



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. E2111 OF 2021
IN THE MATTER OF THE ESTATE OF DR. RB MOSES
OTIENO (DECEASED)

JUDGMENT

INTRODUCTION

1. Grant of Letters of Administration Intestate herein issued to the respondent on 9th October 2023, pursuant to Court Orders of 21st June 2022 and 21st November 2022. Earlier the parties had been unable to agree on who would be the administrator of the estate, efforts to resolve the issue through cost annexed mediation were not successful. Subsequently the Counsel for the parties recorded a consent before Hon. Thande J. on 21st June 2022 mandating the **Duncan Oluoch Otieno and Kevin Ochieng Otieno** to present Petition for Grant of Letters of Administration.
2. These orders were not complied with as **Kevin Ochieng Otieno** declined to execute forms for the joint petition and consequently Hon. Riechi J. authorised **Duncan Oluoch**

Otieno to Petition as sole administrator. It is against this Grant that the Applicants, **JUDITH GRACE AKINYI** and **RICHARD BERNAGO OTIENO** have presented Summons for revocation of grant dated 25th September 2025.

3. The Summons is supported by annexed affidavit of Judith Grace Akinyi sworn on even date and further affidavit that is undated. The grounds on which the revocation is sought, is that the respondent has excluded some of the beneficiaries and assets of the deceased. She contests her exclusion and that of other wives of the deceased.

4. The respondent opposes the summons and has sworn affidavits in opposition, on 7th October 2023, 11th January 2024 and 9th September 2024. He avers that his appointment was in accordance with the law and challenges the existence of a valid marriage between the 1st Applicant and the deceased. The summons was heard by way of *Viva Voce* evidence

SUMMARY OF THE APPLICANTS' EVIDENCE.

5. **OW1- Judith Grace Akinyi**, is the first Applicant. The deceased died on 12th June 2018. He was polygamous and had 4 wives. Rose Riaga (deceased), Judith Grace Akinyi (Herself),

Mathilda Magic Mbindah and Jane Atieno Alul (deceased). He had 11 children namely, Richard Bernego Otieno, Lynda Faith Otieno, Susan Achieng Otieno, Annette Anyango Otieno, Diana Rose Otieno, Denis Oyugi Otieno, Brenda Joan Aluoch Otieno, Duncan Oluoch Otieno, Kelvin Ochieng Otieno, Judy Breanna Otieno and Sylvia Owino Otieno.

6. She was recognised as a wife by the Chief Agoro West Location, in letter dated 3rd July 2018. The deceased hailed from this location and he was buried there. The Chief also wrote a letter dated 8th October 2018 in which she confirmed that the applicant was the Spouse of the deceased and they formalized their marriage in accordance with Luo Customary Laws.
7. She contends that as spouse she ranks prior to the respondent with regards to administration of the estate of the deceased. She asserts that the grant should be revoked as the same was obtained without the consent of the other beneficiaries. She currently resides in Canada. She admits that she was incarcerated at Langata Women's prison and released on

completion of sentence. She asserts that she processed death certificate in her capacity as a spouse of the deceased.

8. She stated that the respondent ought not to be administrator as he has been intermeddling with the estate, withdrawing money from account of deceased absent authority. She concedes that she filed a succession matter which was struck out but maintains that the deceased had property in Kajiado. She states that the respondent was aware of the Petition that was filed in Kajiado but declined to participate.
9. On **cross examination** she conceded that she did not have a marriage certificate. The deceased had a child with Evelyne, Bella Otieno. He did not marry Evelyne. He had a wife called Mathilda but they did not have a child together. He paid dowry for Mathilda. Jane was a wife to the deceased died between 2016 and 2017. She was in Italy at the time the deceased died. The deceased married Jane while he was living with her (1st Applicant).
10. She returned to Kenya after the death of the deceased and perform rites as a widow at his grave. She was supported by members of the Israeli Church. She plastered the grave. She

processed the death certificate without a burial permit. She constructed a home with the deceased in Nyakach Agoro. She lived at Riverbank South C with the deceased, they shared a house with Jane Otieno. She confirmed that under Luo Custom and that divorce is formalized by the former husband collecting dowry and demolishing the house of the estranged wife.

