



**In re Estate of Gerald Ogutu Okoth (Deceased) (Succession Cause 474 of 2004) [2023] KEHC 19082 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19082 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 474 OF 2004  
HM NYAGA, J  
JUNE 21, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE GERALD OGUTU OKOTH (DECEASED)**

**BETWEEN**

**PATRICK O. OGUTU ..... 1<sup>ST</sup> APPLICANT**

**FLORENCE A. OGUTU ..... 2<sup>ND</sup> APPLICANT**

**BERNADETTE A. OGUTU ..... 3<sup>RD</sup> APPLICANT**

**AND**

**GEORGE OWINO OGUTU ..... RESPONDENT**

**RULING**

1. The cause herein relates to the estate of the Gerald Ogutu Okoth who died intestate on August 24, 2003 aged 64 years old. On September 8, 2004 George Owino Ogutu petitioned for grant of letters of Administration Intestate in his capacity as a son of the deceased. According to the Affidavit in support of the Petition for letters of Administration intestate the following persons were listed as survivors of the deceased estate:-
  1. Margaret Obuya – Widow (60 years)
  2. Fredrick O. Ogutu- Son (41 years)
  3. Dolorosa A. Ogutu- Daughter (38 years)
  4. Florence A. Ogutu –Daughter( 37 years)
  5. Bernadette A. Ogutu – Daughter (32 years)
  6. Patrick O. Ogutu- Son (30 years)



2. The deceased estate comprised several parcels of land in Nakuru and Kisumu, company and Sacco shares and Bank Accounts. The value of estate was estimated at Kshs 3,000,000/= with Nil Liabilities.
3. On 25<sup>th</sup> November, 2004 grant of Letters of Administration Intestate was issued to the said George Owino Ogutu and after which he applied for confirmation of the grant vide summons dated June 10, 2005 and the grant was confirmed on 15<sup>th</sup> July, 2015.
4. The applicants/beneficiaries, Patrick O. Ogutu, Florence A. Ogutu and Bernadette A. Ogutu, through a Summons for Revocation of Grant dated October 5, 2021 and filed in Court on October 12, 2021 sought to have the Grant that was issued to George Owino Ogutu, the Administrator/Respondent herein, revoked and Patrick O. Ogutu be appointed as the Administrator of the Estate herein. The application is based on the grounds that the estate is likely to lose a part of its property to third parties as the Respondent has failed to take legal action against them; that the Respondent has failed to proceed diligently with the administration of the estate without any reasonable cause; that the Respondent has unreasonably refused to safe guard the property forming part of the estate; that the Respondent has failed to produce to the court an inventory or account of administration of the estate and that the Respondent took unreasonable time to distribute the estate and only did so after the chief was involved.
5. The summons is supported by an Affidavit sworn by the 1<sup>st</sup> Applicant on his behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants on the even date. The 1<sup>st</sup> Applicant reiterated the above grounds in the affidavit and in addition deposed that they have been compelled at various stages to use the local chief and provincial administration to make the Respondent sign the transfer documents for the portions of land they got under the grant.
6. He accused the Respondent of being uncooperative throughout the administration and distribution process and stated that he has been opaque in his duties as the Administrator and even violent when they approached him and has failed to act in the best interest of the estate and that they stand to lose a parcel of their late mother's land being claimed by the 3<sup>rd</sup> parties as the Respondent has refused to take any measures to safe guard the same.
7. It was his deposition that the 3<sup>rd</sup> parties are laying a claim to Title No. Kisumu/Pandpier/273 which was given to Margaret Obuya and who passed on before the Respondent could sign the necessary paper work to transmit the property to her and that the Respondent has declined to move to court as the Administrator to safe guard the property thus exposing it to serious peril of being grabbed by trespassers.
8. The 1<sup>st</sup> applicant believes the respondent has failed to administer the estate faithfully. He averred that he is willing to administer the same faithfully and in accordance with the law and prayed that the orders sought be granted in the interest of justice.
9. The Respondent opposed the summons via his Replying Affidavit sworn on 4<sup>th</sup> November, 2021. He deposed that the Applicant failed to annex the authority to plead, act and testify for the other Applicants as required by the law.
10. He believes the application is misconceived, misplaced, lacking in bona fides and the same ought to be dismissed with costs.
11. He disputed that he has been uncooperative and or failed to administer the estate of the deceased and attributed the delay to unfortunate death of his mother Margaret Obuya, Brother Fredric Ogutu and Sister Dolarosa Ogutu and contended that no succession causes have been filed in any court to appoint the administrators of the estates of his deceased mother, brother and sister to enable him distribute their respective shares of the estate to them.



