



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oduke v Machio & 2 others (Family Appeal E009 of 2024)  
[2025] KEHC 15752 (KLR) (3 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15752 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
FAMILY APPEAL E009 OF 2024  
WM MUSYOKA, J  
NOVEMBER 3, 2025**

**BETWEEN**

**BENSON SELBYS ODUKE ..... APPELLANT**

**AND**

**ROSELYN AKOMBI MACHIO ..... 1<sup>ST</sup> RESPONDENT**

**MERCILINE EUNICE ODUKE ..... 2<sup>ND</sup> RESPONDENT**

**JACKLINE AKINYI MACHIO ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal from the ruling and orders, of Hon. Anne Njeru, Senior Resident Magistrate (SRM), of 17th December 2024, in Port Victoria SRMCSC No. E066 of 2024)*

**JUDGMENT**

1. The appeal herein arises from orders that were made by the trial court, in a ruling delivered on 17<sup>th</sup> December 2024, revoking a grant and a certificate of confirmation of grant, cancelling a transmission, reverting the estate assets to the name of the deceased, and directing the parties to file separate proposals on distribution.
2. That aggrieved the appellant, the person whose grant was revoked. His appeal revolves around the grant and its certificate of confirmation being revoked and cancelled, despite the respondents having been involved in the matter throughout the course of the succession proceedings; the cancellation of the transmission affecting third parties, who were not afforded a chance to be heard; and the court failing to consider and evaluate the evidence properly.
3. Directions were given, on 7<sup>th</sup> July 2025, for canvassing of the appeal, by written submissions. Both sides have complied. I have read and considered the written submissions, and I have noted the arguments that they have made.



4. The impugned orders were made on an application, dated 6<sup>th</sup> December 2023. The case advanced, in that cause, was that the daughters of the deceased had been sidelined, with respect to the disposal of the assets of the deceased. The trial court took oral evidence from the 3 respondents, while 6 witnesses were heard on the side of the appellant. The trial court ruled, based on what it heard.
5. The dispute was on distribution. The respondents argued that they were not allocated any share in the estate of their late father.
6. I see a letter from the Chief, dated 15<sup>th</sup> August 2017, in the record before me. It listed the respondents and other daughters, amongst the children who had survived the deceased. However, when representation was sought, the daughters were omitted from the schedule of the surviving children of the deceased that was presented in court, vide an affidavit sworn on 16<sup>th</sup> August 2017. That list only comprised of the sons of the deceased. The letter from the Chief had indicated that the deceased had 10 children, being 4 sons and 6 daughters. I see that the Chief referred to the 4 sons as the legal heirs, and that may explain why the daughters were left out.
7. It should be pointed out, that it is not the Chief who determines who the legal heirs of the deceased are, that role belongs to the court, guided by the provisions of the Law of Succession Act, Cap 160, Laws of Kenya. The Law of Succession Act does not discriminate against daughters, for it refers to the survivors of the deceased, in that category, collectively, as children, without differentiating between sons and daughters, or boys and girls, or male and female, or married and unmarried. The Act does not interpret or define “children” to mean sons or male children. The provisions of the Law of Succession Act are gender neutral. Secondly, Article 27 of the Constitution of Kenya outlaws discrimination based on gender. That provision carries the gender equality principle, which asserts that persons of either gender are to be treated equally.
8. Let me recite sections 35(1)(2)(5) and 38 of the Law of Succession Act, to illustrate what I am saying. The 2 read as follows:

“35. Where intestate has left one surviving spouse and child or children

- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children ...
- (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children ...
- (3) ...
- (4) ...
- (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

“38. Where intestate has left a surviving child or children but no spouse



Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

9. The relevant portions of Article 27 of *the Constitution* state as follows:

“27. Equality and freedom from discrimination

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) ...”

10. So, the omission of the daughters of the deceased, in the petition, as children of the deceased, violated *the Constitution* and the provisions of the *Law of Succession Act*. There was concealment of 60% of the persons who had survived the deceased. The process of obtaining the grant, was, therefore, tainted by the defect of not disclosing more than ½ of the survivors and beneficiaries, and by the sins of fraud, misrepresentation, non-disclosure and concealment, by the failure to list the 6 daughters of the deceased in the schedule of the children of the deceased. The court was misled, into believing that the deceased did not have daughters, leave alone the 6, and did not have 10 children, contrary to what was written in the letter from the Chief, and that, in fact, he only had 4 children, all sons. That was a lie and a deception, against which the grant could not stand, going by section 76 of the *Law of Succession Act*.

