

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMABAY**  
**CIVIL APPEAL NO. E104 OF 2023**

**ERICK OKOTH OGALA (Suing as the Legal  
Representative of the Estate of**

**ALEXANDER OGALO OBONDI-Deceased) .....1<sup>ST</sup>**  
**APPELLANT**

**BENARD OCHIENG RANGA.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**CLIVE ODHIAMBO OUKO NATOME.....**  
**RESPONDENT**

**(Being an appeal from the Ruling and Order of Hon. Nicodemus N. Moseti  
(PM) in Mbita PMC Succession Cause No. 13 of 2020 delivered on 8<sup>th</sup>  
November, 2023)**

**JUDGMENT**

**Background of the Appeal**

1. Following the death of Bondo Okech (hereinafter referred to as “the deceased”) on 1<sup>st</sup> January 1982, the respondent, in his capacity as the son of the deceased, petitioned the Court for a grant of letters of administration intestate. The petition was filed on 19<sup>th</sup> February 2020. A grant was subsequently issued on 22<sup>nd</sup> April 2020 and later confirmed on 3<sup>rd</sup> June 2021, allocating the entire property known as

LR No. GEMBE/WAOMDO/WASAKI/1143 (hereinafter referred to as “the estate of the deceased”) to the respondent.

2. By an application pursuant to a summons for revocation of grant dated 17<sup>th</sup> November 2021 and filed on 18<sup>th</sup> November 2021, the appellants sought, among other orders, the revocation of the grant issued to the respondent. The application was premised on the grounds that the appellants were beneficiaries of the estate of the deceased. They contended that the 1<sup>st</sup> appellant had purchased one acre of the deceased’s estate from the deceased’s widow pursuant to a sale agreement dated 16<sup>th</sup> May 1995 for a consideration of Kshs. 6,800/-, while the 2<sup>nd</sup> appellant had purchased one and a quarter acre of the deceased’s estate from the same widow under a sale agreement dated 25<sup>th</sup> October 1999 for a consideration of Kshs. 11,000/-.
3. It was the appellants’ contention that the grant was fraudulently obtained, as the respondent concealed from the Court the material fact that the appellants were beneficiaries of the estate.
4. The appellants further pleaded that they had been in occupation of the respective parcels of land since the dates of purchase and had even buried their loved ones on the said parcels adding that the deceased’s widow was the sole survivor of the deceased and that she had no children. They faulted the respondent for failing to disclose to the Court, prior to the confirmation of the grant, the

existence of Mbita PMC ELC No. E018 of 2021 – Erick Okoth Ogalo & another v Leukadia Achieng Bondo & another, in which they sought, among other orders, a declaration that they were the beneficial owners of the estate of the deceased.

5. Before the summons for revocation of grant could be determined, the respondent filed a chamber summons application dated 11<sup>th</sup> May 2023 and filed on 19<sup>th</sup> May 2023, seeking orders that the summons for revocation of grant dated 17<sup>th</sup> November 2021 be struck out on the grounds that it was frivolous and vexatious, that the objectors lacked the requisite locus standi to seek revocation of the grant, and that the Court lacked jurisdiction to hear and determine the application.
6. By its ruling delivered on 8<sup>th</sup> November 2023, the Court allowed the application dated 11<sup>th</sup> May 2023 and held that the objectors' summons for revocation of grant was frivolous and vexatious, having been filed by parties who lacked the *locus standi* to seek the revocation of the grant.
7. That decision aggrieved the appellants who then lodged the instant appeal vide a Memorandum of Appeal dated 6<sup>th</sup> December 2023. In the appeal the appellants seek orders that the ruling be set aside, that the respondent's summons dated 11<sup>th</sup> May 2023 be dismissed with costs, and that they be awarded the costs of the appeal. The

appellants further pray that the application dated 17<sup>th</sup> October 2021 be set down for hearing before a different magistrate.