11. The deceased paid dowry for her in accordance with Luo Custom. He was accompanied by Ogola Obunga and his sisters. It is acceptable for sisters to attend dowry negotiations. Dowry can be paid in kind or cash. Dowry for her was paid between 1984-5.
12. She confirmed she was aware of the Court's directions that her son, Kevin be appointed as co-administrator. She gave instructions that he should not sign unless she is recognised as a wife. She confirmed that the deceased died at Kileleshwa in Nairobi.
13. She stated that not all the assets were included particularly NAIROBI/ BLOCK 137/101, she considers the transfer to the respondent suspect. The respondent stopped intermeddling

with the bank account of the deceased when the 2nd respondent wrote a letter. She testified that the respondent wrongfully accessed the funds in the deceased's Chuna Sacco Account.

14. She conceded that the affidavit in support of the Petition enumerated all the children of the deceased but she faulted the respondent for not including the assets. His Petition also does not recognise all the wives of the deceased. She was not present at the burial of the deceased but addressed the mourners on phone. She conceded she did not have evidence to show that Mathilda was married. She had no evidence to show she and the deceased built the house. She confirmed that the house in Lavington is not in the deceased's name.

15. **On reexamination**, she reiterated that she and the deceased were married. The ceremony was at her parent's home.

16. **OW-2, Margaret Obara.** The deceased was her younger brother. She stated the deceased had four wives, Rose Riaga (deceased), Judith Grace Akinyi (the 1st applicant), Mathilda Magic Mbindah and Jane Atieno Alul (deceased). She attended dowry ceremonies for all the wives. The ceremony for the 1st

applicant was in Nairobi, among those present was Ogola Obunga, a cousin. The marriage with the deceased was subsisting at the time of his death. She confirmed that the deceased had constructed a home for the 1st applicant at the rural home.

17. On **cross examination**, she stated owing to the passage of time, she could not remember the years that the deceased formalized marriages with his wives. He formalized marriage with Jane so that his elder daughter could marry. He did not formalize his marriage with the other wives. The deceased had constructed a home for the 1st applicant at the rural home and although she was not present at the burial she addressed the mourners via phone.

18. She stated that the deceased did not marry Evelyne but she heard they had a child together. The ceremony for the 1st applicant- 'Nyombo' was in Nairobi. Her own Nyombo was in Nyakach, her husband came to her parent's home and her dowry was paid in Cows and Cash. She was present at her 'Nyombo'. The 'Nyombo' for the 1st applicant was held in

Nairobi because her father was unwell. Her Nyombo was paid in cash, this is acceptable.

19. She confirmed that Ogola Obunga was present at this visit. Under Luo custom, it is acceptable to perform both 'Ayie' and 'Nyombo' at the same time. She was aware that the 1st applicant was incarcerated in jail but she did not have details on the offence she committed. The home of the deceased has 3 houses for Judy, Jane and Rose. Mathilda does not have a house in the compound. She cannot remember the year the houses were constructed.
20. On **reexamination** she reiterated her evidence in Chief and on Cross examination
21. **OW3- Richard Bernego Otieno**. He is the eldest son of the deceased. His father was polygamous and had 4 wives. He approached the local chief and the Chief issued him with a letter confirming the beneficiaries of the deceased.
22. The deceased is entitled to a share of Land Parcel No. Kisumu/ Agoro West/ 114, he faults the respondent for not including this property in the estate assets. The deceased constructed homes for his wives on his share of the land. He

was present when the foundation for the house of the 1st applicant was laid. The marriage between the 1st applicant and the deceased was subsisting at the time of the death of the deceased.

23. He states that the grant should be revoked as the respondent is guilty of intermeddling having withdrawn money from the deceased's Barclays Bank post his death without authority.

24. **On cross examination**, he confirmed that jointly with the 1st applicant they lodged a petition in Kajiado, since the deceased had property in Kajiado. He and the 1st applicant were nominated by the family to represent the estate. The respondent declined to attend the meetings in spite of invitations. He stated that Judy Breanna Otieno is a daughter of the deceased, her mother is Evelyne. She was present at the Burial. Evelyne was not a wife to the deceased.

