

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC. SUCCESSION CAUSE NO. E003 OF 2023

**IN THE MATTER OF THE ESTATE OF JAKINDA SAMUEL
OBALLA (DECEASED)**

DINNAH ADOYO

OBALLA.....1ST ADMINISTRATOR/ RESPONDENT

BENJAMIN ODERO

**OBALLA.....2ND
ADMINISTRATOR/RESPONDENT**

JANE ATIENO

OBALLA.....3RD ADMINISTRATOR/RESPONDENT

VERSUS

GEOFFREY OCHIENG

OBALLA.....1ST OBJECTOR/APPLICANT

RULING

1. The Administrators/Applicants filed an application dated 1st August 2025 brought pursuant to the provision of Order 45, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking principally an order that the proceedings, ruling and order issued on the 15th November 2023 be reviewed and set aside to allow the administrators/applicants to testify in the matter. It seeks that the costs be in the cause.
2. The application is supported by the grounds set out thereunder and the supporting affidavit of the 2nd and 3rd Administrators Benjamin Odera Oballa and Jane Atieno Oballa sworn on even date. The Administrators gravamen is inter alia; that the late Justice Ogembo delivered a ruling on 15th November 2023 revoking the grant; that the administrators were previously represented by the firm of Mwangambo & Co. Advocates and that the said firm did not attend court and thus the Applicants were not represented when the order revoking the grant was made; that the Applicants were never given a hearing; that the Applicants have a right to be heard but that every time the matter came up the advocate informed them that he would attend court and that their attendance was not necessary; that the Applicants were shocked to learn that the grant was revoked without them being given a hearing; that he who comes to equity must come with clean hands and that the Objector herein approached the

court with unclean hands and who colluded with his brother Daudi Omondi Oballa to fraudulently sell the land parcel North Sakwa/Ajiko/2406 while pretending that the sale was being conducted by the then deceased 1st administrator Dinnah Adoyo Oballa; that the said property is now fenced off yet the same was a sub-division of North Sakwa/Ajiko/3559 which had been given to the late 1st Administrator by the deceased Jakinda Samuel Oballa in the year 1958; that the late Dinnah Adoyo Oballa did not have a child and as such she sold part of the property to one Moses Martin Okello Odoyo as this was her property; that the objector together with his brother wanted to disinherit the said Dinnah Adoyo Oballa because she did not have a child and that they have also taken over her rental properties; that the Applicants had to sell some properties to pay off loans owed to AFC and Thabiti Finance Limited so as to salvage the property from being sold; that the Applicants sold part of North Sakwa/Nyawita/883 to offset some of the loans; that the Objector's sole aim is to disinherit everyone so that he acquires all the property together with his brother and that their house was allocated a lot of property which they have mismanaged; that the Objector and his brother come from the 3rd house; that the deceased died when he had already distributed property; that it is important to allow the Applicants testify in the matter so as to shed light on what has happened in the estate since the issues raised by the Objector are weighty and misleading and further

the objector concealed material facts from the court so as to gain favour from it; that the Applicant's want to explain themselves to the court and to give it the accurate information which might change the judgment of the court; that the Applicant will suffer irreparably unless the application is allowed.

3. The Objector filed a replying affidavit sworn on 25th September 2025 wherein he averred inter alia; that the application has been made after inordinate delay as the impugned order was made on 15th November 2023 almost two years have elapsed since the same was made; that the application is fatally defective, invalid, null and void; that the application is intended to cause him to suffer irreparable loss and damage and that it infringes on his right as a beneficiary and has been greatly prejudiced; that the Applicants were represented by counsel and that they attended court in person and hence they were given fair hearing and opportunity to be heard; that the alleged negligence or non-attendance on the part of the Applicant's advocate is not a ground for review of a validly determined matter; that the order was served upon the Applicant's previous counsel and the current counsel in 2024 yet they never complied or sought to set aside the order at the earliest opportunity; that the Applicants had opposed the Objector's application dated 22/1/2024 for review of the same orders yet that was another opportunity to have the order reviewed by consent; that the current application will cause further delay in the

matter leading to wastage of the estate as well as loss and damage to the beneficiaries; that the allegations against the Objector are scandalous, irrelevant, baseless and intended to maliciously malign his name.

