



In re Estate of Clement Andrew Obanda alias Clement Odeny Obanda - Deceased (Succession Cause E007 of 2024) [2025] KEHC 13284 (KLR) (26 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE E007 OF 2024**

A MABEYA, J

SEPTEMBER 26, 2025

**IN THE MATTER OF THE ESTATE OF CLEMENT ANDREW
OBANDA ALIAS CLEMENT ODENY OBANDA - DECEASED**

AND

IN THE MATTER OF AN APPLICATION BY ELIZABETH POLA OBANDA – PETITIONER

AND

IN THE MATTER OF OBJECTION BY JOAN AKINYI OGONJI - PROTESTOR

BETWEEN

ELIZABETH POLA OBANDA PETITIONER

AND

JOAN AKINYI OGONJI PROTESTOR

JUDGMENT

1. This Cause is in respect of the estate of the late Clement Andrew Obanda alias Clement Odeny Obanda (“the deceased”) who died intestate on 3/9/2023.
2. The Petitioner, Elizabeth Pola Obanda vide her Summons for Confirmation of Grant dated 13/2/2025, proposed a detailed mode of distribution of the deceased’s estate as detailed in her affidavit in support of the even date. Basically, she proposed that the estate be exclusively be distributed to her to hold in trust for the rest of the beneficiaries.
3. In opposition to the mode of distribution proposed by the Petitioner, the Protestor, Joan Akinyi Ogonji, a daughter to the deceased swore an affidavit of protest on the 17/3/2025.
4. She deposed that the Grant issued to the Petitioner was obtained without her consent despite the fact that adult children can be administrators of their parent’s estate. That the need for another



- administrator was further justified by her need to take care of the interest of her missing brother, Richard Otieno Obanda.
5. That the mode of distribution proposed by the Petitioner grants the Petitioner all the deceased's assets under the guise of the Petitioner holding the same in trust for the children, yet all the listed children are adults.
 6. On record was another Affidavit of Protest filed by one Dr. Benear Apollo Obanda, the deceased's brother, who opposed the Confirmation of Grant to the Petitioner on account that he had a purchaser's interest in one of the deceased's assets specifically land parcel no. Kisumu/Dago/5773.
 7. However, on the 18/3/2025 the parties agreed to a partial distribution of the deceased's estate as follows: -
 - a. Kisumu/Dago/5773 – To Dr. Benear Apollo Obanda
 - b. Kisumu/Korando/4603 - To the children of the late Joan Brenda Obada (Morgan Owuor Odhiambo & Maxwell Ochieng Odhiambo)
 8. The Protestor similarly sought to have the Grant issued to the Petitioner on the 20/5/2024 revoked vide her Summons dated 6/3/2025. The Summons was based on the grounds therein as well as her Supporting Affidavit of even date.
 9. The Protestor deposed that the Grant of Letters of Administration Intestate was obtained without the mandatory form P & A 38 being filed in the file. That the consent of the adult children was not sought prior to the filing of the Letters of Administration Intestate. That the Petitioner has excluded her and her brother from the administration, disposal and distribution of the movable assets of the estate and as such it is necessary for the Petitioner to render account of the same.
 10. That the Petitioner was dishonest in dealing with the estate as she failed to disclose the true value of the estate as the grant of letters indicates that the estate is worth Kshs. 25 million whereas her own application for confirmation indicated that the estate is worth Kshs. 53 million.
 11. In response to the Protest and Summons for revocation, the Petitioner filed a replying affidavit sworn on the 12/3/2025. She deposed that the Protestor's application for revocation did not meet the conditions set out in section 76 of the Law of Succession Act.
 12. That the Petitioner and his brother Richard Otieno never had a personal relationship with the deceased but that she has still acted in good faith by involving them in the succession proceedings.
 13. That she ranked higher in consanguinity than the Protestor and her brother and hence did not give her Notice before obtaining Grant of Letters of Administration. Further, that Form 38 is only mandatory if the person applying for Grant is entitled in degree equal or lower than that of any other person as per Rule 26 (2) of the Probate and Administration Rules.
 14. That the Protestors motive to be made a sole trustee of Richard Otieno was based on greed and ill motive as she lost touch with Richard about 20 years ago whereas she, the Petitioner, is best placed to be Richard's trustee.
 15. The parties testified and relied on their respective affidavits as set out above on which they were cross-examined. The Protestor maintained that she wanted assets valued at Kshs. 5.4m for herself while her lost brother be assigned property valued at Kshs.2.4m.



