



**Ndinya & another v Abuya & 3 others (Succession Cause 439 of 2015)
[2023] KEHC 22618 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 439 OF 2015
RE ABURILI, J
SEPTEMBER 21, 2023
IN THE MATTER OF THE ESTATE OF NDINYA OKWA HOMBO (DECEASED)**

BETWEEN

**EDWARD OTIENO NDINYA 1ST APPLICANT
HELLEN ATIENO NDINYA 2ND APPLICANT**

AND

**VINCENT OTIENO ABUYA 1ST RESPONDENT
JARED ODHIAMBO OKWACH 2ND RESPONDENT
PAUL OGWENO MANYALA 3RD RESPONDENT
DISTRICT LAND REGISTRAR NYANDO 4TH RESPONDENT**

JUDGMENT

Introduction

1. The applicants filed the application dated March 2, 2022 seeking annulment of the grant issued to the 1st respondent Vincent Otieno Abuya on the grounds that the grant was obtained fraudulently by making false statements and concealment from the court of things material to the case.
2. It was the applicants' case that the 1st respondent, the deceased's grandson, *vide* Nyando PM Succession Cause No E99 of 2021 petitioned the Principal Magistrate's Court in Nyando for grant of letters of administration following the death of 1st respondent's father, Silvanus Aora Ndinya, who was the original administrator of the deceased's estate and the same was granted on the October 14, 2021.
3. The applicants averred that once the late Silvanus Aora Ndinya had obtained a grant from the High Court in Kisumu court, it was not open to the 1st respondent to petition the Court in Nyando for another grant.



4. The applicants further averred that they and seven other siblings were not made aware of the 1st respondent's petition and further that the 2nd applicant's name was used in the said petition without her knowledge and consent and that her thumbprint and signature were forged.
5. It was the applicant's case that the 1st respondent failed to disclose to the Principal Magistrate that the deceased was survived by 2 daughters who were both alive and heirs entitled to petition to administer the deceased's estate as well as other children of Silvanus Aora Ndinya.
6. The applicant averred that property titled Kisumu/Sidho East/1866 which the 1st respondent had allocated to himself and the 2nd respondent had been agreed to be bequeathed to the family of Silvanus Aora Ndinya.
7. The applicant further averred that the 1st respondent had sold that property titled Kisumu/Sidho East/1866 to the 3rd respondent who had already fenced the said property.
8. In response, the 1st respondent filed a replying affidavit in opposition to the instant application dated May 18, 2022. It was his contention that he was the grandson of the deceased Ndinya Okwa Hombo in this cause, who was the owner of the land parcels titled Kisumu/Sidho East/160, 1866, 453 and 143 and that the families of the deceased's late sons had each been apportioned their own parcels as below:
 - i. Family of Silvanus Aora apportioned Kisumu/Sidho East/160
 - ii. Family of Anton Abuya Ndinya and Alex Okwach Ndinya to share Kisumu/Sidho East/1866
 - iii. Kisumu/Sidho East/453 to be shared between the daughters of the deceased
9. It was the 1st respondent's case that he was unaware that the late Silvanus Aora Ndinya had petitioned for letters of administration of the Estate of the Deceased Ndinya Okwa Hombo in Kisumu High Court Succession Cause No HC 439 of 2015 and that the same was not confirmed.
10. The 1st respondent further stated that the applicants were estopped from claiming that they knew about Succession Cause No HC 439 of 2015 as they were not aware that the 1st applicant's sister had transferred Kisumu/Sidho East/143 into her name.
11. It was the 1st respondent's case that Silvanus Aora Ndinya died before completion of the succession process and that there was no specific provision in succession law that provides for substitution of a single deceased administrator.
12. The 1st respondent further stated that the 2nd applicant was aware of the succession proceedings in the Nyando Court and gave her consent in the process and further that each and every son of the deceased were in their rightful portions
13. The parties agreed to file submissions to canvass the application.

The Applicants' Submissions

14. It was submitted that the letters of administration issued to the 1st respondent were based on misinformation, lies and a deliberate attempt to hoodwink the Principal Magistrates' Court at Nyando for purposes of succeeding the Estate of the deceased with a view of unlawfully gaining, intermeddling and side lining some of the beneficiaries of the Estate of the deceased.
15. The applicants submitted that the assertion by the 1st respondent that he was unaware of the filed succession cause before this court was unconvincing as ignorance is not a defense of the law and that



the 1st respondent's replying affidavit ought to have been contained in an objection as provided for under section 67 and 68 of the Succession Act and Rule 17 of the Probate and Administration rules.

16. The applicants relied on the case of *Selina Tipango v Emily Wambui Ishmael & 7 Others* (2016) eKLR where the court revoked a grant on the grounds of concealment of material facts. The applicants further submitted that there cannot be two grants in respect of the same estate and urged the court to revoke the one issued to the 1st respondent.
17. It was the applicants' submission that if the 1st respondent is not satisfied with the distribution of the estate of the deceased, he ought to file an objection.

The 1st & 2nd Respondents' Submissions

18. The two respondents submitted that the deceased had subdivided his land and allocated all his children their portions but that the same had not been registered and transferred and that each of the sons had built on their own portions and were cultivating the same.
19. It was further submitted that the deceased's estate had been fully settled and that the 2nd respondent had been graciously and rightfully offered her share of land in Kisumu/Sidho East/143 on her behalf and on behalf of her children including the 1st applicant.
20. The respondents submitted that the 1st applicant was only entitled to make an application to the court for dependency under and in accordance with section 29 (b) of the Law of Succession Act which he did not.
21. It was further submitted that the 1st applicant was only entitled to inherit by stepping into his parent's shoes as he was a grandson to the deceased in this case as was held in the case of Re Estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR.
22. The respondents submitted that they pursued a grant upon the death of the 1st applicant's father as the initial grant had become inoperative following the circumstance occasioned by the death of the 1st applicant's father and that the law of Succession Act did not provide for substitution of a single deceased administrator.
23. Accordingly, the respondents submitted that the orders sought by the applicants were not available.