11. Secondly, the non-disclosure of the 6 daughters violated Article 27 of *the Constitution*. There was obvious, blatant and brazen discrimination against the female children of the deceased, based on their gender. They were not treated equally with the male children of the deceased, the 4 sons. They were relegated to a secondary and lesser category, where they were invisible and voiceless. Indeed, they were treated as if they did not matter, and as if they did not exist.

12. Anything that is done in contravention of *the Constitution* of Kenya is invalid. That is what Article 2(4) of *the Constitution* declares. Article 2(1)(4) of *the Constitution* states as follows:

“2. Supremacy of this Constitution

- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.



- (2) ...
- (3) ...
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
- (5) ...”

13. A succession process, which is initiated and conducted, by the parties, in violation or contravention of Article 27 of *the Constitution*, runs afoul of Article 2(4) of *the Constitution*, which renders the entire process invalid and a nullity. That was why a grant obtained on the back of a discriminatory petition could not stand. See *Wanjiru & 4 others vs. Kimani & 3 others* [2021] KECA 362 (KLR) (W Karanja, Omondi & Laibuta, JJA).
14. The grant was confirmed, on an application, dated 29<sup>th</sup> October 2019. In that application, the 6 daughters were, again, excluded. The application only disclosed the 4 sons, and the fact that the deceased had been survived by 6 daughters, was, again, concealed from the court. The application, dated 29<sup>th</sup> October 2019, rode on a violation or contravention of Article 27 of *the Constitution*, and it was bound to go nowhere, for it was rendered invalid and a nullity by Article 2(4) of *the Constitution*. The distribution of the estate of the deceased, in a manner that violated or contravened Article 27, made it a complete nullity, when looked at from the lenses of Article 2(4).
15. It has been argued that the estate has since been transmitted or transferred to third parties, whose rights ought to be factored. The alleged third parties acquired property through or after a flawed, or unconstitutional, or invalid process. Their rights, acquired upon the trampling of the rights of the 6 daughters, cannot possibly be more superior to those of the 6 daughters. The rights of the 6 daughters came first. Those rights, of the daughters, ought to be have honoured first, at distribution, to pave way for a possible disposal of assets to third parties. The fact that the rights of the daughters were not recognised or considered, at confirmation, meant that the third parties could not acquire any rights over the assets of the estate, through a process that had no regard for the provisions of *the Constitution*.
16. It has equally been argued that the deceased had distributed his property before he died, in what is known as inter vivos or lifetime transfers or gifting. If the land had been distributed, by the deceased before he met his demise, there would have been no need for succession proceedings. The deceased would have had subdivided the lands, transferred and registered the subdivisions, and obtained title deeds in the names of the persons who benefited from that inter vivos distribution. The fact that that never happened would be evidence that there were no inter vivos transfers or distribution. No evidence was presented to show that the deceased obtained Land Control Board consents to subdivide and distribute his lands, but died before the transfers and registration could be done. Evidence in that direction would have suggested existence of intended inter vivos transfers, that were frustrated by death. In the absence of such evidence, it would amount to mere allegations, which are completely devoid of any proof, that the deceased had distributed his lands before he died.
17. The argument, around the failure to appoint fresh administrators, after revoking the grant, cannot be a good ground for overturning the decision of the trial court. There is nothing, in section 76 of the *Law of Succession Act*, or rule 44 of the Probate and Administration Rules, that makes it mandatory, for the court to immediately appoint fresh administrators, subsequent to revoking a grant. Appointment of administrators would have come as a matter of course, in subsequent proceedings. If anything, the appellants should have applied for such appointments to be made, instead of rushing to appeal.



18. The trial court delivered a very comprehensive and considered ruling, running into 7 pages. It recited the contents of that application and the testimonies, identified the issues for determination, identified the relevant and applicable statutory provisions and caselaw, before analysing the facts, against the identified relevant and applicable law. The trial court handled the matter very well, and drew the right or correct conclusions. The orders, finally made, aligned with the facts of the case, and the law applicable to the said facts. There is nothing to fault in them.
19. Consequently, I find no merit, whatsoever, in the appeal herein. The same is for dismissal, and it is hereby dismissed. This being a family dispute, I shall order that each party shall bear their own costs. The original trial court records shall be returned to the trial court. The instant file shall be closed. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 3<sup>RD</sup> DAY OF NOVEMBER 2025.**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the appellant.

Mr. Odhiambo, instructed by OJ Okoth & Company, Advocates for the respondents.