4. The application was canvassed by way of written submissions. Both parties complied.
5. The Administrators/Applicants in their submissions reiterated the contents of their supporting affidavits and submitted that they want to explain themselves to the Honourable Court and give it the accurate information which might change the judgement of the court since the Applicants will suffer irreparably unless the Application is allowed. It was also submitted that in the interest of justice that the Application be allowed. reliance was placed in the case of **Philip Keipto Chemwolo & ANOTHER V Augustine Kubende [1986] KECA 87 (KLR)** in which the Court of Appeal held as follows in allowing an Application to set aside judgement and hear case on merit held as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

Also, learned counsel relied on the authority of the *Patel v EA Cargo Handling Services Co Ltd* (1974) EA 75, which held that a court has wide discretion to set aside judgments or orders in the interest of justice. It was submitted finally that the Applicants should be allowed to defend themselves in relation to the allegations raised by the Objector in his application seeking for revocation of grant.

6. Vide submissions dated 23rd October 2025, the Objector raised one main issue for determination namely whether

the administrators' application dated 1st August 2025 is premised upon discovery of new and important matter of evidence. It was submitted that the Objector filed an application dated 4th May 2023 seeking for revocation of grant and that the parties attended court on many occasions until the matter was determined by Ogembo J on 15th November 2023. That the application for review has been made after about two years yet the administrators were in court during the delivery of the ruling on 15/11/2023. That the administrators have advanced the reason that their previous counsel did not attend court. It was also submitted that the administrators' application meets the threshold provided by Section 80 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules. That the Applicants' application does not allude to a situation where the Applicants have come across new material or important fact or evidence that could not be obtained after due diligence and further that no evidence has been shown that there is any mistake or error apparent on the face of the record or any sufficient reasons has been adduced. That the Applicants are out to circumvent the obligations under Section 93 of the Law of Succession Act following the grant of the order revoking the grant on 15/11/2023. Further, that the Applicants have mismanaged the estate to the prejudice of the Objector. It was the Objector's view that the application lacks merit and should be dismissed and that

the administrators be ordered to account for what they have done in the estate.

7. I have considered the application, rival affidavits and submissions. It is not in dispute that the Objector herein had filed an application dated 22/1/2024 seeking for review of the order made on 15/11/2023 which was dismissed by this court on 30th May 2025. It is also not in dispute that the said application had been vehemently opposed by the administrators herein. I find the issue for determination is whether the application dated 1/8/2025 has merit.

8. It is noted that the application dated 1st August 2025 seeks for review of orders made on 15/11/2023 by Ogembo J. Revision is provided for under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. They are as follows:

Section 80 of the Civil Procedure Rule

“Any person who considers himself aggrieved.....

a) By a decree or order from which an Appeal is allowed by this Act but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is allowed by this Act, may apply for a review Judgment to the

court which passed the decree made the order and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1

- a) ***Discovery of new and important matter or evidence which alter the exercise of due diligence, was not within the Applicant’s knowledge or could not be produced or could not be produced by him at the time when the decree was passed or the order made;***
 - b) ***On account of some mistake or error apparent on the face of the record; or***
 - c) ***For any other sufficient reason.***
9. The Applicants have beseeched this court to review the orders dated 15th November 2023 on the sole ground that they were let down by their advocate M.S. Mwangambo. That they seek to be given an opportunity to present their side of the story. It is instructive that the Applicants had participated in the application dated 4th May 2023 filed by the Objector herein in that they were granted by the court leave on 17th July 2023 to file and serve replying affidavits and that their advocate filed a Notice of Preliminary Objection dated 13th July 2023. That the court duly considered the issues and came up with the ruling dated