8. The appeal faults and challenges the decision of the trial court on some eight grounds. The grounds are that: -

**a) The Learned Magistrate erred in law by striking out the appellant's summons dated 17<sup>th</sup> October 2021.**

**b) The Learned Magistrate erred in law in failing to appreciate that as a family court the court lacked jurisdiction to strike out pleadings as the power is not provided for under the Succession Act.**

**c) The Learned Magistrate misdirected himself in failing to determine the appellants' application for revocation and embarking on unprocedural undertaking.**

**d) The Learned Magistrate erred in failing to consider the basic requirements necessary for striking out pleadings.**

**e) The Learned Magistrate erred in law and in fact in failing to identify the right issues for determination in respect of the application before him.**

**f) The Learned Magistrate erred in law and in fact in failing to appreciate that the estate of Bondo Okech had naturally transmitted to Leokadia Ochewo Bondi**

**and the respondent herein had a legal duty and obligation to respect and honor the liabilities of the estate.**

**g) The Learned Magistrate erred in law in failing to appreciate the provisions of section 76 of the Law of Succession Act provided that the locus standi to seek revocation of grant was not limited to heirs.**

**h) The Learned Magistrate erred in law and in fact in failing to appreciate that personal representatives of the deceased were required by law to act in utmost good faith and had legal obligations to honor all the liabilities of the estate.**

9. As directed by the court, parties have canvassed the appeal by way of written submissions which the court has had the opportunity to read and appreciate, will duly take into account even without having to rehash the same seriatim in this decision. A brief summation suffices.

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10. The appellants contend that while the trial court was correct in considering the issue of *locus standi*, it erred in disregarding the appellants' presence in the deceased's estate for over twenty-six (26) years. They further contend that the trial court misapplied the principles of *locus standi* under the Law of Succession Act and the

doctrine of intermeddling under section 45 thereof, in light of the fact that section 76 of the Act expressly permits an interested party to lodge a summons for the revocation of a grant.

11. They argue that the power of the court to strike out pleadings should be exercised sparingly, as the right to be heard is a fundamental tenet of justice guaranteed under Article 50 of the Constitution. They further contend that it is the primary duty of the court to determine disputes on their merits rather than on technicalities, a principle reinforced under Article 159(2)(d) of the Constitution. In this regard, it is submitted that striking out pleadings should only be resorted to where a pleading is so hopeless that it discloses no reasonable cause of action, and they place reliance on the decision in **DT Dobie & Company (Kenya) Limited v Muchina (1982) KLR 1**.

12. They contend that by striking out their application for revocation of grant and declining to consider the substance of the revocation claim, the trial court effectively foreclosed their right to have their grievances adjudicated upon. They further contend that, the respondent having failed to respond to their application, the court ought to have allowed it as uncontested.

13. They refer the court to the decision in **Re Estate of Suleiman Kasuti Murunga [2025] eKLR**, wherein the court held that Magistrates' Courts, by virtue of section 23 of the Magistrates' Courts

Act, 2015, have the power to revoke grants issued by them within the jurisdiction conferred by that statute.

14. It is additionally argued that the court has a duty to ensure that the estate is distributed to the genuine beneficiaries and to ascertain any assets and liabilities that may have arisen after the demise of the deceased.
15. They accordingly pray that the appeal be allowed, the orders made on 8<sup>th</sup> November 2023 be set aside, and the Appellants' summons dated 17<sup>th</sup> November 2021 be reinstated for hearing and determination on the merits before a different magistrate.
16. On the other hand, the respondent supports the findings of the trial court that gave rise to the present appeal and contends that the appellants are neither beneficiaries nor creditors of the deceased's estate. He argues that the deceased was the registered owner of the suit property forming part of his estate and that the alleged sale of the property to the appellants is purported to have occurred long after the demise of the deceased.
17. He submits that the jurisdiction of a subordinate court when sitting in probate and administration proceedings is limited to determining the distribution of the estate to its beneficiaries and does not extend to determining whether the suit property was purchased by a third party. In support of this proposition, he relies on the decisions in **Priscilla Ndubi & Zipporah Mutiga v Gerishon**

**Gatobu Mbui, Meru Succession Cause No. 720 of 2013, and Nyeri HC Succession Cause No. 174 of 1999 - In the Matter of the Estate of Kinogu Mukiria (Deceased)**, for the principle that the primary duty of a succession court is to distribute the estate of the deceased to the rightful beneficiaries.