25. His mother separated with the deceased, he was raised by his paternal relatives. His mother was buried in Uyoma. Rose Riaga (deceased), is the mother of Brenda Joan Aluoch Otieno, she was buried at the home of the deceased. He furnished the Chief with the information in the letter. His mother was not a

wife to the deceased. He did not attend the dowry negotiations for the wives of the deceased.

26. It is acceptable to pay dowry in cash and sisters can escort their brothers to dowry negotiations. He asserted that parcel no. KISUMU/ AGORO WEST/114 is registered in the name of the deceased. He did not have proof of ownership. He is opposed to the grant as the applicant did not involve them in the petition. On being shown communication between his Counsel and the applicant's counsel, he stated the same was not brought to his attention and he was not aware of the orders of Hon. Thande J and Hon. Riechi J.

27. Previous efforts at mediation had failed as the respondent refused to acknowledge that the 1st applicant was a wife. He stated that the property in Lavington originally belonged to the deceased. He is not aware when it was transferred to the respondent and his sister. He faults the respondent for obtaining a chief's letter from Kileleshwa and not including the other beneficiaries in that letter.

SUMMARY OF THE RESPONDENT'S CASE

28.PW1- Duncan Oluoch Otieno. He is the administrator of the estate. He was appointed administrator after the son of the 1st applicant failed to comply with the direction of the Court on joint Petition. The 1st applicant is not a wife of the deceased. The eulogy was influenced by her and Mathilda. His mother is the only legally recognised wife. The Lavington property does not comprise part of the estate of the deceased

29. On **cross examination** he confirmed that his father hailed from and was buried in Nyakach. He contested the probative weight to be given to chief's letter on the existence of a marriage. He cannot be faulted for obtaining the Chief's letter from Westlands as the deceased died in Nairobi. He denied that the 1st applicant addressed mourners at the burial. After the death of his mother, his father did not remarry.

30. On **reexamination** he stated that the Petition in Kajiado was struck out for want of jurisdiction. He was not involved in the preparation of the eulogy.

31. At the conclusion of the trial, the parties submitted written submissions. The submissions of the applicants are dated 12th August 2025, the issues for determination are said to be-

- a. Whether the Grant of Letters of Administration should be revoked
 - b. Whether there should be a stay of proceedings.
32. It is submitted that the applicants have met the legal threshold for revocation of a grant as provided for under Section 76 of the Law of Succession Act. Reference is made to the interpretation of the statutory provision in the decisions of **Estate of Kiberenge Mukwa (Deceased) [2021] KEHC 1392 (KLR); Estate of Julius Mimano (Deceased) [2019] KEHC 10103 (KLR).**
33. On the second issue, since the applicant sought a stay of proceedings pending the determination of the application, the same is spent as the application proceeded to hearing. I will therefore not set out the submissions on this point.
34. The respondent's submissions are dated 6th October 2025 and he frames the following as the issues for determination-
- a. Whether the Objectors have satisfied the high threshold for revocation or Annulment of Grant issued to the Petitioner under Section 76 of the Law of Succession Act.
 - b. Whether nominated funds in a SACCO are part of a deceased's estate
 - c. Whether property that has been transferred to someone before death makes part of their estate
 - d. Whether the grant of letters of administration should be confirmed.

35. On whether the grant ought to be revoked reference is made to the decision in **Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR** and it is submitted that the applicants have not met the legal threshold as they have not demonstrated that the 1st applicant was a wife of the deceased. The basis upon which a party proves marriage is that provided under the Marriage Act.

36. It is submitted that this is not an appropriate case for the Court to exercise its discretion and reliance placed on the decision in **Albert Imbuga Kisigwa v Recho Kawai Kisigwa [2016] KEHC 1528 (KLR)**

37. It is submitted that the funds at the SACCO do not comprise the estate as they are nominated funds, reference is made to the decisions in **Wanjiru (Suing as the legal representative and administrator of the Estate of Francis Njoroge Waweru (Deceased) v Mwalimu National Sacco Society Limited [2023] KEHC 23285 (KLR); In the matter of the Estate of David Kiamba Muli (Deceased) [2022] eKLR; Re Estate of Carolyne Achieng Wagah**

(Deceased) [2015] eKLR and Benson Mutuma Muriungi vs Kenya Police Sacco & Another [2016] eKLR.