12. He contended that the Applicants herein has ill intention driven by greed to take up the properties of the above deceased persons and that the Applicants are aware that the deceased herein and their brother Paul Ochino who is also deceased had protracted dispute over a land parcel No. Kisumu/Pandpieri/273 and that the said Paul Ochino subdivided the said land and sold most of it way back in the year 1992.
13. He deposed that upon the sale of the above parcel of land a portion has been occupied by the family of their step grandmother namely Teresia Awiti since 1969 and also the family of their uncle Paul Ochino(deceased).
14. He averred that he provided accounts and have held several meetings with the Applicants and that the Applicants have duly received all their shares as distributed in the grant and receiving benefits from the proceeds of dividends from shares owned by the deceased.
15. It was his contention that as an administrator he has not wasted or disposed off any the property forming the estate of the deceased but has administered the same to the best of his ability and diligently.
16. He averred that the Applicants have not demonstrated intermeddling of the estate of the deceased whatsoever.
17. He also stated that the Applicants have not demonstrated the particulars of his defaults as an administrator and whether they had given the notice before filing this Application as required under section 76 of the Act.
18. The 1<sup>st</sup> applicant swore a further affidavit on 6<sup>th</sup> December 2021 in response to the aforesated Replying Affidavit. He reiterated that since the confirmation of grant was issued the respondent has been uncooperative and in many instances they have been compelled to use the local chief and provincial administration to make the respondent to attend meetings and that they received shares of the estate as distributed in the grant only after summons were issued to the respondent and that the distribution was done at the chief's office in the chief's presence.
19. He deposed that the meetings they have held with the aid of the Provincial Commissioner have had minimal impact due to the Respondent's refusal to grant audience to the 2<sup>nd</sup> and 3<sup>rd</sup> applicants.
20. He stated that the Respondent currently resides at Racetrack Block 1/1446-Nakuru, a property belonging to their deceased parents and has denied the three of them and members of the extended family access to the said property.
21. He averred that all documents belonging to the deceased are in the custody of the Respondent and that the Respondent still holds documents belonging to their sister Dolorosa Ogutu(Deceased) with the full knowledge of the existence of appointed administrators to her estate and grant of letters of administration intestate vesting the estate in Patrick Ogutu and Bernadette Auma Ogutu as personal representatives.
22. He averred that the respondent has refused to keep his word of transmitting the said documents to their sister's only child Derrick Odhiambo Agumbi after he turned 18 years old.
23. He believes the respondent intends to sell property number Kiambogo/Kiambogo B1 2/6613 (Mwariki) and they have filed a Restriction Order seeking to prevent the Respondent from conducting any transaction on the land without the express consent of the administration of the estate of Dolorosa Ogutu(deceased).
24. It was his deposition that the family of their deceased father's brother Paul Ochino (deceased) no longer occupies property No. Kisumu/Pandpier/273.



25. He firmly believes that the Respondent's lack of leadership and failure to diligently administer the estate of the deceased has left the property no. Kisumu/Pandpieri/273 looking abandoned.
26. It was his further averment that the accrued dividends owned by the deceased from Nation Media Group of Ksh. 136,408.15 in form of cheques due to Patrick O. Ogutu were encashed by the Respondent without authority.
27. He further believes that the number of years that have passed is a clear indication of the lack of interest by the Respondent to diligently administer the estate of the deceased.
28. The Application was canvassed through written submissions. Only the Applicants' submissions are on record.
29. The Applicant submitted that the Respondent has failed to diligently administer the estate of the deceased contrary to section 83 and 82(a) of the Law of Succession Act and prayed that this court issues the orders sought.
30. The Applicants cited the provisions of section 76 and 95 (1) (a) of the Law of Succession Act in support of their submissions, referred this court to the holdings in the cases of In re Estate of Peter Machisu Shirekuli (Deceased) [2022] eKLR, In Re Estate Of Kibowen Komen (deceased) [2018] eKLR, In re Estate of Des Raj Gandhi (Deceased) [2021] eKLR, In re Estate of Julius Mimano (Deceased) [2019] eKLR, Jesse Karaya Gatimu vs Mary Wanjiku Githinji [2014] eKLR and Albert Imbuga Kisigwa vs Recho Kawai Kisigwa [2016] eKLR and urged the Court to allow the instant summons with costs to be borne by the Estate of Deceased.

