



**In re Estate of Jairo Koga Otieno (Deceased) (Civil Appeal  
E028 of 2022) [2023] KEHC 997 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 997 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E028 OF 2022  
KW KIARIE, J  
FEBRUARY 16, 2023**

**BETWEEN**

**JAMES OKELLO KOGA ..... APPELLANT**

**AND**

**FRANCIS OTIENO KOGA ..... RESPONDENT**

*(Being an Appeal from the ruling and order in Homa Bay Magistrate's CMC  
Succession Cause No.318 of 2018 by Hon. Tom Mark Orlando–Principal Magistrate)*

**JUDGMENT**

1. On May 11, 2022 Hon Tom Mark Orlando dismissed an application for revocation of grant on grounds:
  - a. That the appellant was a grandson of the deceased Jairo Koga Otieno and was not entitled as an administrator.
  - b. That the applicant could only be included as a beneficiary.
2. The appellant was aggrieved by the said ruling and filed this appeal. He was represented by the firm of Nangami & Company Advocates. He raised the following grounds:
  - a. That the learned magistrate erred in law and in fact in dismissing the applicant's application for revocation of the grant of letters of administration issued to the respondent.
  - b. That the learned magistrate erred in law and in fact in failing to address and make a determination on the concealment of facts occasioned by the respondent leading to the issuance of the said grant.
  - c. That the learned magistrate erred in law and in fact in failing to address and make a determined on the issue of breach of trust by the respondent as raised by the applicant.



- d. That the learned trial magistrate erred in law and in fact in giving costs to the applicant despite no wrong doing on the part of the applicant.
3. The appeal was opposed by the respondent through the firm of H Obach & Partners Advocates on the following grounds:
  - a. That the appellant is not entitled to inherit from the estate of the deceased herein.
  - b. That the appeal lacks merit.
4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. There is no dispute that the appellant is the grandson of Jairo Koga Otieno, the deceased herein. He cannot directly lay a claim on the estate but can do so through his father's estate. In *re Estate of Joyce Kanjiru Njiru(Deceased)* [2017] eKLR the court said:

In this present cause, the two grand children are not claiming interests as dependants but are coming in to claim the interests of their respective parents who are now deceased. My view is that the children are entitled to inherit the share which their deceased parents would have inherited. In persuasive decision by Musyoka J in the case of *Estate of Veronica Njoki Wakagoto (deceased)* (2013) eKLR it was stated:

“.....grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. 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.”
6. Upon my perusal of form P& A 5 and in the application for confirmation of the grant, I have established that he or other grandchildren of the sons and daughters of the deceased herein were not included as a beneficiaries albeit of their parents' estates. The learned trial magistrate therefore ought to have revoked the grant.
7. In the written submissions filed herein, the respondent has contended that some land parcels which belonged to the deceased were registered in the names of some of the sons. This is new evidence which ought to be canvassed in court seized of the matter to avoid other parties being disinherited or others taking undue advantage.
8. Even where some beneficiaries have benefitted in the lifetime of the deceased, it is important to list them as beneficiaries and indicate what the benefit was and why they are not therefore entitled to any other part of the estate.
9. The respondent had concealed material facts to the court.
10. I therefore find that the appeal has merit. I allow the same and revoke the confirmed grant to give way for the issues raised herein to be addressed.
11. Costs to the appellant.

**DELIVERED AND SIGNED AT HOMA BAY THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023**



**KIARIE WAWERU KIARIE**  
**JUDGE**