Analysis and Determination

24. Having considered all the above pleadings and submissions, the main issue for determination is whether the application has merit as argued by both parties. The issue of revocation or annulment of grant of Letters of Administration and the jurisdiction of the court to entertain the application to revoke the grant is expressly provided for under Section 76 of the Law of Succession as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or its own Motion.

- (a) That the proceedings to obtain the grant were defective in substance,
- (b) That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case
- (c) That the grant was obtained by means of untrue allegations of facts essential to the point of Law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. The revocation or annulment is also



governed by Rule 26 of the Probate & Administration Rules which states that:

“Letters of Administration shall not be granted to any applicant without Notice to every other person entitled in the same degree as or in the priority to the applicant. An application for a Grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent, in the form 38 or 39, by all persons so entitled in equally or priority be supported by an affidavit of the applicant and such other evidence as the court may require”

25. The above provisions signify that a petitioner for grant of Letters of Administration will be deemed prima facie to have obtained a grant fraudulently, with respect to the state if he or she fails to issue notice to any of the dependents or beneficiaries of the estate of the deceased, including obtaining their necessary consents as mandatorily provided for in the *Law of Succession Act*.
26. Equally, the grant of letters turns out to be defective if the evidence shows that it was issued in error, misrepresentation of facts, concealment or nondisclosure of material evidence relevant and admissible for the making of the grant of representation. In one of the leading judgments of the court in this area of Law in *Matheka and Another v Matheka* [2005] EA 251, it was clearly stated that:

“A grant may be revoked either by application or by an interested party or on the courts own motion. Even when revocation is by the court upon its own of motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegations of facts essential. I n point of Law or that the person named has failed to apply for Confirmation or to proceed diligently with the administration of the estate. The grant may also be revoked if it can be shown to the court that the person to which the grant has been issued has failed to produce to the court such inventory or account of administration as may be acquired.”
27. In addition, the crucial deficiency of a grant sufficient for the court to grant an order for revocation or annulment is as stated *In the matter of the estate of Ngaii Gatumbi alias James Ngaii Gatumbi (deceased)* Nairobi Succession Cause No 783 OF 1993. In that case, the application for revocation was brought by persons who were omitted from the Petition for Grant, of Letters of Administration although, they were equally entitled to apply, but were not notified of the Petition and neither were their respective consents obtained. The court revoked the grant on the ground that it had been obtained by a defective or irregular process. (See also) *In the Matter of the Estate Isaac Kireru Njuguna (deceased)* Nairobi Succession Cause Number 1064 of 1994.
28. Having said much about the grounds for revocation or annulment of a grant, the question is whether the grant of Letters of Administration issued to the 1st respondent on the September 8, 2021 was made with concealment of material facts.
29. The pleadings presented before this court clearly show that this court had previously issued a grant of letters of administration to Silvanus Aora Ndinya, the 1st applicant’s father and the husband to the 2nd applicant to administer the state of the deceased Ndinya Okwa Hombo and despite the fact that an application for confirmation of grant was made on the June 17, 2016, the same was not confirmed by the time the 1st applicant’s father was dying.



30. It is a fact that the 1st respondent filed a petition at the Principal Magistrate's Court in Nyando for grant of letters of administration that were issued on the September 8, 2021, in respect of the same estate of the deceased herein Ndinya Okwa Hombo.
31. The petition for letters of administration at the Principal Magistrate's Court at Nyando was on similar facts and property inventory to that filed before this court by the late Silvanus Aora Ndinya. That fact was never disclosed by the 1st respondent at Nyando Principal Magistrates' Court. Was that not a concealment of a material factor provided for under Section 76 of the *Law of Succession Act*?
32. The 1st respondent alleged that he was not aware of the succession proceedings before this court but in my view, this was not true. The 1st respondent in his submissions and replying affidavit stated that he opted to file the succession proceedings in Nyando due to the inoperative nature of the grant previously issued to the late Silvanus Aora Ndinya who had since died and that no law permits substitution of a single deceased administrator. The fact, whether true or not, that the 2nd applicant was aware of the proceedings before the Principal Magistrates Court in Nyando does not stand before this court.
33. That fact that there were previous pending succession proceedings before this court was never disclosed by the 1st respondent at Nyando Principal Magistrates' Court and in my view, this amounts to concealment of a material factor. All the subsequent resultant actions are thus rendered illegal.
34. The upshot of the above is that the grant of letters of administration intestate that were issued on the September 8, 2021 by the Principal Magistrates Court at Nyando in SPM Succession Cause No E099 OF 2021 to the 1st respondent are hereby called into this court, revoked, quashed and set aside.
35. Taking into consideration that the sole administrator, Silvanus Aora Ndinya passed on, there is absolutely no room of substitution of the deceased administrator under the *Law of Succession Act* and thus the grant becomes useless or inoperative. Accordingly, the grant of letters of administration issued in this cause to the now deceased Sylvanus Aora Ndinya on December 16, 2015 be and is hereby revoked and annulled. The parties are advised to apply for a fresh grant.
36. This ruling to be served upon the Senior Principal Magistrates at Nyando for implementation in the succession cause before that court.
37. This file is closed.
38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF SEPTEMBER, 2023

R.E. ABURILI

JUDGE