### **Analysis & Determination**

31. The issues that arise for determination are;
  - a. Whether the Application is defective for want of authority to plead.
  - b. Whether there are sufficient grounds adduced to revoke the grant.
32. I will first address the issue raised by the Respondent on failure by the 1<sup>st</sup> Applicant to annex the authority to plead, act or testify from the other Applicants as required by law. The requirement of an Applicant swearing an affidavit on behalf of Co-Applicants procuring written authority is provided by order 1 rule 13 (2) of the Civil Procedure Rules which states as follows:-
 

“(2) The authority shall be in writing signed by the party giving it and shall be filed in the case”.
33. The 1<sup>st</sup> Applicant stated that he was authorized by his Co-Applicants to make deposition on their behalf but did not annex such authority as a proof. That, to me, is a procedural issue curable by article 159(2) of the Constitution 2010 which provides that “Justice shall be administered without undue regard to procedural technicalities”. I do not see any prejudice caused to the respondent by the said affidavit.
34. In any case the 1<sup>st</sup> applicant had the right to move the court on his own, as a beneficiary of the Estate. The court will therefore proceed to determine this matter on merits.
35. Section 76 of the Law of Succession Act states 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.”

36. Section 76 was clearly expounded on by the court *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.”

37. Under the above section, 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.
38. The Applicants’ case is anchored on section 76 d(ii) and (iii) grant. They contend that the Respondent has failed to proceed diligently with the Administration of the estate without reasonable cause and has unreasonably refused to safeguard the property forming part of the estate and produce to court an inventory or account of administration of the estate.
39. The Respondent on his part disputed the above position and stated that the Applicants have failed to demonstrate the same and further failed to prove that they issued him with a notice as required under section 76 of the Act.
40. Under section 76(d), a revocation founded on the third ground would only apply where the administrator has been given due notice but fails without reasonable cause to apply for confirmation of grant or to proceed with diligence or to render accounts, as the case may be. Therefore, failure to proceed diligently or render accounts, without a notice having been issued to the administrator, would not suffice as a ground to revoke a grant. The Applicants herein have demonstrated that they have consistently asked the respondent to complete the administration. The complaint to the chief is one such action. To me this serves as sufficient notice on the administrator and ideally section 76(d) has been correctly invoked by the Applicants.
41. Even if I am wrong on the above under section 47 of the [Law of Succession Act](#) and rule 73 of the [Probate and Administrations Rules](#) the court has unfettered discretion to make orders either to meet the ends of justice. Said Section 47 and Rule 73 provides as follows section 47 of the [Law of Succession Act](#)

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

#### Rule 73 of the Probate and Administration Rules

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

42. The Applicants have contended that the Respondent has failed to render account, proceed diligently to administer the estate and safeguard the property forming part of the estate.
43. An administrator’s office of the deceased’s estate is an office built on the foundation of trust and goodwill. Where such is seen to be lacking, the court ought to invoke its unfettered powers and discretion to ensure that justice is done to the beneficiaries especially where the Administrator puts them in a prejudicial position. Section 83 of the [Law of Succession Act](#) provides for duties of personal representatives which includes: -



- a. to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
- b. to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- c. to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- d. to ascertain and pay, out of the estate of the deceased, all his debts;
- e. within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- f. subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- g. within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
- h. to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- i. to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

44. It is well settled law that the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa* Succession Cause No. 158 of 2000 where Mwita J stated: -

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

45. In the instant case, the Applicants have adduced sufficient evidence to show the respondent has been operating in an opaque manner. The applicants have had to invite the national government officials to intervene. However, they were unable to sufficiently show that;

- a. The Respondent failed to safeguard the deceased’s estate.
- b. There is intermeddling of the estate by third parties.



