



REPUBLIC OF KENYA



KENYA LAW
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**Ogutu v Omondi (Family Appeal E003 of 2025)
[2025] KEHC 14041 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E003 OF 2025
DK KEMEL, J
OCTOBER 9, 2025**

BETWEEN

FREDRICK MIYAGA OGUTU APPELLANT

AND

FRED ONYANGO OMONDI RESPONDENT

(Being an appeal from the Ruling of Hon. J.P. Mkala(R.M) delivered on the 19th December 2024 in Siaya Succession cause No. E016 of 2021 Re Estate of Opong Owiti Omolo)

JUDGMENT

1. This appeal emanates from the ruling of Hon. J.P. Mkala dated 19/12/2024 wherein he allowed the Respondent's Summons for Revocation of Grant dated 3/10/2022 and amended on 28/6/2024 in the following terms:
 - i. The grant of letters of administration intestate be and is hereby revoked.
 - ii. The certificate for confirmation of grant dated 28th July 2022 be and is hereby cancelled, revoked and/or annulled and all other transaction arising pursuant to the said confirmation of grant be and are hereby revoked and title number 2523 and 2506 shall revert back to the deceased Owiti Omolo Opong.
 - iii. A new form 41 be and is hereby issued in the names of Fredrick Onyango Omondi and Fredrick Miyaga Ogutu.
 - iv. Parties bear their costs.
2. Aggrieved by the said ruling, the Appellant has appealed to this court vide his memorandum of appeal dated 13/1/2025 wherein he raised the following grounds of appeal:



- i. That the trial magistrate erred in law and fact by making the Respondent herein a joint administrator to the estate in spite of the fact that the Respondent is a liability to the estate.
- ii. The trial magistrate erred in law and fact by placing reliance on the methodology rather than the findings of the Siaya County Surveyor's report dated 22nd December 2021.
- iii. The trial magistrate erred in law and fact by failing to appreciate the Appellant's parallel survey report dated 22nd October 2021.
- iv. The trial magistrate erred in law and fact by granting orders outside the pleadings of the parties, specifically making the Respondent an administrator when he is a liability to the estate.

The Appellant therefore seeks that the appeal be allowed and that the impugned ruling be set aside and the revoked Grant be reinstated and that the status obtaining prior to the order be reinstated and that the Respondent be ordered to pay the cost of the appeal.

3. This being the first appellate court, its duty is to analyze and evaluate the entire evidence by subjecting it to a fresh exhaustive scrutiny and to arrive at its own independent conclusion as to whether or not to uphold the decision of the trial court. This court must bear in mind that it did not have the opportunity to hear or see the witnesses and must give due allowance for that. (See *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123; *Peters v. Sunday Post Ltd* (1958) EA 424; *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA).

4. It is noted that the trial court had been presented with a Summons for Revocation of Grant dated 3/10/2022 and amended on 28/6/2024 wherein the Objector averred inter alia; that the Administrator had administered the estate unfairly and unjustly; that his father who was a buyer from the estate was entitled to more than what was given to him by the administrator; that the administrator/Respondent included someone by the name of Washington Owino who was neither a beneficiary nor a liability to the said estate and that he was allocated land that belonged to the Applicant's/Objector's father's portion; that he proposed that the estate be distributed as follows:

Parcel No. Siaya/Sigoma Uranga/2523

- a. Johnson Omolo Nongah.....1.0 hectares
- b. Duha Primary School..... 1.33 hectares

Parcel No. Siaya/Sigoma Uranga/2506

Fredrick Miyaga Ogutu.....1.33 hectares (holding in trust for the children of Owiti Omolo Opong).

5. The Petitioner/Respondent filed a replying affidavit dated 2nd September 2024 wherein he averred inter alia; that succession was done procedurally and that the Objector was given his rightful portion of 0.33 hectares from parcel No. Siaya/Sigoma – Uranga/2523; that the Petitioner carried out a survey which established that the Objector was entitled to 0.33 hectare and nothing more; that the claim by the objector is an afterthought and actuated by malice as the matter relating the estate had already been mitigated upon and the succession brought to a logical conclusion with the estate being distributed in accordance with the Summons for Confirmation of Grant dated 24/5/2021 wherein the Objectors late father one Johnson Omondi Nongah was present in person and never objected to the issuance of the grant; that the application is meant to delay the wheels of justice yet the Objector's late father had



