

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HCCA NO. E058 OF 2024

MAURICE ODUOR.....APPELLANT

VERSUS

BERGITA AWINO OGOLA.....RESPONDENT

(Being an appeal from the ruling and order of Hon. T. K. Nambisia (RM) dated 14/11/2024 in Ukwala Law Courts Mc Succession No. E015 of 2022 in the matter of the estate of Damiano Mwanda)

BETWEEN

**MAURICE
ODUOR.....OBJECTOR/APPLICANT**

VERSUS

BERGITA AWINO

OGOLA.....PETITIONER/RESPONDENT

JUDGMENT

1. The appeal herein arises from the ruling and order of Hon. T. K. Nambisia in Ukwala Magistrate's Court Succession Cause Number E015 of 2022, dated 14/11/2024 wherein she dismissed the Appellant's summons for revocation and or annulment of grant dated 8/4/2024.
2. The Appellant was aggrieved by the said ruling and or order and duly filed his Memorandum of Appeal dated 25/11/2024 wherein he raised the following grounds of appeal namely:
 - 1) The learned trial magistrate erred in law and fact by dismissing the summons for revocation of grant without considering the affidavit of Ann Odhiambo Mudenyio who was the eldest child of the deceased.
 - 2) The learned trial magistrate erred in law and fact in coming to the conclusion that the Respondent was a widow of the deceased without having regard to the evidence on record to the contrary.

- 3) The learned trial magistrate erred in law and fact in dismissing the summons for revocation of grant without questioning the fact that the deceased was survived by a number of children yet those set to inherit are only two.

The Appellant therefore prayed that the appeal be allowed and that the summons for revocation of grant be allowed with costs as well as the costs of the appeal.

3. This being the first appellate court, its duty is to re-evaluate the evidence presented before the trial court and subject it to an independent analysis so as to arrive at an independent conclusion as to whether or not to uphold the decision of the trial court. This court must also take note of the fact that it neither heard nor saw the witnesses as they testified and therefore must give due allowance for that. See **Selle Vs. Associated Motor Boat Co. Ltd [1968]EA 123.**

4. It is noted from the record that the Respondent herein had filed summons for confirmation of grant dated 29/9/2022 wherein she had proposed to acquire wholly parcel number East Ugenya/Ligala/1591. The Respondent later filed an amended replying affidavit dated 1/8/2023 wherein she made a fresh schedule of distribution of the estate to herself and three other beneficiaries with each taking $\frac{1}{4}$ share of the 2.2 Ha property of the deceased. It was in the process of concluding the aforesaid summons

for confirmation of grant when the Appellant herein filed summons for revocation or annulment of grant dated 8/4/2024.

5. In the summons for revocation or annulment of grant dated 8/4/2024, the Appellant raised one ground namely that the Respondent had obtained the grant fraudulently by the making of a false statement or by the concealment from court of something material to the case. The Appellant swore a supporting affidavit dated 8/4/2024 wherein he averred inter alia; that the deceased was his grand father and that his father is John Otieno Mudenyio while his siblings were Anna Adhiambo Mudenyio, Maria Oyoko Mudenyio, Anjelina, Akoth and Gaudensia Atieno; that the deceased herein had inherited his brother's wife Helen Omondi and sired a son namely Joanes Oloo Mudenyio; that the Petitioner herein is the sister to Helen Omondi; that the Petitioner is wife to one Otieno Ogola, Ogola of Komenya Rabar sub location with five children namely Michael Ogola, Omondi Ogola, Mary Ogola, Anjelina Rayed Ogola and Awuor Ogola; that the Petitioner has never been the deceased's wife; that the Petitioner used to assist Helen Omondi to look after the deceased; that the deceased rewarded the Petitioner for her services with two acres of land in LR East Ugenya/Ligala/274 and that the Petitioner later had it registered in the name of her niece one Jane Akelo Awuor and was registered as East Ugenya/Ligala/1592 while the

deceased remained with parcel East Ugenya/Ligala/1591; that the Petitioner secretly petitioned for grant of letters of administration yet she was not and had never been a wife of the deceased; that the Petitioner is out to grab the deceased's estate; that those entitled to the estate of the deceased are the children from the first household Johannes Oloo Mudenyio who is a son of the deceased and Helen Omondi; that the Petitioner has left out names of beneficiaries.

