



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ochwangi v Moronge & 2 others (Family Appeal E001 of 2021)  
[2023] KEHC 2480 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2480 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
FAMILY APPEAL E001 OF 2021  
WA OKWANY, J  
MARCH 23, 2023**

**BETWEEN**

**DAVID OGEA OCHWANGI ..... APPELLANT**

**AND**

**MAKORI OCHWANGI MORONGE ..... 1<sup>ST</sup> RESPONDENT**

**PAUL NYAMWEYA OCHWANGI ..... 2<sup>ND</sup> RESPONDENT**

**ROBERT NDEMO MOKAYA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Ruling of Hon. W. C. Waswa (Mr.) – RM  
Nyamira dated and delivered on the 31st day of May 2021 in the original  
Nyamira Chief Magistrate’s Court Succession Cause No. 93 of 2017)*

**JUDGMENT**

**Introduction**

1. On November 20, 2017, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein petitioned the lower court for the grant of letters of administration, *ad litem*, in respect to the estate of their father Johnstone Ochwangi Moronge (deceased) in Nyamira CM succession cause No 93 of 2017.
2. On January 15, 2018, the lower court issued the 1<sup>st</sup> & 2<sup>nd</sup> respondents with the limited grant of letters of administration *ad litem* for purposes of filing suit.
3. Through an application dated April 5, 2021, the Appellant herein approached the lower court to set aside and/or annul or revoke the limited grant issued on January 15, 2018 and to strike out the entire succession cause on the basis that the same was based on fraud. The application was premised on the ground that the appellant did not sign the consent that accompanied the application for the limited grant and that his signature had been forged.



4. The respondents did not file any response to the application. After considering the merits of the application, the lower court declined to revoke the limited grant thus precipitating the filing of the instant appeal that is the subject of this judgment.

### **Memorandum of Appeal**

5. A summary of the grounds of appeal are listed in the memorandum of appeal as follows: -
  1. The court erred and misapplied both the facts of my application with respect to applicable law in dismissing the application as “lacks merits” when in fact the section of the law cited clearly provides for precisely the relief sought in the application.
  2. The trial magistrate erred in law and was prejudiced insofar as he relied on his own knowledge of a separate proceeding that he said to be a related succession action pending before the High Court (petition No 4 of 2021), to render his ruling.
  3. Ruling is against public policy – the respondents in this matter committed forgery which is defined in section 345 of the Penal Code defines forgery as follows: “forgery is the making of a false document with intent to defraud or deceive.”
  4. Grant Misused – barring the overwhelming evidence of the illegal manner in which the grant was obtained, the court erred in failing to properly analyze the evidence submitted to it that demonstrated the grant was misused by the respondent Makori Ochwangi.
  5. As additional discussion and analysis in support of this memorandum, I submit that left unturned, the magistrate’s court’s ruling is a miscarriage of justice that perpetuates and emboldens criminal conduct and impunity.
6. The appeal was canvassed by way of written submissions which I have considered.
7. The main issue for determination is whether the lower court made the right decision in declining to revoke the limited grant.
8. The gist of the appellant’s case was that the limited grant was obtained through fraud perpetrated by the respondents who forged his signature and the signatures of other family members purporting to have obtained their consent to apply for the limited grant.
9. The appellant further stated that contrary to the respondent’s claim that the limited grant was for the purpose of filing a suit, the respondents continued to use the grant to block him, his mother, his agents and workers from accessing their home.
10. The respondents, on their part, submitted that the alleged fraud or forgery of the appellant’s signature had not been proved to the required standards or at all.
11. It was the respondents’ case that the limited grant had been used specifically for the purpose of filing a suit being Nyamira ELC No 5 of 2018 and not for any other purpose.
12. The respondents’ further stated that there is Nyamira HC succession No 4 of 2021 that seeks the distribution of the estate of the deceased where the appellants should address any concerns regarding the deceased’s estate.
13. I have perused the record of appeal and i note that apart from merely claiming that the respondents forged his signature and those of other family members when applying for the limited grant, no material, in the form of handwriting of expert’s evidence or supporting affidavit from the said family members was presented before the lower court to prove the said forgery.



14. Regarding the issue of the consent of the other beneficiaries, the *Law of Succession Act* explicitly provides that, a court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the fifth schedule to this Act. I find that the Act clearly provides that the aspect of consent with regard to special limited grants of representation need not be mandatory.
15. Under section 73 of the *Law of Succession Act*, the court has inherent powers to make orders in the interest of justice or to prevent abuse of the court process. The rule imposes a duty on the court to make orders to protect from waste or to preserve the estate of a deceased person. In the instant case it is clear that a special limited grant issued in respect to the estate of the deceased herein was for limited purposes of filing a suit and not for distributing the estate of the deceased.
16. While the applicant herein is a beneficiary of the estate of the deceased and may have genuine fears over the actions carried out by the respondents using the limited grant, it was not disputed that the beneficiaries of the deceased's estate have taken out letters of administration for the estate in Nyamira HC succession No 4 of 2021. It would therefore be advisable for the applicants to channel any concerns that they may have over the administration of the said estate to the said succession case.
17. I further note that no concrete evidence was presented before the lower court to prove the claim that the limited grant was being used by the respondents to pursue other activities other than the filing of the suit before the Environment and Land Court.
18. The lower court held as follows over the purpose of the grant: -

“It is important to note that the grant in issue is letters of administration *ad litem*. the same was issued by the court on January 15, 2018 for purposes of filing suit only. According to the application lodged, the then applicants wanted to file a suit at the High Court. They annexed a copy of the plaint to the application.

The purpose of a limited grant *ad litem* is for filing suit only. Such a grant is not used to distribute the estate of the deceased. in this case, the court issued the grant on January 15, 2018. There is a likelihood that the holders filed the intended suit before the High Court and the superior court determined the matter. At the same time, there is also possibility that the matter is pending before the superior court.

Having that in mind, it would not be wise for this court to revoke the grant since it is not clear whether or not the suit is still pending before the superior court. Revoking the grant would definitely interfere with the matter pending before the superior court. This court cannot purport to meddle with matters pending and or determined by the superior court.

If the matter has already been determined, then revocation of the grant would be an academic exercise.”

19. As I have already stated in this judgment, the limited grant was issued on January 15, 2018 for the specific purpose of filing a suit. I also note that the application that gave rise to the instant appeal was filed over 3 years later on April 5, 2021.
20. My finding is that in light of the lapse of time, the trial court was justified in holding that the revocation of the grant would not serve any useful purpose and would be an academic exercise in the event that the purpose for which it was issued, which was to file a suit, had already been actualized.
21. It is instructive to note that the appellant did not inform the lower court of the exact status of the High Court case filed pursuant to the limited grant yet the revocation of the grant would have had a



bearing on the said High Court case. I say so because, assuming, for arguments sake, that the case filed pursuant to the grant had been finalized, or is ongoing, what would be the effect of revoking the grant on the said suit?

22. Having regard to the findings and observations that I have made in this judgment, I find that the instant appeal is not merited and I therefore dismiss it with costs to the respondents.
23. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS  
THIS 23<sup>RD</sup> DAY OF MARCH 2023.**

**W. A. OKWANY**

**JUDGE**