38. With regard to the property in Lavington, it is submitted that it does not comprise the estate of the deceased. Reliance is placed on the decision in **re Estate of Joseph Kipkemoi Limo (Deceased) [2025] KEHC 1623 (KLR)** and **Re Jamleck Karanja Muiruri (Deceased) [2022] KEHC 16989 (KLR)**. In light of the foregoing it is submitted that the grant be confirmed.

ANALYSIS AND DETERMINATION

39. In light of the foregoing, I discern the following to be issues for determination
- a. Whether the grant herein should be revoked?
 - b. Who are the beneficiaries of the estate of the deceased?
 - c. What are the assets that comprise the estate of the deceased?
 - d. What if any are the consequential orders
40. The grounds upon which the applicants seek to revoke the grant are that the respondent has failed to disclose all the assets and beneficiaries of the Estate, the 1st applicant as a spouse ranks in priority to the respondent on persons who can administer the estate of the deceased. It is also submitted that

the respondent is guilty of intermeddling with the deceased's bank account and funds in his Sacco Account at Chuna.

41. Section 76 provides the circumstances may revoke a grant either on its own motion or on the application of an interested party. It provides-

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.

42. I have seen the affidavit sworn on 18th October 2021 in support of the Petition lodged by the respondent, at paragraph 4 he enumerates the survivors to the estate. It is conceded that he has enumerated all the known children of the deceased. He did not include the 1st applicant. This issue was addressed by Hon. Thande J in directions issued on 21st June 2022 which compromised the objection dated 21st March 2022.

43. I reproduce the Order verbatim-

After engaging Counsel off the record, it is agreed by consent that after gazettelement of Petition the grant can be issued to Duncan Oluoch Otieno and Kevin Ochieng Otieno, a son of the Objector whose paternity is not disputed. Mention on 17th October 2022 to confirm position.

44. In presenting the Summons for revocation, the applicants are in effect seeking to set aside the consent order of the Court. The basis upon which a court will disrupt a consent are well articulated in the court of Appeal decision **in Musa v**

Mustafa & another [2025] KECA 677 (KLR), when the court expressed itself as follows-

[48] This Court enunciated the grounds upon which consent judgment may be set aside in Board of Trustees National Social Security Fund versus Michael Mwalo [2015] eKLR as follows: “The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.

45. The 1st applicant admits that she instructed her son not to sign the joint Petition. It is evident therefore that she was aware of the Court order, snubbed it and now she wishes for this Court to reopen the matter. This she cannot do. I find that the respondent properly petitioned for the grant under the authority of a court order.

46. I therefore decline to revoke the grant.

47. Having so found, question is then what are the consequential orders? The respondent is of the view that the Court should proceed to confirm the grant. Having regard to the provisions of Section 71 of the Law of Succession Act and rule 40 of the

Probate and Administration rules, the Court can only confirm the grant on the formal application of the administrator. The grant is only confirmed on certain conditions, including certification of the beneficiaries, assets of the deceased and a proposal on how the net estate will be distributed. Order 40 (4) provides-

Where the deceased has died wholly or partially intestate the applicant shall satisfy the Court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.

48. It is evident therefore that the Court cannot at this stage confirm the grant. I will direct therefore that the respondent makes a formal application for confirmation of the Summons for Grant.

49. On the issue of who are the beneficiaries of the Estate. Parties are agreed on the children of the deceased as being-

- a. Richard Bernego Otieno
- b. Lynda Faith Otieno
- c. Susan Achieng Otieno
- d. Annette Anyango Otieno
- e. Diana Rose Otieno
- f. Denis Oyugi Otieno
- g. Brenda Joan Aluoch Otieno
- h. Duncan Oluoch Otieno
- i. Kelvin Ochieng Otieno

j. Judy Breanna Otieno

k. Sylvia Owino Otieno.

50. The respondent contests that the 1st applicant and Mathilda are spouses of the deceased. He contends that the deceased and his mother were in a monogamous marriage. He however recognises that Rose Riaga (now deceased) was a spouse to his father. Section 3 of the Law of Succession Act, defines spouse as 'a husband or a wife or wives recognised under the Marriage Act. Notwithstanding the legislative attempt to align the Law of Succession Act with the Marriage Act which sets out the forms of marriage recognised under Kenyan law, the law still recognises for the purpose of succession as marriages, unions that are otherwise void or voidable under the Marriage Act. Section 3 (5) provides-

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular Section 29 and 40 thereof, and her children are accordingly children within the meaning of the Act.