18. It is further argued that the spirit and intent of Rule 41(3) of the Probate and Administration Rules is that the mandate of a probate court is confined to the distribution of estate assets, and where a dispute arises concerning the ownership of any asset, such dispute ought to be litigated and determined in a separate forum, and not within the succession cause. He contends that, pursuant to Article 165(5) of the Constitution, this court lacks jurisdiction over matters relating to the use, occupation, and title to land, which fall within the exclusive mandate of the Environment and Land Court. In support thereof, he cites **Re Estate of Henry Kithia Mwitari (Deceased) [2021] eKLR** and **Re Estate of Joshua A. Visaho (Deceased) [2019] eKLR**.

19. The respondent further relies on the decision in **In re Estate of Joseph Mutiso Kithome (Deceased) [2019] KEHC 1649 (KLR)**, where the court held as follows:

**“The court vested with jurisdiction to address the concerns of the objectors is the Environment and Land Court. The objectors are free to pursue an action for**

recovery of land to assert their rights, if any, to the subject land. They shall present evidence on ownership before the requisite court, which shall make a determination. The grant herein has since been confirmed, and the objectors, not being beneficiaries, cannot be allowed to come and muddy the waters in the estate of the deceased. It is not possible at this stage to isolate any property to await a determination of the objectors' claims in the relevant court. The objectors will have their day in the ELC, where they will prove their claims against the administrators of the estate."

20. The respondent further contends that the appellants are guilty of intermeddling with the estate, having engaged third parties in relation to the deceased's property, a position he submits is supported by the authorities in **Re Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR**, **Benson Mutuma Muriungi v CEO, Kenya Police SACCO [2016] eKLR**, and **In re Estate of M'ngarithi M'Miiriti [2017] eKLR**. He argues that allowing the appeal would amount to the court sanctioning an illegality.

21. He concludes by asserting that the appellants' claim, if any, is that of purchasers and not creditors of the estate, and accordingly urges the court to uphold the findings of the trial court.

### **Issues, Analysis and Determination**

**22.** The Court has carefully considered the record of appeal, the rival written submissions, the authorities cited, and the applicable law. The central issue for determination is whether the learned trial magistrate erred in law in striking out the appellants' summons for revocation of grant dated 17<sup>th</sup> November 2021, as opposed to dismissing same and pave way for the determination of the objection application on its merits. In other words, was the issue in the dispute presented to court in the summons for revocation an inheritance issue or a claim over land and the title thereto. The court views that to be the sole question because, whichever way determined, will align all grounds of the appeal.

23. The power to revoke or annul a grant is donated by section 76 of the Law of Succession Act. The provision grants the court authority, at any time, to revoke a grant where it is shown, inter alia, that the proceedings were defective in substance, that the grant was obtained fraudulently by the making of a false statement or by concealment of material facts, or where the grant has become inoperative.

24. A plain reading of section 76 reveals that the legislature did not restrict the category of persons who may move the court to seek revocation of a grant. That is so because the due and legal administration of estate of a deceased is more of a public interest undertaking. The provisions of section 76 is principally concerned

with the validity and integrity of the grant itself, rather than the standing of the applicant alone. The court's role in succession proceedings is therefore supervisory and protective in nature, aimed at ensuring that the administration of estates is conducted lawfully, transparently and with openness to ensure that the entire net estate is ascertained then distributed to the persons entitled.

25. In **Matheka & Another v Matheka [2005] KLR 455**, the Court of Appeal held that a grant may be revoked where material facts were concealed from the court, and emphasized that succession proceedings are not strictly adversarial. A probate court, therefore, has inherent jurisdiction to interrogate the propriety of the process leading to the administration, the full course of the administration and the dissolution of the estate by transmission. In doing so, the court never loses the inherent nature of every court to do justice and not engage in sideshows by giving undue regard to procedural technicalities.