15th November 2023. It is noted that the Administrators/Applicants have been aware of the existence of this ruling all along but have not sought to challenge it either by way of review or appeal. It is also noted that the Applicants were aware and were present in court when the Objector herein filed an application dated 22nd January 2024 for review of the order dated 15th November 2023 and in which the Applicants herein filed response and vehemently opposed it and that this court delivered its ruling on 30th May 2025. It is also noted that the Applicants' response to the application dated 22nd January 2024 was filed by the Applicant's present advocates M/s Mutisya & Co. Advocates. It is believed that the said present advocates for the Applicants herein had full instructions from the Applicants to peruse the entire court record and file the requisite pleadings. Indeed, the said advocates duly canvassed the Objector's application dated 22nd January 2024 leading to the ruling dated 30th May 2025. At no time did the said advocates seek for review of the orders of 15th November 2023. In fact, it was the Applicants and their advocate who opposed the application for review. It is therefore surprising that the Applicants are now turning around and want to feign ignorance and seek to lay blame upon their former erstwhile advocate for the debacle. They have relied in the case of **Philip Keipto Chemwolo & Another V Augustine Kubende [1986] KECA 87 (KLR)** where the court held as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

However, it is trite that each case is determined on its own merits. In the Applicants' circumstances, it is clear that they were aware of the fact that the order had been made on 15th November 2023 wherein the court allowed the Objector's summons for revocation of grant dated 4th May 2023. It is also instructive that the Applicant's despite being aware have slept on their rights for about two years. This is a long period and further worsened by the fact that the Applicants as late as January 2024 duly participated in an application dated 27th January 2024 filed by the Objector which sought for review of the orders of 15th November 2023 and in which the Applicants strongly opposed the said application. Had the Applicants agreed with the Objector, probably the court could have ruled on the matter differently. Hence, the Applicants should not be heard to blame their former advocates who represented them in 2023 yet they had already appointed the present counsel in 2024 and that the present counsel ought to have acted in good time. It is now two years since the new counsel came on board and thus the delay is inordinate. I find that the Applicants were aware of all the facts in the matter and that there is no discovery of new and important matter since all the issues were within their knowledge and further there is no mistake or error apparent on the face of the record or any other sufficient reason to warrant the review. In any event, the Applicants of their own volition chose to challenge the Objector's application for review of the impugned orders. I am not convinced that the Applicants were not aware of the orders made on 15th November 2023. I am inclined not to accept the invitation sought by the Applicants to vary or rescind the orders of 15th

November 2023. It is also a fact that application for review has been made after an inordinate delay.

10. After an analysis of the entire pleadings, I come to the finding that the Applicants have not managed to convince this court that there has been discovery of fresh evidence. It is instructive that the Applicants have been in court all through upto date and that they were aware of the matters including the role of their former advocate and when he ceased to represent them. I am hesitant to give the Applicants a second chance after they blew the first one in January 2024 when they opposed the Objector's request for review. I find that the Applicants are not acting in good faith and that I am inclined to agree with the Objector that the Applicants are out to seek refuge and thereafter evade their statutory obligations to the estate of the deceased as administrators. In the case of **D.J Lowe & Company Ltd v Banque Indosuez, C.A Civil Application No. 217 of 1988**, the Court of Appeal sounded a caution in such applications based on that ground. It stated:

“Where such a review application is based on fact of the discovery of fresh evidence, the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed that party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

I am persuaded by the foregoing authority and proceed to find that the Applicants' application has not met the threshold for review as envisaged under Section 80 of the

Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.

11. In the result, it is my finding that the Applicants' application dated 1st August 2025 lacks merit. The same is dismissed. As parties are members of one family, I order each party to bear their own costs.

Dated and delivered at Siaya this 19th day of January 2026.

**D. KEMEI
JUDGE**

In the presence of:

Odhiambo Otieno.....for Administrators/Applicants.

Jaoko.....for Objector/Respondent.

Maureen/Kimaiyo.....Court Assistant.