



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Henry Olunga Obanda (Deceased) (Succession Cause
122 of 2011) [2023] KEHC 22247 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE 122 OF 2011
AC MRIMA, J
SEPTEMBER 19, 2023
IN THE MATTER OF THE ESTATE OF HENRY OLUNGA OBANDA
(DECEASED)**

BETWEEN

DAVID SYEUNDA OLUNGA OBANDA 1ST OBJECTOR

EMMANUEL OLUNGA OBANDA 2ND OBJECTOR

WALTER OSAMA OLUNGA 3RD OBJECTOR

AND

EZEKIEL CHESA OBANDA ADMINISTRATOR

RULING

Introduction:

1. The Estate of Henry Olunga Obanda is currently under the administration of Ezekiel Chesa Obanda, the Respondent herein. The Objectors as well as the Administrator are all children of the deceased.
2. Initially, the administration of the estate was jointly undertaken by two persons. They were Fridah Bwabi Olunga and Ezekiel Chesa Obanda as the widow and son of the deceased respectively. Fridah Bwabi Olunga also passed on leaving Ezekiel Chesa Obanda as the sole administrator.
3. The Applicants, vide an application by way of a Summons for Revocation dated January 7, 2011, are variously challenging the administration of the estate by the said Ezekiel Chesa Obanda.
4. The administrator is opposed to the application.



The Application:

5. The application invokes Section 76 of the *Law of Succession Act*, Cap 160 of the Laws of Kenya and Rules 44 and 73 of the *Probate and Administration Rules* in seeking the following prayers: -
 - a. Spent;
 - b. The Grant of Letters of Administration in respect to the estate of Henry Olunga Obanda (deceased) issued to Fridah Bwari Olunga and Ezekiel Chesa Obanda on February 5, 2008 and confirmed on July 15, 2008 be revoked and/or annulled;
 - c. A fresh Grant do issue in the names of Ezekiel Chesa Obanda and David Syeunda Olunga Obanda as co-administrators;
 - d. Costs of the Application be provided for.
6. The application is supported by the grounds on its face and by the annexed Affidavit of David Syeunda Olunga Obanda, the 1st Objector/Applicant.
7. The Applicants synopsisized that the deceased died in 1998. They averred that following the death of the deceased, Fridah Bwabi Olunga and Ezekiel Chesa Obanda petitioned for a Grant of Letters of Administration in 2007. However, that was clandestinely done to their exclusion.
8. During the proceedings on the confirmation of the grant, the Applicants accused Ezekiel Chesa Obanda, who was a joint administrator by then, of taking advantage of Fridah Bwabi Olunga's deteriorating health and solely undertook the said proceedings, again to the exclusion of the rest of the siblings. They also accused the then Administrators of undertaking the conformation of the grant before the lapse of six months without justifiable cause.
9. The Applicants contended that no consent was obtained from them as to the mode of distribution. They also impugned Ezekiel Chesa Obanda's administration of the estate in that since confirmation, the administrator embarked on selling portions of the estate properties before distribution. They lamented that Fridah Bwabi Olunga left a huge pending medical bill yet to be cleared by the administrator. They further accuse the administrator of collecting rent out of the lease forming part of the estate without rendering accounts.
10. The Applicants concluded thus that the proceedings leading up to the confirmation of the grant were defective as they were premised on false statements and concealment of material facts. They accused the administrator of committing forgery on the Applicants' signatures expended in the consent to confirmation of grant. They alluded that they had since reported the matter at Kitale Police Station under OB No 0351/03/01/2011.
11. Finally, they justified that the application was premised upon the need to replace Fridah Bwabi Olunga as an Administrator since she passed on.

The Response:

12. The application was opposed.
13. Ezekiel Chesa Obanda swore his Replying Affidavit on January 15, 2011. He dismissed all the allegations set out in the application urging this Court to dismiss the motion since, principally, the supporting Affidavit was technically flawed.