- already been given his own portion measuring 0.33 hectare; that the application is misconceived and an abuse of the court process and which should be dismissed with costs to the Petitioner/Respondent.
6. The said Summons for Revocation of Grant was canvassed by way of viva voce evidence.
 7. Omondi Fred Onyango (OBW1) relied on the contents of his supporting affidavit dated 28/6/2024 as well as the affidavit filed by his late father which were adopted by the trial court. He sought to have the land to revert back to the original buyer – Johnson Nongah. That he has not seen any agreement between one Washington Owiti and the registered owner. On cross examination, he stated inter alia; that his father bought land from Owiti Omolo Obong on 11/1/1993 when he was about ten (10) years old; that his father passed away before he could procure the registration of title; that Petitioner is the closest relative to Owiti Opong; that his father got a portion from the succession; that he saw the sale agreement which indicated the size of the land to the effect that his father purchased half and that the agreement did not indicate the size of the land bought; that his father was not the only buyer of the land as there were other buyers; that each buyer was shown their specific portion and they occupied them; that the exact acreage is not indicated since there is no document showing the specific acreage that his father bought; that when the application for consent was made, the land was to be divided by two; that dividing by two does not mean dividing into half; that the intruder who entered onto his father's portion is Washington; that the Petitioner was not supposed to divide land that had already been bought; that there is no document which provided the exact acreage bought by his father.
 8. Fredrick Miyaga Ogutu (RW1) relied on his statement dated 2/9/2024 and list of documents of the same date as his evidence in chief. He stated that the deceased herein was his uncle while the Objector's father had bought a portion of land measuring 0.3Ha and that the agreement did not show the acreage and that all the buyers were catered for. On cross-examination, he stated inter alia; that both the Objector's father and Washington are buyers and have share of the land; that there is no document that the deceased gave Washington 0.47 Ha of land; that he has not included his siblings in the succession matter; that he was closer to the deceased than the Objector; that the deceased had given Washington who was a distant relative a portion of the land (0.47 Ha) one year before he died.
 9. The appeal was canvassed by way of written submissions. The Appellant submitted that the deceased died leaving no wife and no children. This made him a nephew to become the deceased's son under the Luo culture. He relied on the case of *Immaculate Wangari Munyanga v Zachary Waweru Ireri* (2016) eKLR. He submitted that he was the closest as he fell in the first degree of consanguinity and thus a beneficiary pursuant to section 39(10) of the *Law of Succession Act*.
 10. He submitted that Johnson Omondi Nonga had already been allocated his portion measuring 0.33 ha exercised from parcel number L.R No. Siaya/ Sigoma-Uranga/2523 pursuant to the certificate of confirmation of grant dated 28th July 2022, alongside one Washington Owino Ochieng who received 0.47 Ha and that he himself obtained 0.88 Ha while Duha primary school got 0.93 Ha. It was further submitted that the Respondent's late father Jonson Nongah had admitted in his earlier affidavit dated 3/10/2022 that his share was 0.33 Ha. It was finally submitted that the Respondent's claim is baseless and actuated by malice as the matter had been finalized after the Respondent's father okayed the distribution of the estate. It was also submitted that survey reports were presented to court and which showed the exact acreage of the Respondent's father's portion as 0.33 Ha out of parcel number Siaya/ Sigoma-Uranga/2523. The Appellant prayed that that the appeal be allowed with costs.
 11. The Respondent herein submitted that the original objector was his father Johnson Omondi Nongah. That he had bought a parcel of land from the deceased during his lifetime and that he lived on the suit land with his family. That the said Objector John Omondi Nonga participated in the proceedings prior to the confirmation and had expressed his contention and protest as regards the confirmation of



the grant. That his late father had, in fact, filed an affidavit dated 3rd October 2022 in support of the objection which is on record. That his contention was on the distribution. That the Administrator had brought in one Washington Owino and allocated him land that belonged to the Objector John Omondi Nonga.

