings by the applicants was a miscarriage of justice.
 8. That the findings of the learned magistrate were against the law of succession and [Civil Procedure Rules](#) 2010 (order 4 rule 1 sub-rule 3).
3. Based upon those grounds, the appellant urged this court to overturn the ruling which had been rendered in favour of the respondents.
 4. The appeal was canvassed by written submissions.
 5. The 1st issue discussed by the appellant was about the alleged relationships between the respondents and the deceased. He pointed out that whilst the respondents had purported to be the grandsons of the deceased, it transpired that the deceased had not sired the father of the respondents.
 6. In any event, as Martin Obilo, who is the father of the respondents, was deceased, it was the appellant's contention that the respondents lacked any *locus standi* to bring the application. He submitted that the respondents ought to have, first, taken out letters of administration in relation to the estate of their late father, before they could lodge any application in these proceedings.
 7. I have carefully perused the record of the proceedings before the trial court, however, I did not trace any issues which the appellant had raised in order to question the *locus standi* of the respondents herein.
 8. I also did not find any decision by the trial court on the question of the *locus standi* of the respondents.
 9. As the matter was neither raised during the proceedings from which this appeal arose; and because the trial court did not make a determination on the issue, I find that the submissions in that respect do not form a critique of the decision which was being challenged by the appeal which is before me.
 10. If anything, the new material which the appellant was putting forward before me, should be utilised by him when the respondents or any other person sought either to be appointed as administrators, or better still, when the issue of the distribution of the estate was being dealt with.
 11. The second issue raised by the appellant was pegged on section 45 of the [Law of Succession Act](#). Pursuant to that provision, no person is allowed to intermeddle with the estate of a deceased person.
 12. Any person who, for any purpose, takes possession or disposes of or otherwise intermeddles with the free property of a deceased person, except so far as expressly authorised by the [Law of Succession Act](#) or by any other written law or a grant of representation under the statute governing succession, is deemed to be guilty of an offence.
 13. Whilst the appellant has correctly stated the legal position in that respect, I find that the decision being appealed against did not make a determination on the question of any intermeddling by the respondents.
The third issue being raised by the appellant was about the jurisdiction of the court.
 14. He reasoned that the respondent's claim was one for land. Therefore, in his review the respondents could have moved the Environment and Land Court to determine their said claim.



15. With due respect to the appellant, the claim by the respondents was properly based upon the provisions of section 76 of the *Law of Succession Act*.
16. In her ruling, the learned trial magistrate held as follows:

Going by the provisions of section 76 of the *Law of Succession Act*, it is my opinion 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; being that the petitioners failed to advise the chief accordingly to correct his relationship with the deceased. The petitioner misrepresented himself as the son and at the same time, brother to the deceased.”
17. The appellant has not challenged the accuracy of that holding.
18. In any event, the appellant cannot have been both a son and a brother of the deceased.
19. But he now asserts that the error in the description of his relationship to the deceased may be excusable pursuant to section 51(4) of the *Law of Succession Act*.
20. Whereas an omission of any information from an application by a petitioner shall not affect the power of the court to entertain an application, I find that the said statutory provision is not applicable to the facts in this case. I so hold because the petitioner did not simply omit some information: he provided information which was fatally inaccurate.
21. Even though the appellant expressed the review that the grant was not obtained by false information or by concealment of material facts, I find that at the time when the grant was issued, the information which the appellant had made available was false. He said that he was a brother of the deceased; yet he knew very well that he was not.
22. As the information was provided in the petitioner’s affidavit which was in support of the petition for letters of administration, it was information given under oath. The court was supposed to accept it and to act upon it; on the presumption that a deposition under oath was factually accurate.
23. The same information was provided in the petition for letters of administration.
24. As the said information was false, I find no merit in the appellant’s contention that there was no omission of information. His act was one of commission: it was definitely not an omission.
25. The appellant also drew this court’s attention to the actions which the respondents undertook after the trial court had revoked the grant. It was said that the respondents uprooted crops which the appellant had planted on the parcel of land which is the subject matter of the proceedings herein.
26. The court notes that the appellant did lodge a report at Ratta police station, and that the police had preferred criminal charges against Isaiah Omedo Obilo.
27. Nonetheless, the actions of the respondents, subsequent to the ruling which gave rise to the appeal herein, cannot be the subject of the appeal.
28. In the final analysis, there is no merit in the appeal: it is therefore dismissed in its entirety.
29. The appellant will pay to the respondents the costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JANUARY, 2023.

FRED A. OCHIENG

JUDGE