16. On the other hand, the Petitioner insisted that she wanted the entire estate to herself to use until her demise when they should then devolve to the children of the deceased. She admitted that she had collected a total of Kshs.1.2m as rent from the estate which she had spent and had not paid any of the assets of the estate.
17. The parties filed their respective submissions which they highlighted on the 23/6/2025. The Protestor submitted that the marriage certificate relied on by the Petitioner was proof of marriage and not a weapon to be used during succession proceedings to deny beneficiaries of the deceased's from benefitting from the estate.
18. That section 35(1) (b) of the Law of Succession Act ("the Act), which the Petitioner based her case on was declared unconstitutional in the case of *Ripples International v AG & Another* [2020] E017/2021] KEHC No. 13210 KLR (2021).
19. On her part, the Petitioner submitted that the grant ought not to be revoked as the Protestor had not met the requirements for revocation of grants provided under section 76 (1) (a) of the Act. That there was an order of preference of appointment of administrators provided in section 66 of the Act and that she complied with the requirements of P&A 5.
20. That Rule 7 (7) of the Probate & Administration Rules apply to persons who do not apply in order of priority in section 66 of the Act and upheld in the case of *Seth Vamita Achuma* [2020] eKLR.
21. That distribution of the deceased's estate should be guided under section 35 (1) of the Law of Succession Act and the Protestor ought to wait until her interest determines as children are not entitled to access of the deceased's estate until the death of the surviving spouse. Reliance was placed on the case of *Tau Katungi v Margrethe Thorning Katungi & another* [2014] KEHC 3226 (KLR).
22. I have considered the rival affidavits and the evidence on record. The Protestor sought to have the Grant issued to the Petitioner on the 20/5/2024 revoked. Section 76 of the Act provides: -

“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.”

23. A court may therefore revoke a grant so long as any of the grounds set out in section 76 of the Act is proved. This may be either on the Court’s own motion or on an application by a party.
24. The first ground under section 76 of the Act when a court may revoke a grant is where the process of obtaining the grant was marred by several irregularities. This 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 is made instead of a grant of probate, or vice versa.
25. 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.
26. In the present case, the Protestor averred that the Grant of Letters of Administration Intestate herein was obtained without the mandatory form P & A 38 being filed and that the Petitioner was dishonest in dealing with the estate as she failed to disclose the true value of the estate
27. On her part, the Petitioner contended that the Protestor had not satisfied the conditions precedent for revocation of a grant as prescribed in section 76 of the Act.
28. Form 38 is the consent by a person of equal or lesser priority. Rule 26(1) and (2) of the Probate and Administration Rules provides as follows: -
 - “ 1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
 - 2) 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 Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”
29. From the record, it is clear that the above provision was not complied with. There is no evidence that the Petitioner filed Form 38 in her application for Letters of Administration Intestate.
30. I have also examined the Summons for Confirmation of grant and the accompanying consent which is signed by a few individuals. Though the Protestor and her brother were listed by the Petitioner as beneficiaries, they did not sign the said consent. No explanation was advanced by the Petitioner for that failure. However, from her testimony in Court, it could be discerned that she did not regard them as being entitled.
31. Rule 40(8) of the Probate and Administration Rules provide as follows: -

“ Where no affidavit of protest has been filed, the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on



receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit”.

32. From the foregoing, it is clear that there were infractions by the Petitioner that would warrant the revocation of the grant. There were crucial mandatory procedural omissions. However, since there was a Protest that was filed and heard together with the Summons for confirmation, revoking the grant would serve no purpose other than delaying what is now clear, that the estate should be distributed. In *Re Estate of G K K (Deceased)* [2017] eKLR, it was held that: -

“The primary function of a probate court is distribution of the estate of a dead person.”