12. It is upon the said confirmation of grant that the said John Omondi Nonga instructed the firm of M/s Ooro Company Advocates who filed the original summons for revocation of the grant dated 3rd October 2022, which was supported by the affidavit of John Omondi Nonga, sworn on the same date. That the said Johnson Omondi Nonga did not live to prosecute his application as he died on 9th May 2023 and that he was substituted by Fred Onyango Omondi as the new Objector and the Respondent herein. That the new objector filed an amended summons for revocation of grant in which he fully adopted the supporting affidavit of his father as part of his evidence.
13. It is the Objectors/Respondent's submission that the Appellant was not truthful when he stated that he is the only son and surviving heir to the deceased's estate. That he testified on cross-examination that he is a nephew to the deceased and that his father is one Joseph Ogutu Miyaga and that he had other siblings. He confirmed that he had not included his other siblings to the petition.
14. Further, the Objector/Respondent submitted that the Appellant herein had intermeddled with the deceased's estate prior to filing the succession proceedings, as evidenced in paragraph 33 & 34 of the supporting affidavit of Johnson Omondi Nongah sworn on 3rd October 2022 as adopted at paragraph 9 of the affidavit of Fred Onyango Omondi. That by the conduct of the Appellant, it was not safe to allow him administer the estate alone and that the appointment of the Objector as a co-administrator was in order to ensure just and accountable administration of the estate.
15. Lastly, the Respondent submitted that the trial magistrate was not in error by finding that Washington Owino was not entitled to a share of the estate as he was a stranger thereto.
16. I have considered the record of appeal, the rival affidavits and submissions including the authorities herein and find that the issue for determination is whether the appeal has merit.
17. It is noted that the Respondent's late father had filed a summons for revocation of grant dated 3/10/2022 and which was amended on 28/6/2024 following the demise of the initial objector and that the main gravamen of the Respondent was that the Appellant had hived off a portion of their family land and gave it out to a stranger one Washington Owino who was not a beneficiary or even a buyer of the land. He thus sought for the grant as well as the certificate of confirmation of grant revoked and the properties to revert back in the name of the deceased. The threshold for revocation of a grant is stipulated under section 76 of the *Law of Succession Act* as hereunder:

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.

18. In re Estate of Prisca Ongayo Nande(deceased) [2020] eKLR, Musyoka J stated as follows:

“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.”

18. In the instant case, the Respondent contended that the Appellant did not properly administer the estate as he included one Washington Owino who was neither a beneficiary nor a liability/buyer and further took away a huge junk of the land that had been sold by the deceased to the Respondent’s father. The Respondent further contended that the Appellant in collusion with other 3rd Parties including the said Washington Owino changed the shares of the persons who had bought land to the prejudice and disadvantage of the Respondent. The Respondent finally contended that his family is entitled to 1 hectare of land which was lawfully purchased by his late father. The Appellant on the other hand maintains that his proposed mode of distribution had been agreed upon by the Respondent’s father Johnson Omondi Nongah and that the grant was confirmed with the said Johnson Omondi Nongah getting a share of 0.33 Ha. The Appellant therefore faults the Respondent for bringing new issues yet his father was agreeable to the mode of distribution. The Appellant finally seeks that the Respondent’s claim lacks basis and should be dismissed.
19. From the proceedings that were conducted before the trial court, it is clear that the trial court had earlier called for survey reports dated 22/10/2021 and 22/12/2021 which were considered and which led to the issuance of a certificate of confirmation of grant by Honourable Wambani dated 28/7/2022. Prior to the confirmation of the grant, the Respondent’s father Johnson Omondi Nongah had indicated



that he had no objection to the proposed mode of distribution. The objection therefore was raised afterwards. The Respondent while testifying before the lower court, admitted on cross examination that the Sale Agreement between his late father and the deceased herein did not indicate the exact size of the land being sold. The Respondent also stated that when the application for consent at the Land's Board was made, the land was to be divided by two and went on to state that dividing by two did not mean dividing into half. It would then appear that the question whether the land was to be divided into two meant that it was to be divided into two equal parts. This then formed the crux of the dispute in that whereas the Respondent was of the view that his father was given half of the land, the Appellant was of the view that the land was not to be divided equally but that the Respondent's father was to get a portion of the land. Indeed, the surveyor visited the land and came up with the map. As the size of the land had not been indicated in the sale agreement, it left open the issue of the size to be given to the Respondent's father. It was on that basis that the Appellant proceeded to allocate the Respondent's father 0.33 Ha and which compelled the Respondent to later on file an objection to the grant as well as the confirmed grant.