51. The respondent submits that in the absence of a certificate of marriage, there is no evidence of marriage between the 1st applicant and the deceased. Indeed, the Marriage Act, has made it mandatory for all marriages to be registered. The question is whether the non- registration of a marriage invalidates or voids it. This issue was determined in **PWK v EWK [2024] KEHC 12146 (KLR)** where the Court stated-

[34] In light of the above and guided by the established principle that the law must serve the public interest and that a statute should not be interpreted to produce absurd results, I find and hold that the Kikuyu Customary marriage conducted by the parties herein in July 1998 was not invalidated merely because it was not registered by August 1, 2020 by the parties as stipulated under sections 96(2) and (3) of the Marriage Act 2014 as read together with the Marriage (Customary Marriage) Rules 2017

52. It is the 1st Applicant's case that she and the deceased formalized her marriage under Luo Customary Law, she called 2 witness who were present at the function where dowry was paid. That evidence was not shaken. In addition, there is evidence that she has a house that is constructed for her at the rural home of the deceased. I find therefore that she is a wife within the meaning of the Law of Succession Act. I find that

the marriage of Mathilda to the deceased has not been proved.

Mathilda herself is not participating in these proceedings.

53. Accordingly, the beneficiaries of the Estate of the deceased are-

- a. Rose Riaga (deceased)
- b. Jane Atieno Lulu (deceased)
- c. Judith Grace Akinyi (Spouse)
- d. Richard Bernego Otieno
- e. Lynda Faith Otieno
- f. Susan Achieng Otieno
- g. Annette Anyango Otieno
- h. Diana Rose Otieno
- i. Denis Oyugi Otieno
- j. Brenda Joan Aluoch Otieno
- k. Duncan Oluoch Otieno
- l. Kelvin Ochieng Otieno
- m. Judy Breanna Otieno
- n. Sylvia Owino Otieno.

54. The next issue for determination is what are the assets of the deceased that are available for distribution. The applicants state that the assets of the deceased include-

- a. Lavington house LR No. Nairobi Block/137/101
- b. Shares in Chuna Sacco No. 8554
- c. A share of Kisumu/ Agoro West/ 114

55. On his part the respondent contends that the assets of the estate are-

- a. Barclays Bank Account 0948363097
- b. Kajiado/ Kaputei North 9562
- c. Mercedes Benz KAJ 047 Z
- d. Cooperative Bank ACCOUNT 01116084488600

56. Attached to the Petition in support of ownership of the Bank Accounts and the property in Kajiado. The log book for the motor vehicle has not been availed.

57. On their part the applicants have not attached proof of ownership of any of the assets they contend belong to the deceased. The respondent has produced a title that shows the property in Lavington is registered in his name and that of the sister. The respondents challenge the integrity of that title. That however is not an issue to be resolved by the probate court. With regards to the land at Agoro West, no title has been availed to show ownership. With regards to Chuna Sacco, the funds in SACCO are outside the jurisdiction of a probate court.

58. Consequently, I find that at this stage the assets of the deceased available for distribution are-

- a. Barclays Bank Account 0948363097
- b. Kajiado/ Kaputei North 9562
- c. Cooperative Bank ACCOUNT 01116084488600

59. The final orders are therefore

- a. The application to revoke the grant is denied
- b. The beneficiaries of the estate of the deceased are those enumerated under paragraph 53 above.

- c. The assets of the estate of the deceased are set out in paragraph 58 above
- d. The administrator will present summons for confirmation within 30 days and serve it on all the beneficiaries. Any beneficiary opposed to the proposed mode of Distribution will file affidavit of protest within 14 days of service.
- e. Mention on **27th April 2026** to confirm compliance and take further direction.
- f. Each party will bear their own costs.
- g. Parties at liberty to appeal. Party exercising their right to appeal to do so within 30 days

It is so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT
THIS 13th DAY OF FEBRUARY, 2026.**

**P. M NYAUNDI
HIGH COURT JUDGE**

In the presence of:

Fardosa Court Assistant
Osiemo for Administrator
Oonge for Respondent

ORIGINAL