33. With the trial that ensued the Protest, all the material required to determine this Cause were produced and placed on record. The Court has all that is required to determine the Cause in its entirety. It is a Constitutional imperative that substantive justice be done and without any undue delay. In this regard, the Court will determine the matter based on the material on record and will hesitate and refrain from revoking the grant.

34. Following the judgment in *Ripples International* (supra), section 35(1)(b) of the Act is no longer good law. Every individual/beneficiary to a deceased’s estate is entitled to an equal share thereof unless in a case where the widow has staked her claim under the *Matrimonial Property Act*. In this regard, the Court rejects the invitation to determine the distribution of the estate under that section.

35. In the present case, the deceased was married to the Petitioner and they had three children. The deceased also had two children from an earlier relationship. These were the Protestor and her missing brother Richard Otieno Obanda. Each one of the beneficiaries, including the petitioner constitute a unit. All are entitled to an equal share of the estate.

36. Accordingly, I will proceed to distribute the deceased’s estate however, I must first address myself to the debts and liabilities accumulated by the estate.

37. The Petitioner made disclosures of all the available assets and liabilities of the estate. The following liabilities were disclosed and not objected to: -

- a. Kshs. 4,408,000/- – Legal Fees to Erykah Law Advocates.
- b. Kshs. 1,438,800/- – Balance of purchase price for Apartment No. MKS-CS-16, Makasembo Estate.
- c. Kshs. 47,162/- – Owed to National Housing Corporation.

38. On her part, the Protestor pleaded that she had a liability of Kshs. 4,408,000 arising out of a retainer agreement with her advocates on record which ought to be settled by the deceased’s estate.

39. The Petitioner proposed that while her legal fees should be shouldered by the estate, the Protestor should shoulder her bill on her own. That the sum proposed to be paid to the Advocates for the Petitioner is because their Advocate was acting for the estate. While that may be the case, there would not have been any Protest and the incurring of the legal costs on the part of the Protestor were it not for the deliberate attempt by the Petitioner and her children to exclude the Protestor and her missing



brother from the estate. The Protest and the attendant legal costs were necessitated by the Petitioner's skewed distribution and the attendant consent given by her children to the same.

40. In the view of this Court, the general rule is that the legal costs of applying for a grant should be borne by the estate. That those who unnecessarily object and Protest to the issuance of the grant and distribution should bear their own legal costs.
41. In a case like the present one where a group of beneficiaries bind the estate to a whooping huge legal costs which would considerably reduce the estate while at the same time seek to short change other lawful beneficiaries, I think equity would not let the opposing beneficiaries to suffer the legal costs alone. Equity will not suffer a wrong without a remedy.
42. It should be recalled that: -
 - a. the Petitioner admitted that she has been collecting rent from the estate property ever since the demise of the deceased and sorely consumed the same;
 - b. the petitioner failed to pay any of the liabilities of the estate despite collecting over Kshs.1.2m;
 - c. ordinarily, the amount wrongly used and or consumed by an administrator of an estate should be accounted for, ie. the administrator should be made liable therefor by deducting the same from his/her share. In this case, the administrator being the Mother of the beneficiaries, the Court will ignore the same for the sake of expedited settlement of the matter;
 - d. the Petitioner and her children sought to exclude the Protestor and her brother from the distribution of the estate;
 - e. the Petitioner severally in Court held that the children of the deceased were only those born by her;
 - f. the Petitioner and her own children agreed and intended that she holds, uses and enjoys the entire estate to the exclusion of the other beneficiaries for life or until she remarries;
 - g. the Petitioner and her own children are the ones who signed the retainer for a whooping sum of Kshs.4,408,000/- for an estate of slightly over Kshs.50m;
 - h. the Protestor was categorical that the Petitioner was very cruel to her and her missing brother at the time they were living together and that it is the cruelty that made her and her brother leave their home.
43. For the foregoing reasons, this Court holds that it would be just and fair that the entire legal costs of Kshs. 8.8m be borne by the estate. The Protestor's costs as well as those of the Petitioner be borne from the estate.
44. The Petitioner had set aside 3 properties, Kisumu/Korando/ 4601, Kisumu Korando/4599 and Kisumu/Dago/5772 to cater for all the liabilities that totaled Kshs.5,893,962/- before adding the Protestor's legal costs of Kshs.4,808,000/-. Since the said 3 properties are valued at Kshs.7,900,000/-, whilst the total liabilities are Kshs.10,301,962/=, the Court will include Kisumu/Korando/4598 to those properties that should be disposed off to cater for the liabilities.
45. Having taken care of the liabilities, the net estate should be divided equally amongst the beneficiaries. The beneficiaries are: -
 - a. Elizabeth Pola Obanda
 - b. Job Otieno Obanda



