



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Omollo v Odongo (Civil Appeal E074 of 2024)  
[2026] KEHC 3444 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3444 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E074 OF 2024**

**TA ODERA, J**

**MARCH 13, 2026**

**BETWEEN**

**JOSEPH ODONGO OMOLLO ..... APPELLANT**

**AND**

**JUNE OBIERO ODONGO ..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of the Principal Magistrate’s Court delivered on 29<sup>th</sup> November 2024, by which the court dismissed the Appellant’s Summons for Revocation of Grant dated 28th November 2023, with costs.
2. The Appellant was dissatisfied with that decision and lodged the present appeal challenging the dismissal of his application for revocation of grant issued in favour of the Respondent.

**Background**

3. The undisputed background is that the deceased, Omollo Odongo, died intestate leaving an estate comprising, inter alia, Land Parcel Numbers Kanyada/kotieno/katuma “A”/742, 743 and 794.
4. The Respondent petitioned for and obtained a grant of letters of administration intestate, which was later confirmed.
5. The Appellant subsequently resurfaced in the year 2023 after having allegedly been away from home for over fifty (50) years and filed summons seeking revocation of the grant on the grounds that:
  1. The proceedings to obtain the grant were defective in substance;
  2. The grant was obtained fraudulently through concealment of material facts;



3. He was a biological son and beneficiary of the deceased who had been excluded from the succession proceedings.

### **Proceedings Before the Trial Court**

6. The application proceeded by way of viva voce evidence.
7. The Appellant testified that he was the son of the deceased, born of his marriage with Rosalia Atega, and that upon returning home after many years he found the Respondent had caused the deceased's land to be registered in her name.
8. He called two witnesses, Joanes Ouma Odongo and Elisha Onam, who generally supported his claim that he was related to the deceased, though their accounts differed materially on the number and identity of the deceased's children.
9. The Respondent testified that she was the widow of Andrew Odongo, whom she asserted was a son of the deceased from an earlier marriage. She acknowledged that the deceased had a long-lost son named Joseph Odongo, but stated that she was unsure whether the Appellant was that person and required proof before ceding any portion of the estate.
10. After evaluating the evidence, the trial court found that the Appellant had failed to prove, on a balance of probabilities, that he was a son or dependant of the deceased and dismissed the application.

### **Grounds of Appeal**

11. The appeal is premised on, inter alia, the following grounds:
  1. That the trial court erred in law and fact in failing to find that the Appellant was a beneficiary of the deceased's estate;
  2. That the court improperly disregarded the Respondent's alleged admission that the Appellant was a beneficiary;
  3. That the court placed undue weight on the Appellant's inability to recall the names of his siblings;
  4. That the court failed to appreciate the Appellant's advanced age and the totality of the evidence.

### **Submissions**

12. The Appellant submitted that he is the only surviving son of the deceased and that the Respondent had conceded his status as a beneficiary. He argued that the evidence tendered, including his identity documents and witness testimony, sufficiently established paternity.
13. The Respondent opposed the appeal, maintaining that no documentary or credible oral evidence was produced to establish the Appellant's relationship with the deceased and that the trial court correctly dismissed the application.

### **Issues for Determination**

14. Having considered the record of appeal, submissions, and the law, the issues for determination are:
15. Whether the Appellant proved that he is a child or dependant of the deceased;



16. Whether the grant issued to the Respondent was obtained fraudulently or through concealment of material facts;
17. Whether the trial court erred in dismissing the application for revocation;
18. Who should bear the costs of the appeal.

## **Analysis**

### **(a) Role of the First Appellate Court**

19. As a first appellate court, this Court is duty-bound to re-evaluate the evidence afresh and draw its own conclusions, bearing in mind that it did not see or hear the witnesses testify as was held in the case of

#### (a) Role of the First Appellate Court

20. As a first appellate court, this Court is duty-bound to re-evaluate the evidence afresh and draw its own conclusions, bearing in mind that it did not see or hear the witnesses testify as was held in the case of *Selle & another v Associated Motor Boat co. Ltd.& others* {1968} EA 123 and in *Peters v Sunday Post Limited* (1958) EA 424

### **Burden of proof.**

21. The burden of proof in Civil cases is on a balance of probability. In *James Muniu Mucheru v National Bank of Kenya Ltd* 120191 eKLR, the Court stated as follows: "Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable."