14. He affirmatively confirmed that a Grant of Letters of Administration Intestate was issued jointly to Fridah Bwabi Olunga and himself on February 5, 2008. He continued that the deceased was survived by nine children who are now all adults.
15. The administrator vehemently denied that the Applicants were unaware of the proceedings herein stating that they had full knowledge. He drew the Court's attention to paragraph 4 of the Applicants' Supporting Affidavit where they stated that they were aware that the Petition for Letters of Administration was lodged in 2007.
16. The Administrator further averred that that vide Gazette Notice No 3806 dated November 16, 2007, Objectors were invited, for a period of 30 days, to raise objections as to the Petition. None was done.
17. On the hearing of the confirmation of the Grant, the administrator deposed that all the parties herein, save their mother, Fridah Bwabi Olunga, were present in Court and despite the Court asking whether any one was opposed to the then mode of distribution, no objection was raised. The Court was also informed as to the health of Fridah Bwabi Olunga. The administrator also noted that it was the very nature of ill-health of Fridah Bwabi Olunga that prompted the filling of the application for confirmation of Grant before the lapse of 6 months, a prayer which was allowed by the Court.
18. The administrator was emphatic that he did not forge the signatures of the rest of the beneficiaries and the Applicants herein. He observed that the alleged complaint was only filed on January 3, 2011, being 2 days prior to the filing of the present application on the January 7, 2011. He cited the Applicants for mischief in that regard. Furthermore, he confirmed that he had never been summoned, arrested or charged with any offence.
19. It was the administrator's further disposition that since the confirmation of the grant aforesaid, the Applicants had actively participated and endorsed administrative actions undertaken by him. For instance, upon the consent of all beneficiaries, the administrator disposed of a parcel of land from the estate's assets to meet various liability costs. He annexed an agreement dated June 19, 2010 executed by the Applicants to that end.
20. The Administrator also stated that he remained an ardent diligent Administrator solely since the passing of their mother and that he had since discharged his duties correctly and as at now, he had largely administered 95% of the estate. He annexed a Draft Plan prepared by the Surveyor indicating the ascertainment of shares under the names of each beneficiary and a bundle of documents revealing the administrative expenses so far incurred.
21. The administrator lamented that if the Grant is revoked, the obligations as between the estate and other third parties will be frustrated and that will be further liabilities on the estate.
22. The Administrator acknowledged that while their mother's poor health left a huge medical bill, he endeavored to discharge the estate from that responsibility but with precision and strategy.
23. He urged that the application was mala fides and insincere not deserving of the orders of this Court. For instance, the Applicants maligned his actions, but urged this Court to Grant Letters of Administration in his name as co-Administrator.
24. In the end, the Administrator prayed that the application be dismissed with costs.



The Hearing of the Application:

25. Before directions as to disposal of the instant application were issued, this Court by an order made on June 3, 2021, revoked the Grant of Letters of Administration issued on February 5, 2008 and substituted it with a Fresh Grant issued in favor of only Ezekiel Olunga Obanda.
26. Thereafter, parties were on November 11, 2022 directed to dispose of the application by way of written submissions. However, as at the time of writing this ruling, the Court was only in receipt of the Applicants' written submissions dated February 3, 2023.
27. In their written submissions, the Applicants relied on Section 76 of the *Law of Succession Act* and several authorities to substantiate their claim. They accused the Administrator of administering the estate without their consent and/or consultation and lethargically replacing their mother as a joint administrator. That action was in their view intent on ostensibly defeating the present application.
28. They maintained that the signatures if closely observed, were signed by the same person thus forged. On the strength of the forgery claims, they prayed that the application be allowed.

Analysis:

29. This Court has carefully, and with caution, considered the instant application, the response thereto, the written submissions and the decisions referred to.
30. It is the position in law that Section 76 of the *Law of Succession Act* gives a Court the discretion, on the basis of settled grounds, to revoke a grant of representation, whether confirmed or otherwise, on an application.
31. The said provision 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."

