



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Grace Akumu Wauyube (Deceased) (Succession Appeal
E015 of 2024) [2025] KEHC 15557 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E015 OF 2024**

AC BETT, J

OCTOBER 31, 2025

IN THE MATTER OF THE ESTATE OF GRACE AKUMU WAUYUBE (DECEASED)

BETWEEN

FREDRICK OKUMU ABISAI 1ST APPELLANT

JOHN ABISAI 2ND APPELLANT

AND

FLORENCE ZEBEDEE TARI RESPONDENT

*(Being an appeal from the Ruling of Hon. Z. J. Nyakundi, Senior
Principal Magistrate, Kakamega, delivered on 20th of August 2024 in
Kakamega Chief Magistrate's Court Succession Cause No. 671 of 2022)*

JUDGMENT

Background

1. This appeal arises from succession proceedings concerning the estate of the late mother of both the Appellants and the Respondent, who are step-siblings. The Respondent had taken out letters of administration without involving the Appellants and obtained a confirmed grant on 6th July 2023. In doing so, she excluded the Appellants and other dependants of the deceased, despite the deceased having been survived by eight children, including the Appellants.
2. The Appellants contended that the deceased had, during her lifetime, allocated the estate, comprising L.R. No. Bunyala/Sirigoi/211, equally among her four children, including themselves. They argued that they have occupied, cultivated, and developed the land for over thirty years. They further accused the Respondent of fraudulently obtaining a death certificate and colluding with a retired chief to initiate succession proceedings secretly, resulting in their unlawful exclusion from the estate distribution.



3. The Appellants sought orders to revoke grant based on the said grounds.

Appellant's Case

4. In an affidavit in support of their summons dated 9th January 2024 seeking revocation of grant, the 1st Appellant deponed that the deceased had passed away on 2nd April 2022 at Sirigoi Sub-location, leaving behind eight (8) children (three sons and five daughters), including the Respondent, Florence Zebedee Tari.
5. He averred that the deceased had left behind L.R. No. Bunyala/Sirigoi/211, measuring approximately 0.8 hectares. He deponed that, before her death, the deceased had successfully pursued Kakamega Civil Suit No. 24 of 1997, where she sued one of her sons and a third party for unlawfully selling the matrimonial land and the court ruled in her favor on 19th March 2005, and she was subsequently registered as the sole proprietor on 23rd March 2022, shortly before her demise.
6. The 1st Appellant deposed that in order to deprive him and the other rightful beneficiaries, namely Joyce Abisai, John Abisai, Fredrick Okumu Abisai, and Judith Abisai, the Respondent fraudulently applied for letters of administration without informing or involving them. He alleged that the Respondent colluded with a retired sub-Chief to obtain a Chief's letter that purposely excluded these four beneficiaries. The whole estate was thus, by the act of the Respondent, allocated to herself, without the knowledge or consent of the other siblings. The 1st Appellant stated that he and the excluded beneficiaries only learned about the confirmed grant when a friend informed them that the matter was before the court.
7. It was further deposed that the deceased had intended for the land to be shared equally among the four children mentioned above. The Appellants proposed that the said land be divided equally among Joyce Abisai, John Abisai, Fredrick Okumu Abisai, and Judith Abisai. On these grounds, he prayed for the revocation of the grant issued on 15th February 2023 and confirmed on 6th July 2023, arguing that fairness and justice required proper distribution among all rightful heirs.

Respondent's Case

8. In her replying affidavit before the lower court, the Respondent deponed that she was the offspring of the deceased, Grace Akumu Wauyube, and her first husband, Abisai Kabala. She stated that the Appellants were her stepbrothers, being the sons of the deceased and her second husband, Kassim Wauyube. She also averred that her sister, Joyce Abisai, was her full sibling from the same mother and father.
9. The Petitioner averred that before filing the succession cause, she informed her sister Joyce Abisai of the proceedings, but Joyce declined, claiming the land in question had caused disputes that led to their mother's distress and eventual death. The Petitioner contended that the Appellants were not entitled to the estate property, specifically L.R. No. Bunyala/Sirigoi/211, as the deceased had purchased and allocated them a separate property during her lifetime.
10. She further deposed that her late father, Abisai Kabala who passed away in 1964, had initially bought L.R. No. Bunyala/Sirigoi/211 in the 1960s and later transferred it to her brother Joseph Harun Abisai, who unlawfully sold it to a third party, leading to the litigation in Kakamega Civil Suit No. 24 of 1997, which ended with the court cancelling the buyer's title deed and re-registering the land in the name of their mother, Grace Akumu Wauyube.
11. The Respondent asserted that at the time of confirmation of the grant, other beneficiaries of L.R. No. Bunyala/Sirigoi/211 had consented to the title being issued in her name for later subdivision.