6. The Petitioner filed a replying affidavit sworn on 31/7/2024 wherein she averred inter alia; that the deceased herein was her husband as confirmed by the chief's letter; that the deceased was survived by several beneficiaries as per the chief's letter as follows:

- i) Anna Adhiambo Mudenyio - daughter (alive)
- ii) Mary Oyoko Mudenyio - daughter (alive)
- iii) John Otieno Mudenyio - son (alive)
- iv) Johannes Oloo Mudenyio - son (alive)
- v) Bergita Awino Ogola - Widow (alive)

That the Objector is a stranger to the estate and that the chief's letter has not recognized him; that she resides on parcel 1591 and that she is a stranger to the issue of LR No. 1592 or the alleged Jane Akelo Awuor who is the owner thereof; that the Objector has not provided any evidence to prove his interest in the estate; that she has proposed that parcel No. East Ugenya/Ligala/1591 be

shared equally (1/4) between Bergita Awino Ogola, Anna Adhiambo Mudenyo, Mary Ayoko Mudenyo and Joanes Oloo Mudenyo.

7. The summons for revocation of grant was also supported by the affidavit by Anna Adhiambo Mudenyo sworn on 20/8/2024, who averred inter alia; that she is the eldest child of the deceased; that the Petitioner herein was not a wife of the deceased but was the one who used to cater for him as his house help; that the deceased later gifted the Petitioner with a piece of land in appreciation of her care to him; that the Petitioner later had her niece Jane Akelo registered as the owner of the parcel of land; that the Objector/Applicant is a son of John Otieno Mudenyo who was her brother; that Mary Ayoko Mudenyo was her sister who follows after her; that the Petitioner resides in the house which belonged to her mother; that the Petitioner is not one of the beneficiaries of the estate.

8. Parties were directed by the trial court to file submissions but none complied. The trial court later considered the application and came up with the impugned ruling.

9. The appeal was canvassed by way written submissions. Both parties duly complied.

10. The Appellant's submissions are dated 6/11/2025. It was submitted that the Respondent fraudulently lodged the petition for grant without involving the genuine beneficiaries. It was also submitted that the Respondent was never a wife of the deceased but had only been employed by the deceased as a caretaker when his first wife died. That the Respondent is a sister to one Helen Omondi who was the deceased's second wife. That the deceased later rewarded the Respondent with LR No. East Ugenya/Ligala/1592. It was further submitted that the provisions of Section 76 of the Law of Succession Act are relevant in that the grant was obtained by the concealment from court of something material to the case making of a false statement and obtaining the grant by means of an untrue allegations of a fact essential in law in determining the petition. It was further submitted that the petitioner did not comply with the mandatory provisions of Rule 7(7) of the Probate and Administration Rules as well as Section 66 of the Law of Succession Act by ensuring that all the beneficiaries were involved and their consent obtained.

11. The Respondent's submissions are dated 7/11/2025. It was submitted that the Appellant failed to avail evidence showing that he is a grandson of the deceased as well as that the Respondent is not the widow of the deceased. That the said Anna Adhiambo Mudenyo had earlier on indicated that she was only opposed to the

proposed mode of distribution and did not challenge the status of the Respondent as a wife of the deceased only to turn around much later after the Appellant filed the summons for revocation of grant as it can be seen that Annah Adhiambo Mudenyo's affidavit is sworn on 20/8/2024 and not on 8/4/2024.

12. I have given due consideration to the record of appeal as well as the submission filed by the learned counsels. I find the issue for determination is whether the summons for revocation of grant dated 8/4/2024 lodged by the Appellant had merit.

13. Revocation of grant is provided for under Section 76 of the Law of Succession Act which stipulates:

“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 allegations 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)

ii)

iii)

e) That the grant has become useless and inoperative through subsequent circumstances.”

14. It was the Appellant’s case that the Respondent had obtained the grant fraudulently as she had misled the court that she was the wife of the deceased yet she was just a house help. The Appellant further accused her of not involving the genuine beneficiaries of the deceased. It was finally claimed that the Respondent had already been rewarded by the deceased with a two-acre parcel of land namely East Ugenya/Ligala/1592 for the service she had rendered to the deceased following the death of his wife. The Respondent has countered this claiming that she is a

wife of the deceased as confirmed by the chief's letter s and that she resides on the deceased's parcel of land East Ugenya/Ligala/1591 and further that she does not know the alleged Jane Akelo Awuor who owns parcel East Ugenya/Ligala/1592. She finally claimed that following the trial court's direction in which the chief forwarded another letter, she has distributed the estate to all the beneficiaries of the deceased.