32. In this case, the Applicants rationalized the applicable grounds as misrepresentation and concealment of material facts, forgery, indolence and failure to administer the estate appropriately.
33. Before addressing the grounds raised by the Applicants, this Court is alive to the position that the Applicants did not respond to the factual or otherwise averments deposed to by the Administrator in his Replying Affidavit. To that end, this Court posits that such factual averments are uncontroverted.
34. Back to the grounds impugning the grant at hand, the issue of misrepresentation and concealment of material facts is a serious averment. Such ought to be supported by evidence and, in turn, it should also be properly responded to.
35. The Administrator deposed to the allegation. He denied it and stated that the administration of the estate was done in full glare of all the siblings. That position was supported by 6 out of the 9 children of the deceased. That means, with an exception of the 3 Applicants herein, the rest of the beneficiaries attest to the fact that all beneficiaries were well aware of the succession proceedings in this matter. As stated earlier, that averment was not controverted.
36. The Administrator also stated that all the beneficiaries were present in Court during the proceedings on the confirmation of the grant and that no one opposed to the proposed mode of distribution. There was no contrary averment thereto.
37. Further, the Administrator exhibited a copy of an Agreement for sale of one of the estate properties signed by among others the Applicants herein. The fact, again, went uncontroverted.
38. There was also the issue of conformation of grant before the expiry of the statutory period of 6 months. The record speaks for itself on the issue. On July 15, 2008, Hon Onyancha, J (as he then was) granted leave for the early confirmation of the grant.
39. Given the evidence on record and Applicants' failure to denounce the prevailing state of affairs, this Court hereby finds and hold that the Applicants were all aware of the entire prior proceedings in this matter and as such, the allegation of misrepresentation and concealment of material facts lacks a legal leg to stand on and is for rejection.
40. On the contention of forgery, again 6 out of 9 beneficiaries opposed it. The Applicants alleged that they reported the matter to the police, but to date this Court has not been updated of any progress.
41. It was the Administrator who deposed that he had not either been summoned by the police or charged. He saw the reported as misguided and only calculated to create a wrong impression to this Court.
42. The report was allegedly made on January 3, 2011 and the Administrator filed his replying affidavit on September 30, 2012. That was a period close to 2 years. By then, the Administrator had not even been summoned for interrogation. There is, as well, no evidence on how the Applicants have been pursuing



the matter with the police. Surprisingly, the Applicants asked this Court to compare the signatures on the documents accompanying the Petition and the Consent used in the confirmation application.

43. Being a criminal offence, forgery, is a serious indictment. Allegedly, there are investigations which are on-going. It can only be fitting for this Court to leave the aspect of comparison of the signatures to the experts. As at now, no finding has yet been made on the allegation. In such a case, the presumption of innocence under Article 50(2) of the Constitution comes to the fore. The allegation of forgery is, therefore, unproved and cannot be a basis of impugning the grant at hand.
44. The above is fortified by two decisions of the Court of Appeal. In *RG Patel vs Lalji Makanji* [1957] EA 314 the former Court of Appeal for East Africa stated as follows: -

..... Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.
45. Much later, and more recently, in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court of Appeal stated as follows: -

.... It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.
46. On the ground of indolence and failure to administer the estate appropriately, the Administrator deposed that he had administered the estate up to 95% thereof. In such a case, indeed where the fact is not disputed, this Court cannot impugn the grant.
47. As the administration of the estate is almost complete, the beneficiaries are at liberty to implore other avenues in the event they have reservations on the administration thereof. In doing so, it is imperative for the Applicants to be aware of the need to make allegations based on proven facts.
48. In sum, none of the grounds favoured in impugning the grant has succeeded.

Disposition:

49. Deriving from the above discussion, this Court hereby makes the following final orders: -
 - a. The Summons for Revocation dated January 7, 2011 is hereby dismissed with costs.
 - b. This matter shall be fixed for a mention on a date to issue for ascertainment of the status of the administration of the estate.

Those are the orders of this Court.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Wanyonyi, Learned Counsel for the Objectors/Applicants.

No appearance for Messrs. F. N. Wamalwa & Co., Advocates for the Administrator.