- c. The Respondent has denied them and members of the extended family access to property of their parents namely Racetrack Block 1/446- Nakuru.
- d. The Respondent intends to sell property Number Kiambogo/Kiambogo B1 2/6613(Mwariki).
46. The Respondent has only partly proved that he rendered accounts of the administration of the estate. He annexed a copy of the agreement of the beneficiaries acknowledging receipt of the share certificates. The Applicants have acknowledged this in the further Supporting Affidavit. However, the Respondent does not state what he did with the dividends he allegedly received on behalf of the estate. The applicants annexed a copy of Dividends summary from Nation Media Group marked as Annexure POO-4 to prove that the Respondent encashed the accrued dividends of Ksh. 136,408.15/= owned by the deceased therein without their authority.
47. The Applicants have also proved through the annexed copies of letters of summons from the chief and provincial administration dated 8.11.2010, 23.01.2012, and 22.04.2014 respectively that the Respondent has been uncooperative and it took the intervention of the Local Chief and Provincial Administrations to have him attend Family meeting.
48. The Respondent contended that the delay on administration of the estate has been occasioned by the death of their mother, brother Fredrick Ogutu and Sister Dolarosa Ogutu and that the administrators of their respective estate are yet to be appointed to enable him distribute the respective shares to them. To counter this, the Applicants demonstrated that grant of letters of administration to the estate of their sister Dolorosa Ogutu was issued to Patrick Ogutu and Bernadette Auma Ogutu on 23<sup>rd</sup> June 2008. Therefore, there is no reason for the Respondent not to transmit the title document of property known as Kiambogo/Kiambogo B1 2/6613(MWARIKI) to her personal representatives. This goes to show that the Respondent has been unnecessarily uncooperative.
49. There is no evidence that the personal representatives of the other deceased persons have been appointed. This could be an excuse for delay in the administration of the deceased's estate as averred by the respondent. However, it is to be noted that these deceased persons died long after the grant was confirmed. The respondent had time to complete the administration of the estate before their demise.
50. It is trite law that there is need to faithfully and diligently administer the estate of the deceased. I note that the Respondent has been very indolent in taking steps to conclude the administration of the estate. It is 18 years since the grant was confirmed. On that basis alone, this court has good grounds to revoke the grant issued to him.
51. Despite there being fertile grounds to grant the orders to revoke the grant, I am of the view that this is a case where the court ought to make orders in the best interest of the estate and the beneficiaries. Appointing a new administrator may be just the beginning of another cycle of disagreements in the family.
52. In order to ensure smooth administration of the deceased estate I shall make the following orders: -
1. The prayer to revoke the grant is hereby disallowed.
  2. In exercise of the powers conferred by Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules I hereby appoint Patrick O. Ogutu as the Co- administrator of the estate of the deceased herein. He shall file Forms 11, 12 and 57 prior to issuance of the fresh grant.



3. Upon compliance with order 2 above, a fresh grant to issue in the names of the two co-administrators.
4. The Respondent shall within 60 days from the date hereof produce in court a full and accurate inventory of the assets and liabilities, proceeds received and payments he has made as an administrator of the estate from the time he became an administrator up to the date of this ruling.
5. In default of compliance with the orders in (4) above the grant of letters of administration to the Respondent shall stand revoked and the said Patrick Ogutu shall continue as the sole administrator.
6. The co-administrators or administrator shall within 90 days prepare and execute all the necessary documents required to transmit to each beneficiary their entitlement as set out in the confirmed grant. The costs thereof shall be borne by the estate and if that is not possible, each beneficiary shall contribute equally to the same.
7. That each party to meet their own costs of this application.

**DATED, SIGNED AND DELIVERED THIS 21<sup>ST</sup> DAY OF JUNE, 2023.**

**H. M. NYAGA**

**JUDGE**

**In the presence of:-**

Court Assistant Jennifer

Ms Mbugua for Matiri for Applicant

N/A for Respondent