26. In the present matter, the appellants alleged concealment of material facts regarding long occupation of portions of the estate property, and non-disclosure of pending litigation touching on the estate prior to confirmation of the grant. There is however no dispute that the claim by the appellant was that grounded on an alleged sale of land by a widow to the deceased and not a claim on inheritance.

27. To this court, the duty and mandate of the court in every succession cause is to resolve contests about inheritance and no more. The court has no mandate to determine questions of right to occupation use of title to land which must be the dispute said to have been pending before the court in Mbita PMC ELC No. E018 of 2021 - Erick Okoth Ogalo & another v Leukadia Achieng Bondo & another.
28. The court discerns the summons for revocation of grant to have been a regurgitation of the claim over land that was already before the Environment and land court at Mbita. It is the view of the court that in filling the suit at the ELC to enforce its title or other claims of the land, the appellants were conceding that theirs was not an inheritance claim. In fact, even in this appeal and before the trial court, there is no assertion that the claim is that of inheritance. Without such a claim of inheritance, the succession court was deprived of jurisdiction to entertain the matter. If anything, in pursuing the same claim before the court the appellants could not escape the tag of abusers of court process and being vexers to the respondent.
29. When such becomes evident to the court, it has the obligation to not only protect its own processes from abuse but also protect the respondent from vexation.

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30. The trial court placed decisive weight on the issue of *locus standi* and concluded that the appellants, not being beneficiaries or creditors, lacked standing to seek revocation of the grant. With respect, that approach was unduly restrictive.
31. While it is appreciated by the court that the Court of Appeal held and settled the law that *locus standi* in revocation proceedings cannot be narrowly construed, the person demonstrating sufficient interest in an estate must be interested as an acknowledged creditor, heir, dependant or beneficiary. Not every imagined interest suffices. The sufficient interest must not be of the kind that seeks to vest the court with a jurisdiction that is not vested by statute or the constitution.
32. Indeed, In **Matheka & Another v Matheka (supra)**, the Court observed that the probate court's duty is to ensure that grants are properly obtained and administered, and that any person who demonstrates sufficient interest may bring irregularities to the attention of the court, but it did not open a floodgate for every interest to be litigated in the succession cause as a family dispute.
33. To entertain the appellants' claims as purchasers would invite the court to consider among other things; the capacity of the seller to so sell, whether the claim over land was within time or statute barred, whether prescriptive rights had crystallised, and whether or not the alleged agreements were enforceable. Those are not issues

for a family court but the Environment and land court, in terms of the constitutional donation of duty to courts of equal status.

34. It is to court clear that the claim by the appellant was improperly before the court and in striking it out, the court did nothing more than properly decline jurisdiction. It was thus a clearest of the clear cases and the principle of law enunciated in **D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1** and **Law Society of Kenya v Centre for Human Rights and Democracy & 12 others (Petition 14 of 2013) [2014] KESC 29 (KLR)** were properly applied. Questions of jurisdiction of a court are substantial and germane issues never to be lowered to fit into the cubicle of undue technicalities.

35. The respondent argued, and the trial court appeared to accept, that the succession court lacked jurisdiction as the appellants' claims touched on ownership of land, a matter reserved for the Environment and Land Court.

36. For the foregoing reasons, the court find that the learned trial magistrate never erred in law and principle by striking out the appellants' summons for revocation. The appeal is therefore adjudged bereft of merit and is dismissed. Even though the matter is presented in a family file, there is no family relationship between the appellants and the respondent. Coupled with the fact that the

appellant sought to engage court twice on the same issue, the court finds that this is a classicus matter in which the successful party must be awarded costs. The cost of the appeal shall be paid by the appellant to the respondent.

Dated, signed and delivered at Lodwar this 13<sup>th</sup> day of February 2026

Patrick J O Otieno

Judge

Original