



REPUBLIC OF KENYA



**In re Estate of Daudi Odeka Waganda alias David Odeka (Deceased) (Succession Cause 166 of 2007) [2023] KEHC 18602 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18602 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
SUCCESSION CAUSE 166 OF 2007**

**WM MUSYOKA, J**

**JUNE 19, 2023**

**IN THE MATTER OF THE ESTATE OF DAUDI ODEKA WAGANDA ALIAS DAVID ODEKA  
(DECEASED)**

**RULING**

1. The deceased herein died on June 26, 2003. There is a letter from the Assistant Chief of Burinda Sub-Location, dated September 4, 2007, which is not helpful at all, as it does not disclose the individuals who survived the deceased.
2. Representation to the intestate estate was sought by Grace Atieno Odeka, in her capacity as a daughter of the deceased, through a petition filed herein on September 3, 2007. She listed herself as the sole survivor of the deceased, and Marachi/Bumala/161 as the asset that he died possessed of. Letters of administration intestate were made to her on September 30, 2008, and a grant was duly issued, on even date. I shall refer to her as the administratrix. The said grant was confirmed on October 1, 2013, on an application dated May 13, 2013. The estate was devolved, not on Grace Atieno Odeka, the alleged sole survivor, but on Christabel Taabu Ndonji, whose relationship with the deceased was not disclosed. A certificate of confirmation of grant was duly issued, dated October 2, 2013.
3. I am called upon to determine a summons for revocation of grant, dated December 28, 2021, brought at the instance of Elizabeth Achieng Odeka. I shall refer to her as the applicant. She avers that the grant was obtained through a defective process, where facts were concealed and distorted, as the deceased had 6 daughters, 4 of whom are alive, and had 1 son, who had died, yet the administratrix only disclosed herself as the sole surviving child of the deceased, creating an impression to the court that the deceased had only 1 child, the administratrix. The applicant asserts that she was entitled equally with the administratrix to administration of the estate. In her affidavit, she lists the names of the 8 children that the deceased had, both those alive and those who have since died. She further states that the administratrix had gone ahead to sell the property, even before the grant was confirmed.
4. There is evidence, vide the affidavits of service, sworn on March 6, 2023 and April 18, 2023, indicating that the application was served on the administratrix, and on Christabel Taabu Ndose, the person to whom Marachi/Bumala/161 was allegedly sold. The matter came up for directions on March 7,



2023, and the affidavit of service, sworn on March 6, 2023, related also to service of a notice of the mention date for March 7, 2023. On March 7, 2023, I directed that the application be disposed of by way of oral and affidavit evidence, and I fixed the hearing for April 20, 2023. The affidavit of service of April 18, 2023 also relates to service of a hearing notice for April 20, 2023. On April 20, 2023, the administratrix and Christabel Taabu Ndonji did not attend court, despite service with hearing notices, and I proceeded to take evidence from the applicant, at the end of which I assigned a date for ruling.