- She expressed willingness to allocate a portion of the estate to her sister, Joyce Abisai and insisted that the Applicants had no claim over the parcel since their mother had already settled them on a separate property, being L.R. No. Bunyala/Sirigoi/650, which disqualified them from further entitlement.
12. The objection proceedings were disposed of through written submissions, and after considering the application, the trial Magistrate dismissed the objection.
 13. Being dissatisfied with the decision of the trial court, the Appellants filed an appeal in which they faulted the trial court for failing to appreciate and find that they were deserving of the orders sought, failing to consider the issues pleaded, giving strange orders not pleaded in the application, failing to find that the Respondent fraudulently obtained grant of letters of administration, failing to give due regard to the Appellants authorities, and giving alien orders against the weight of evidence.
 14. The appeal was canvassed through written submissions.

Appellants' Submissions

15. The Appellants submitted that the appeal is meritorious since the trial court ought to have applied Section 76 of the *Law of Succession Act*. They contended that the Respondent obtained the grant by fraud by concealing material facts, particularly the fact of the existence of other beneficiaries, namely the Appellants and their siblings, and that the proceedings were defective. They relied on the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR, where it was stated that any grant which was obtained by a false statement or by concealment is liable to be revoked.
16. The Appellants contended that the succession cause was covertly instituted by the Respondent without their knowledge and consent, contrary to the law that insists upon notice and consent of all beneficiaries and relied on the case of *In the Matter of the Estate of Ngari Gatumbi* (Nairobi HCSC No. 783 of 1993), where it was held that failure to inform and obtain consent from those entitled amounts to sufficient grounds for revocation. They submitted that the defective chief's letter and unsigned Form P&A 57 were additional evidence of the procedural irregularity involved.
17. They contended that the actions of the Respondent contravened Article 27 of *the Constitution*, which guarantees equality and non-discrimination, as well as Section 38 of the *Law of Succession Act*, which requires that all the surviving children should share their parents' estate equally. The Appellants also referred to *Stephen Gitonga Murithi v Faith Ngiramurithi* (2015) eKLR, wherein the court held that all children, whether legitimate or illegitimate, should receive equal shares from the estate.
18. The Appellants also submitted that they had satisfactorily proved fraud and concealment, which the law requires to be established before the grant is revoked. They cited the case of *Albert Imbuga Kisigwa v Kisigwa*, Succession Cause No. 158 of 2000, in which the court stated that discretion to revoke a grant should be exercised in the event of apparent wrongdoing, and *Samuel Wafula Wasike v Hudson Simiyu Wafula* CA No.161 of 1993, where it was held that grants obtained without the consent of a party and by way of concealment are revocable.
19. The Appellants contended that revocation was a must in the interest of substantive justice, referring to Succession Cause 36 of 2017, *Ibrahim v Hassan & Charles Kimenyi Macharia* [2019] eKLR, wherein it was held that the excluded beneficiaries should be accorded their rightful shares. They thus prayed for revocation, fresh issuance of the grant, and redistribution to include all lawful heirs.

Respondent's Submissions

20. The Respondent submitted that the trial court was justified in dismissing the objection proceedings as the Appellants did not prove their case on a balance of probabilities. She relied on the case of *Miller*



v. Minister of Pensions [1947] cited with approval in D.T. Dobie Company (K) Limited v. Wanyonyi Wafula Chebukati [2014] eKLR; Section 107 of the Evidence Act and the case of Anne Wambui Ndiritu v. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334.

21. The Respondent further submitted that the Appellants did not furnish evidential proof that they are children of the deceased and relied on *Langat & 5 others v. Chepkwony* [2025] KEHC 1864 (KLR). She insisted that the Appellants did not produce any evidence that she had failed to proceed diligently with the administration of the estate of the deceased.
22. The Respondent posited that it was upon the Appellants to produce their evidence through affidavit and not through submissions and relied on *Joshua Arego Obuor v. Simon Ochieng Odhiambo HC. Succ. No. 80 of 1986*.

Analysis and Determination

23. From the memorandum of appeal and the parties' written submissions, the issue that emerge for determination are:-

a. Whether the trial court was justified in dismissing the summons for revocation of grant.

24. It is well settled that the power to revoke a grant is a discretionary power that ought to be exercised judiciously and only upon establishment that the objection is based on sound grounds. The grounds for revocation of grant are well set out in Section 76 of the Law of Succession Act and there must be evidence of wrong doing before the court can revoke or annul a grant.
25. That being said, I have noted that the objection proceedings before the trial court were disposed through the parties' affidavits and written submissions. In my view, such a complex application that invited the court to decide whether the deceased had two sets of children from two different husbands and which set of children was entitled to inherit her estate which it was contended belonged to the first husband, ought to have been addressed by viva voce evidence. The advantage of viva voce evidence is that it would allow the parties to test the veracity of each other's claims through cross-examination. It would also afford the trial court the opportunity to observe the witnesses' demeanour during questioning and through their body language, hesitation or lack thereof, determine the truthfulness and reliability of their evidence.
26. Be that as it may, the parties chose the simpler way of disposing of what was a complex and sensitive matter and having reviewed the various affidavits on record, I find that each party presented conflicting claims as to whether or not the Appellants should be deemed to be beneficiaries of the deceased.
27. I have carefully considered the averments made by the Respondent and find that she does not dispute the Appellants' claims that they are biological children of the deceased. That being the case, the Appellants are dependants of the deceased within the meaning of Section 29 (a) of the Law of Succession Act which provides:-

“29. Meaning of dependant

For the purposes of this Part, "dependant" means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) ...