A perusal of the record of the lower court indicates that the initial chief's letter dated 23/12/2021 showed three beneficiaries namely Bergita Awino Ogola (widow), Joanes Oloo Mudenyio (son) and Mourice Oduor (grandson) and which names were also captured in form of P&A 5. It is further noted that the two beneficiaries Joanes Oloo Mudenyio and Mourice Oduor duly signed the consent to the making of grant of letters of administration intestate in form 38. Again, the two beneficiaries duly signed the consent to confirmation of grant dated 29/9/2022. The trial court later called for a fresh chief's letter which was duly availed and it is dated 2/2/2023 and which indicated six names as follows:

- 1) Ogola Muma - 1st wife (deceased)
- 2) Anna Adhiambo Mudenyio - daughter
- 3) Mary Ayoko Mudenyio - Daughter
- 4) John Otieno Mudenyio - son (deceased)
- 5) Joanes Oloo Mudenyio - son
- 6) Bergita Awino Ogola - 2nd wife.

It is further noted that upon the filing of the second chief's letter, the Respondent filed an amended schedule of distribution of the estate comprised in land parcel East Ugenya/Ligala/1591 to be shared equally between Bergita Awino Ogola, Anna Adhiambo Mudenyio and Joanes Oloo Mudenyio. It is clear from this schedule that the name of John Otieno Mudenyio (deceased) has been omitted. The Appellant herein claims that the said John Otieno Mudenyio was his father and that he claims interest in the estate of the deceased as a grandson.

Turning to the Appellant's claim that the grant was obtained by the Respondent fraudulently by concealment of facts from the court yet the Respondent has never been a wife of the deceased, the two chiefs' letters dated 23/12/2021 and 2/2/2023 indicated the Respondent as the deceased's second wife. Even though one of the beneficiaries Anna Adhiambo Mudenyio in her affidavit dated 20/8/2024 claimed that the Respondent was not a wife of the deceased, she goes ahead to confirm vide paragraph 14 thereof that the Respondent currently resides in the house which belonged to her mother. It is therefore unlikely that the Respondent who is alleged to have been a house help to hang around and linger for that long at the home of the deceased as she ought to have left. I am satisfied that the Respondent was one of the wives of the deceased as the same was confirmed by the chief vide his introductory letters presented to the trial court. The record and pleadings reveal that the Appellant

had been listed by the Respondent as one of the beneficiaries and that he had duly consented to the Respondent to take out letters of grant to the distribution of the estate. It seems that the Appellant turned against the Respondent after the schedule of distribution did not contain his name. The Appellant's grouse should have been addressed during the hearing of the summons for confirmation of grant.

The parties agreed to dispose the Appellant's application dated 8/4/2024 by way of written submissions. Had they opted to go via viva voce evidence then the parties and deponents of the rival affidavits could have been taken through cross examination and that the truth or otherwise of their averments could have been properly established. The trial court was thus left to consider the rival affidavits only without the benefit of oral testimonies. A careful analysis of the entire rival affidavits leads me to come to the conclusion that the Appellant did not succeed in his quest to have the grant issued to the Respondent revoked and or annulled. Indeed, the Appellant failed to explain how his name and signature appeared in the initial pleadings lodged by the Respondent. The Appellant failed to challenge that crucial fact and hence his claim that he was not aware of the succession proceedings was hollow and was properly rejected by the trial court. The Respondent having presented evidence of being the widow of the deceased ranked higher in degree regarding the persons entitled to take out letters of grant of

administration intestate pursuant to Section 66 of the Law of Succession Act. Further, the issue of absence of other beneficiaries was cured after the area chief issued another letter listing more beneficiaries who were duly included by the Respondent and catered for in the amended schedule of distribution. At that juncture, the Appellant's grievances were deemed to have been attended to so that the only issue remaining was the distribution of the estate and not the need for removal of the Respondent as administrator. I find that revocation of grant would take the parties back and all would be prejudiced yet the sole issue for determination is on the distribution of the estate. I find that the proper course in the circumstances was to decline the request for revocation and direct the parties to proceed with the issue of distribution of the estate vide the pending summons for confirmation of grant dated 29/9/2022 as amended.

15. Finally, the Appellant and Anna Adhiambo Mudenyio averred that the Respondent had already been given a two-acre piece of land in LR East Ugenya/Ligala/1592 by the deceased for her service as a house help. They further averred that the Respondent had the land registered in the name of her niece Jane Akelo Awuor. However, upon the Respondent denying the allegation, the evidential burden shifted to the Appellant to avail evidence in support of his claim. No such evidence was availed and hence the trial court was justified in rejecting

the Appellant's application. In any event, the Appellant should have waited to raise the issue during the hearing of the summons for confirmation of grant.

16. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. As parties are family members, I order each party to bear their own costs. Parties are now directed to proceed and prosecute the pending summons for confirmation of grant dated 29/9/2022.

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

**D. KEMEI
JUDGE**

In the presence of:

Jr. Juma.....for Appellant.

N/A Odera.....for Respondent.

Maureen/Kimaiyo...Court Assistant.

SIAYA HCCA NO. E058 OF 2024 - JUDGMENT