5. Revocation of grants is provided for under section 76 of the [Law of Succession Act](#), Cap 160, Laws of Kenya. A grant may be revoked on 3 general grounds. The first focuses on the process of obtaining the grant. The grant will be revoked if the process was defective, in terms of some step not being taken, or some rule not being complied with, or incompetent documents being placed on record, among others. It would also be revoked where the court is misled to make the grant through statements being placed before the court, which are misleading, on account of facts being concealed from the court, or misrepresented, or distorted. The second general ground focuses on the administration process, where the grant had been obtained properly or regularly, but difficulties attended the administration process on account of either failure to apply for confirmation of grant within the timelines set by the law, or where the administrator has failed to diligently administer the estate, or where the administrator has failed to render accounts as and when required of him. The second general ground is generally about failure of administration. The third general ground relates to the grant becoming useless or inoperative, on account of certain circumstances, such as where the sole administrator dies, or is rendered mentally or physically infirm to the extent of being unable to discharge his duties, or is adjudged bankrupt robbing him of capacity to hold an office of trust.
6. The application before me is founded on the first general ground, as it touches on matters relating to the process of obtaining the grant. It is about the court being misled to make a grant to the administratrix, based on information which was misleading, to wit that the deceased had only 1 child, the administratrix, meaning that there was concealment of the existence of the other children, including the applicant. There is also the issue of the process being defective, as the applicant, being a daughter of the deceased, had equal right with the administratrix to petition for representation, and her consent ought to have been obtained.
7. Non-disclosure of survivors of the deceased is a fertile ground for revocation of a grant. Distribution of an estate in intestate is based on the persons who survived the deceased, and how they were related to him. Section 35 of the [Law of Succession Act](#) provides for distribution of an estate between a surviving spouse and surviving children. Section 36 provides for distribution of an estate where the deceased was survived only by a spouse. Section 38 distributes the estate between the surviving children, where there is no surviving spouse. Section 39 distributes the estate amongst other relatives of the deceased, where there are no surviving spouses and no surviving children. The non-disclosure of any person in any of those categories, would mean there would be distortion in the distribution. The property would be distributed in a way that leaves out the undisclosed family member, in effect disinheriting that person. Inheritance is a right given by the law, and disinheritance is not countenanced. All the persons beneficially entitled must be involved in the process, so that they can take up their right or entitlement, unless they renounce it themselves. Disinheriting survivors through rigging the process, by simply not disclosing them, should automatically result in the nullification of the process.
8. The deceased had more than 1 child. The non-disclosure of the majority of the children meant that the process was distorted. The resulting distribution left out those who were not disclosed, and their rights were trashed. The property was subsequently devolved upon Christabel Taabu Ndonji, whose relationship with the deceased is not even disclosed. The other children of the deceased, or their survivors, were disadvantaged, and no one has any right to disadvantage anyone else. Section 51(2)(g) of



the Law of Succession Act is clear that all the children of the deceased, and the children of any dead child of the deceased, ought to be disclosed. Section 52 criminalizes misrepresentation of facts. A process tainted by the criminality of fraud, non-disclosure and misrepresentation cannot possibly produce a valid outcome.

9. Non-compliance with section 51(2)(g) of the Law of Succession Act also amounts to a defect in the process. That provision, read with Rule 7 of the Probate and Administration Rules, sets out the process, in terms of what ought to be filed in court. Non-compliance would mean the process was defective. The consequence of such defects is exclusion of persons who are entitled to a share in the estate, which the law cannot countenance. Rule 26 of the Probate and Administration Rules is also relevant. It requires that persons with equal right to administration ought to be notified of the process. In addition to being notified, they ought to execute consents allowing the petitioner to go ahead and petition, or to execute a renunciation denouncing their right to apply. I have not seen any such consents or renunciation by the other surviving children of the deceased, disclosed in the affidavit in support of the application herein. The process of obtaining the grant herein was defective in that respect.
10. I am satisfied, therefore, from this material, that the applicant herein has made out a case for revocation of the grant herein. Consequently, the orders that I shall make are as follows;
  - a. That the grant made herein on September 30, 2008, to Grace Atieno Odeka, is hereby revoked;
  - b. That, as a consequence of (a), above, the orders made herein on October 1, 2013, confirming the grant of September 30, 2008, are hereby vacated, and the certificate of confirmation of grant, dated October 2, 2013, is hereby nullified and cancelled;
  - c. That, as a consequence of (b), above, any and all transactions carried out on the basis or strength of the certificate of confirmation of grant, dated October 2, 2013, are hereby cancelled, and the Land Registrar, responsible for Busia County, is hereby directed to cancel any transactions relating to Marachi/Bumala/161, including its transfer or transmission to Christabel Taabu Ndonji, and to revert the property back to the name of the deceased herein;
  - d. That I hereby appoint Elizabeth Achieng Odeka administratrix of the estate of the deceased herein, and I direct that a grant of letters of administration intestate be issued to her;
  - e. That the new administratrix, Elizabeth Achieng Odeka, shall apply for confirmation of her grant in the next 45 days, and the matter shall be mentioned thereafter for compliance and directions; and
  - f. That any party aggrieved by these orders has leave of 30 days to appeal against the same, at the Court of Appeal.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 19<sup>TH</sup> DAY OF JUNE 2023**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Wanyama, instructed by Wanyama & Company, Advocates for the applicant.