Lord Denning J. in *Miller —vs- Minister of Pensions* (1947) 2 ALL ER 372, discussing that burden of proof had this to say-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

22. It also trite law that an appellate court will not lightly interfere with findings of fact by a trial court unless they are shown to be based on no evidence, a misapprehension of evidence, or wrong principles of law. In the case of *Mbogo & Another V. Shah* [1968] EA 98 it was held that decision as follow:

23. “.....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

24. Issues for Determination

- a. Having considered the record of appeal, submissions, and the law, the issues for determination are:



- b. Whether the Appellant proved that he is a child or dependant of the deceased;
- c. Whether the grant issued to the Respondent was obtained fraudulently or through concealment of material facts;
- d. Whether the trial court erred in dismissing the application for revocation;
- e. Who should bear the costs of the appeal.

## Analysis

### (a) Whether the Appellant Proved He Is a Child or Dependant of the Deceased

25. Section 29(a) of the *Law of Succession Act* defines dependants to include the children of the deceased, whether or not they were maintained immediately prior to death.
26. The burden of proof, however, lies on the person alleging dependency or filiation. Section 107 of the *Evidence Act* is explicit that he who alleges must prove.
27. In the present case, the Appellant did not produce:

A birth certificate a national identity card linking him to the deceased chief's letter confirming paternity. The chief's letter dated 16th October 2023 was merely marked for identification and never produced as an exhibit. It therefore formed no part of the evidentiary record.
28. Further, the oral testimony presented by the Appellant and his witnesses was riddled with material inconsistencies, particularly regarding:
  1. The number of the deceased's children
  2. The existence or non-existence of daughters
  3. Whether the deceased had one or two sons.
29. Notably, the Appellant testified that he lived with his alleged siblings for over sixty (60) years but could not recall the name of even one sibling. While advanced age may affect memory, the inability to recall any sibling, coupled with contradictory evidence, reasonably raised doubt.
30. I am therefore unable to fault the trial court's finding that the Appellant failed to establish, on a balance of probabilities, that he was a child of the deceased.

### (c) Alleged Admission by the Respondent

31. The Appellant argued that the Respondent admitted his status as a beneficiary. A careful reading of the Respondent's affidavit and testimony reveals no clear, unequivocal admission. The Respondent merely acknowledged the existence of a long-lost son of the deceased but expressly disputed whether the Appellant was that person. Such conditional statements cannot amount to an admission in law.

### (d) Whether Grounds for Revocation Were Established

32. Under Section 76 of the *Law of Succession Act*, a grant may be revoked where it is shown to have been obtained fraudulently, through concealment of material facts, or where the applicant has locus as an interested party. Having found that the Appellant failed to prove that he is a beneficiary or dependant of the deceased, he lacked the requisite locus standi to sustain an application for revocation



of grant. Consequently, the trial court properly exercised its discretion and dismissed the summons for revocation.

### **Conclusion**

33. In the upshot, I find that:

1. The Appellant failed to prove that he is a child or dependant of the deceased;
2. No fraud, concealment, or defect in substance was established in obtaining the grant;
3. The appeal therefore lacks merit.

### **Orders**

34. Accordingly, the Court makes the following orders:

- i. The appeal is dismissed in its entirety.
- ii. The judgment of the trial court delivered on 29th November 2024 is hereby affirmed.
- iii. Each party to bear his own costs.

**T.A ODERA**

**JUDGE**

3.26

Delivered, Virtually Via Teams Platform on this at Kisii this 13<sup>th</sup> day of March 2026, in the Presence of:

Court Assistant - Kipchirchir