- c. Joel Ochieng Obanda
 - d. Joshua Baya Obanda
 - e. Joan Akinyi Obanda
 - f. Richard Otieno Obanda
46. During the trial, the parties entered into a consent on the distribution of Kisumu/Korando 4603 and Kisumu/Dago/5773. As per their consent, these properties will be distributed to the children of Joan Bereda Obanda (Morgan Owuor Odhiambo & Maxwell Ochieng Odhiambo) and one Dr. Beneah Apollo Obanda, respectively.
47. I have taken into consideration that there is a matrimonial home at East Gem/Uranga/773. This being a matrimonial home, the same should be distributed to the Petitioner as the widow of the deceased.
48. Consequently, I proceed to distribute the deceased's estate as follows: -
- a. Elizabeth Pola Obanda - East Gem/Dago/Uranga/773
 - b. Job Otieno Obanda - Kisumu/Korando/4378
 - c. Joel Ochieng Obanda - Kisumu/Korando/5910
 - d. Joshua Baya Obanda - Kisumu/Korando/5422 & 5421
 - e. Joan Akinyi Obanda - Kisumu/Korando/3583 & 6085
 - f. Richard Otieno Obanda- Kisumu/Korando/4697
 - g. Kisumu/Korando/4440 – Elizabeth Pola Obanda, Job Otieno Obanda, Joel Ochieng Obanda, Joshua Baya Obanda, Joan Akinyi Obanda & Richard Otieno Obanda (Equally)
 - h. Kisumu/Korando/4603 – Morgan Owuor Odhiambo & Maxwell Ochieng Odhiambo (Equally)
 - i. Kisumu/Dago/5773 - Dr. Beneah Apollo Obanda

Others

- a. Motor Vehicle Registration No. KAX 213P, ISUZU – Elizabeth Pola Obanda wholly
- b. Money held in Bank Accounts
 - National Bank of Kenya
 - A/C No. 0124XXXX5700
 - A/C No. 0152XXXX00
 - Co-operative Bank of Kenya
 - A/C No. 0110XXXX100 To all beneficiaries equally
 - A/C No. 0110XXXX200
 - Standard Chartered Bank
 - A/C No. 0151XXXX200
 - A/C No. 010XXXX200



- c. Shares - To all the beneficiaries equally
- A bsa Bank Ltd Shares
 - CIC Insurance Group Ltd Shares
 - Co-operative Bank of Kenya Ltd Shares
 - Eveready East Africa Ltd Shares
 - KenGen Shares
 - Kenya Re Insurance Corporation Ltd Shares
 - Kenya Power & Lighting Co. Ltd Shares
 - Kenya Commercial Bank Ltd Shares
 - Mumias Sugar Co. Ltd Shares
 - Nairobi Securities Exchange Ltd Shares
 - Scangroup Ltd Shares
 - Standard Chartered Bank Kenya Ltd Shares
 - Safaricom Ltd Shares

49. For the avoidance of doubt, the shares of the missing son of the deceased, Richard, shall continue to be held by the Administrator until he resurfaces or until further orders of the Court.

It is hereby so decreed.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF SEPTEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE

