



**Akoth & another v Onyango (Succession Cause 503 of 2006)
[2024] KEHC 15557 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 503 OF 2006
RE ABURILI, J
DECEMBER 4, 2024**

BETWEEN

LINDA AKOTH 1ST APPLICANT

ALFRED JOHN ONYANGO 2ND APPLICANT

AND

SARAH TAABU ONYANGO PETITIONER

JUDGMENT

1. This is one of the oldest matters in this Court. This judgment determines Summons for revocation/annulment of grant 12th September 2022 which was heard viva voce seeking to revoke the Grant of Letters of Administration made to the Respondent on the 16th November 2006. The summons seeks orders that:
 - a. Spent.
 - b. That the grant issued to administrators on 16th November 2026 be revoked.
 - c. That the application for confirmation of grant dated 14th February 2022 be dismissed with costs.
 - d. That the grant was obtained fraudulently by making false statement to the court, concealing material facts of the case and making of untrue allegation of a fact essential in point of law to justify the grant.
 - e. That this honourable court be pleased to appoint the applicants to be joint administrators of the estate of the deceased and thereafter be granted time to apply for a fresh Grant of Letters of Administration Intestate.
 - f. That the court be pleased to make such further orders as may think just and expedient.



- g. That costs be provided for.
2. The summons was based on the grounds therein as well as the supporting affidavit of Linda Akoth, the 1st applicant/objector. The applicants averred that the grant was obtained fraudulently by the petitioner who made a false statement and by concealing from the court that she is a sister-in-law to the deceased and not a wife or mother to the deceased's surviving kids as she claims, information that was very material to the case.
 3. The applicants further averred that the petitioner applied for the confirmation of grant without consulting or informing the applicants about the schedule of distribution. It was their case that they were the only persons entitled in order of priority to apply for Letters of Administration as enshrined under Section 66 of the [Law of Succession Act](#).
 4. The applicants and one Janet Okello all testified in support of their case as OW1, OW2 and OW3. They adopted their respective testimonies all that were dated the 20th February 2024.
 5. The applicants testified that the petitioner was their aunt and that they were the surviving children of the deceased. Their testimony was that the petitioner used fake documents alleging to be the deceased's wife in her application for letters of administration.
 6. It was their testimony that the petitioner was convicted of the forgery and uttering false documents in Kisumu Chief Magistrate Criminal Case No. 318 of 2015 only to be acquitted in Kisumu High Court Criminal Case No. 78 of 2019.
 7. In response, the respondent filed a replying affidavit sworn on the 8th November 2022 in which she averred that the applicants had not provided enough evidence to warrant the revocation of the grant which was legally issued to her and the 2nd applicant. She stated that she was legally married to the deceased.
 8. Only the applicants' submissions were on record as at the time of writing this judgement.

The Applicants' Submissions

9. It was submitted that the petitioner was not a wife of the deceased but rather a sister-in-law whereas they were children of the deceased and that the documents relied on by the petitioner to support her claim of being a wife were affirmed as a forgery in Kisumu Chief Magistrate Criminal Case No. 318 of 2015 which evidence had not been overturned by the Court of law.
10. The applicants further submitted that the petitioner had failed to prove the alleged customary marriage to the deceased while they had proved to the contrary.

Analysis & Determination

11. The issue for determination herein is whether the Applicants' application meets the threshold for the revocation of a grant within the meaning of Section 76 of the [Law of Succession Act](#).
12. For avoidance of doubt, 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.”
13. 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.”

14. The Applicants invited the court to revoke the grant of letters of administration for the reasons that the Respondent obtained the confirmed grant by way of concealment of a material fact that she was not a wife to the deceased but rather a sister –in- law. The applicants all testified in support of their case reiterating their averments.
15. In her replying affidavit dated 8th November 2022, the petitioner averred in her replying affidavit that she was the deceased’s wife. The petitioner did not testify or adduce any evidence in support of her claim that she was a wife. However, from the previous proceedings pitying the respondent and her



co administrator, she filed some documents in court showing that the deceased had named her as a wife and that she got married to him after his first wife died in 1999. The applicants assert that the respondent is the sister to their mother and not their step mother. That aside, issues of whether the respondent was a wife or not are matters of fact that require cross examination since no marriage certificate was produced as an exhibit and the affidavit allegedly sworn by the deceased as evidence of marriage was discredited in the criminal trial of the respondent. The respondent did not attend court to be cross examined on the same. I shall not say more on that issue here.

16. Even assuming that the respondent was a wife to the deceased, she is bound by the *law of Succession Act* to ensure that she acts in the best interest of the estate of the deceased, and the estate comprises assets and beneficiaries. Being an administrator is not the same as being the owner of the assets in the estate. In the case of *Motex Knitwear limited v Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002*, Lessit, J citing the case of *Autar Singh Bahra and another v Raju Govindji, HCCC No. 548 of 1998* appreciated that:

“ Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

17. In the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No 1243 of 2001* the court citing the same above quoted decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.
18. The failure to adduce any evidence means that the evidence adduced by the applicants against the respondent remains uncontroverted and therefore unchallenged, although the applicant still bears the burden of proving her case on a balance of probabilities.
19. The record shows that the respondent filed summons for confirmation of grant dated 14th February, 2022 but none of the beneficiaries signed the consent for distribution of the estate. Those summonses remain unprosecuted on record. The matter has been pending for long and the grant which was issued to the respondent and the 2nd applicant co administrator has never benefitted the beneficiaries of the estate. In such circumstances, the estate is likely to be wasted. There is obvious mistrust of the respondent by the children of the deceased. She cannot build consensus and yet she cannot distribute the estate in the glare of evidence that the documents which she relied on to petition for a grant were forgeries. Whether she forged them or not, she used them to petition for the grant. The standard of proof in criminal cases is higher than that in civil or succession cases as this one.
20. The Criminal Court found that the documents which the respondent relied on to petition for grant were forgeries including a marriage affidavit, only that she was not proved to have been the person who forged them. This was emphasized by F.A. Ochieng J (as he then was) in the Criminal appeal where the respondent was acquitted for want of proof that she forged the documents, with the court sustaining the finding that indeed, the documents were forgeries.
21. I however observe that the co-administrator did apply to revoke the grant and the court dismissed the application because he was part of the illegality that was being perpetuated by the respondent in obtaining the grant and the fact that he had used the same grant to ask for special harvesting of cane by the Kibos Sugar Factory.



22. That said, in estates of deceased persons, each beneficiary has their own individual beneficial interest and may apply in their own name and right for appropriate orders. That is why section 76 of the [law of Succession Act](#) uses the term “any interested party.” The 1st applicant being a daughter to the deceased has a beneficial interest in the estate whose administration by the respondent and the 1st applicant’s brother is in issue.
23. It is clear that the 1st applicant was not part of the team that used forged documents to obtain grant. That being the case, I find that the 1st applicant has established on a balance of probabilities that the respondent and the 2nd applicant are not the proper persons to administer the estate of the deceased.
24. The upshot of the above is that I find the summons for revocation of grant dated 12th September 2022 to be meritorious. It is thus allowed. The grant issued in favour of the 1st applicant and the respondent on 16th November, 2006 is revoked and annulled. The Summons for confirmation of grant dated 14th February, 2022 are struck out.
25. The beneficiaries of the estate of the deceased to agree on credible persons among them, other than the respondent and the 2nd applicant co administrator herein Alfred John Onyango and to petition for a fresh grant and to administer the estate on their behalf.
26. The respondent and the 2nd applicant must however give an account of the estate which they have purportedly been administering jointly but without accounting to the other beneficiaries. They shall file into court accounts within 60 days of this order.
27. I order each party to bear their own costs of the summons for revocation of grant.
28. This file is closed, only subject to the filing of accounts by the now ex-administrators.
29. Decree to issue.
30. This file is closed.
31. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