20. The Respondent in his objection had indicated that the Appellant had not given proper information to the court when applying for letters of grant. For instance, he contended that the Appellant's claim that he was a son of the deceased yet he was a nephew and further that he had other siblings who ranked in equal degree of consanguinity to the deceased and further failed to include them as beneficiaries. It is to be noted that during the hearing of the objection, none of the Appellant's siblings came forward to lay claims to the estate and to blame the Appellant for not including them in the distribution and hence the Respondent failed to secure an ally in his quest to paint the Appellant in bad light. It is common ground that in various African societies/communities an uncle could refer to his nephew as a son. Indeed, the Appellant indicated that Luo culture allowed an uncle to refer to a nephew as his son. It was on that premise that the Appellant lodged the succession proceedings. I am unable to fault the Appellant for the description he gave while filing the succession case since it became clear that he was the one whom the deceased had taken in as his child prior to his demise. That is the reason why the Appellant's siblings did not contest his appointment as administrator and the subsequent distribution of the estate. On that ground, the Respondent's ground of objection must fail. Again, under Section 39(1) of the Succession Act, the Appellant was entitled to take out letters of grant as he was a relative (nephew) of the deceased and who lived with him and was therefore closest in terms of the degree of consanguinity and affinity. That being the position, the Respondent's claim that the Appellant had given false information to the court fails to meet the test of revocation.
21. As regards the exact size of land that the Respondent's father bought from the deceased, the evidence tendered before the lower court left no doubt that the deceased had sold portion of his land comprised in Siaya/Sigoma-Uranga/2523 but did not indicate the exact size thereof. The Respondent on cross examination, stated that the application for consent of the Land Board indicated that the land was to be divided by two and that dividing by two did not mean dividing into half. The trial court presided over by Hon. Wambani (CM) prior to the confirmation, called for survey reports which were duly availed and upon consideration, ordered the redistribution of the estate comprised in Siaya/Sigoma-Uranga/2523 as follows: Fredrick Miyaga Ogutu 0.88ha, Washington Owino 0.47 ha, Johnson Omondi 0.33 ha, and Duha Primary School 0.93 ha. These were the sizes of the land pursuant to the certificate of confirmation of grant dated 28/7/2022. It is instructive that at a time and prior to the confirmation, the Respondent's father was aware of the portion of 0.33 Ha allocated to him. However, the Respondent's father seems not to have been satisfied with the distribution despite indicating to the court that he had no objection to the Appellant's proposed schedule of distribution.
22. The Appellant has also faulted the trial court for ordering the Respondent to be made a co-administrator yet he was not a beneficiary but a creditor to the estate. Even though Section 66 of



the Law of Succession Act provides that even a creditor is entitled to take out letters of grant in the event of lack of an administrator by virtue of his interest in the estate as a creditor, the circumstances obtaining at the time were that there was an administrator already in place. It was not necessary to include the Respondent as an administrator yet his only interest is that of a purchaser. The trial court did not require to bring him in as an administrator so as to secure his interests. The order making the Respondent a core Petitioner was erroneous as it had the effect of creating a stalemate in the process due to the competing interest. The order of the trial magistrate amounted to throwing a spanner in the works and thereby leading to convolution of the matter yet it was easy to just provide for the share of the Respondent in the estate if any and then leave the issue of administration of the estate to the Appellant. To that extent, the trial magistrate was in error.

23. Finally, it is noted that the Respondent's main claim is that his portion of land had been encroached by the Appellant and one Washington Owino. As titles to the parcels had already been issued, I find the issue of trespass would be adequately and properly ventilated in the Environment and Land Court. Hence the Respondent had a remedy in the ELC Court and ought to have approached it for redress but not to seek for revocation of grant and cancellation of certificate of confirmation of grant.
24. After an analysis of the entire evidence and the submissions, it is my finding that the Respondent's summons for revocation of grant dated 3/10/2022 and amended on 28/6/2024 lacked merit and ought to have been dismissed. Hence, the finding by the trial court was in error and must be interfered with.
25. In the result, it is my finding that the Appellant's appeal has merit. the same is allowed. Each party to bear their own costs.

Orders accordingly.

DATED AND DELIVERED THIS 9TH DAY OF OCTOBER 2025.

D. KEMEI

JUDGE

In the presence of:

Ochanyo.....for Appellant

N/A Ooro E.....for Respondent

Kimaiyo/Kevin.....Court Assistant