(c) ...”

28. Rule 7 (7) of the Probate and Administration Rules provides that where an applicant seeks a grant of representation to the estate of a deceased person, the application should be supported by an affidavit which sets out the names, addresses, marital status of all surviving spouses and children of the deceased, among other particulars. Over and above the requirement for particulars of the children of the deceased, an applicant must give notice to other persons entitled in the same degree as or in priority to the applicant as provided in Rule 26 of the Probate and Administration Rules which provides:-

“(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.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”

29. It is worth noting that the Appellants’ particulars were not set out in the Respondent’s petition nor in Form 38 and 37 which the Appellant’s ought to have executed. The Respondent filed Form 38 on 8th December 2022 which Form 38 was only executed by Joseph Abisai Harun, Felistus Oyela Kabala and Jenifer Asiko Abisai. This form totally excluded her siblings namely John Abisai, Fredrick Okumu Abisai, Kennedy Abisai (deceased) and Judith Abisai, yet their execution was mandatory.

30. The failure to disclose the existence of four children of the deceased was a fundamental omission that rendered the succession proceedings defective. This defect went to the root of the petition as it amounted to concealment of material facts. Further, the failure to secure the consent of the Appellants and their siblings before confirmation of grant was also a fundamental omission. The effect of failure to comply with Rule 7 (7) and 26 of the Probate and Administration Rules was considered in *Al Amin Abdulrehman Hatimy v. Mohamed Abdulrehiman Mohamed & Another* [2013] eKLR and in *re Estate of Gatumo Njimuko (Deceased)* [2019] eKLR.

31. The trial court fell in error when it disregarded the Appellant’s objection and relied on the Chief’s letter dated 31st October 2022 to determine that the Appellants were not entitled to inherit from the deceased. It appears that the trial court placed much reliance on the Respondent’s case and dismissed the Appellants’ case notwithstanding the averments by the Appellants that they were excluded from the Succession proceedings although they are beneficiaries of the estate and had even constructed their houses on the estate property where they had lived all their lives.

32. I note that there was a claim by the Respondent that the Appellants had no right to inherit from the estate of the deceased. That notwithstanding, the Appellants should have been invited to take part in the succession proceedings and given the opportunity to advance their claim. Disclosure of dependants and compliance with Rule 26 of the Probate and Administration Rules is not an indication of automatic entitlement by a dependant to the estate of a deceased person as the dependant could



have been given property inter vivos during the lifetime of the deceased. Such gifts inter vivos will often be taken into consideration when undertaking distribution of the estate of the deceased. Additionally, there could be other factors that would render a dependant ineligible to inherit from the deceased.

33. I have further noted that the Respondent claims that the property comprising the estate of the deceased belonged to the Respondent's father and could not devolve to the Appellants who were sired by the deceased's second husband. If the objection proceedings had been heard orally, the aforesaid issues would have been addressed. As it stands, the Respondent's claims were controverted in the Appellants further affidavit filed on 15th May 2014 but none of the averments were tested through cross-examination. Since each side vehemently contested the other side's averments, a viva voce hearing would have enabled the court to arrive at a fair and just determination.
34. Flowing from the above, I find that the appeal must succeed. The ruling dated 20th August 2024 is hereby quashed and set aside. It is substituted with the following orders:-
- (a) That the grant made to the Respondent on 15th February 2023 is hereby revoked and the Certificate of Confirmation of grant issued on 6th July 2023 is hereby cancelled.
 - (b) That this file is remitted to the Chief Magistrate's Court for hearing and determination before any Magistrate other than Hon. Z. J. Nyakundi.
 - (c) That the new trial Magistrate is directed to issue a fresh grant to the Respondent and Appellants jointly.
 - (d) That the new Administrators are at liberty to jointly or separately file Summons for Confirmation of Grant within 30 days. Any aggrieved party shall file a protest to the Summons for Confirmation of Grant within 30 days of being served.
 - (e) That the protest proceedings be disposed of through viva voce evidence and each party to be at liberty to adduce evidence and call witnesses.
 - (f) This being a family matter, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF OCTOBER 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Chesire for the Appellants

Ms. Kadenyi for the Respondent

Court Assistant: Polycap

