

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION APPEAL CAUSE NO 5 OF 2018**

IN THE MATTER OF THE ESTATE OF NELSON ONGUTI OKINDO AND JOYCE  
BOSIBORI ONGUTI (DECEASED)

BETWEEN

EDWIN MOTARI ONGUTI-----  
APPLICANT

VERSUS

DANIEL MAYAKA OKINDO-----  
PETITIONER

AND

KENYA COMMERCIAL BANK-----  
PETITIONER

GUSII MWALIMU SACCO----- 2<sup>ND</sup> INTERESTED  
PARTY

MINISTRY OF FINANCE & PLANNING ----- 3<sup>RD</sup> INTERESTED  
PARTY

(Being an appeal to the ruling delivered by Hon. Ongeri SPM ON THE 2<sup>ND</sup>  
October 2018 at Vihiga in succession cause 102 of 2004)

**JUDGMENT**

1. This appeal before this court arises from the ruling of Hon. Ongeri (Principal Magistrate) in Vihiga Succession Cause No. 102 of 2004, relating to the estate of the late Nelson Onguti Okindo, who died intestate on 17<sup>th</sup> March 2003, and his wife, Joyce Bosibori Onguti, who predeceased him on 29<sup>th</sup> October 2001.
2. Following their demise, Daniel Mayaka Okindo, a brother of the deceased, petitioned for letters of administration intestate, which were issued and confirmed on 10<sup>th</sup> May 2005.

3. The Appellant, Edwin Motari Onguti, a son of the deceased, later filed a Summons for Revocation of Grant dated 6<sup>th</sup> June 2018, contending that the grant had been fraudulently obtained through concealment of material facts and omission of a beneficiary, Edna Onguti Okindo.
4. He further alleged that part of the estate property including a parcel at Nyachwa and another at Migori in Suna East/Wasweta 1/8443 was not included as part of the deceased estate and that the administrator had misappropriated the pension benefits and funds deposited with KCB and Gusii Mwalimu SACCO, to the detriment of the rightful heirs being himself and his siblings and that they were not able to attend school due to the mismanagement by their uncle and elder sister Maureen Kerubo.
5. The Applicant filed a summons for revocation of the grant on 6<sup>th</sup> June 2018, which was dismissed by the trial magistrate by stating that once the grant had been confirmed, no further application could be entertained under Section 76 of the Law of Succession Act (Cap. 160).
6. The applicant, aggrieved by the decision by Hon. Ongeri (PM), filed the memorandum appeal dated 3<sup>rd</sup> February 2021 detailing the following grounds of appeal;
  - a. The trial Magistrate failed to consider that the petitioner had forged the signature of the applicant, who is the son of the deceased.

- b. The trial Magistrate failed to consider that the applicant was sitting for the advocate training programme exams (ATP) as from July 2018 and needed the money to pay school fees from the Estate of Nelson Onguti Okindo and Joyce Bosibori Onguti.
- c. The trial Magistrate failed to revoke the grant on the ground that section 7 of the Cap 160 was not expressly pleaded despite referring to the provision.
- d. The Trial Magistrate failed to consider that one Daniel Mayaka Okindo, who petitioned for letters of administration, had no Locus Standi and had been charged in criminal case 2002 of 2018, currently pending at the City County of Nairobi.
- e. The trial magistrate at Vihiga Law Courts failed to consider that it had no jurisdiction to hear and confirm the grant on the basis that the deceased died domiciled at Nyamira County and had no property or any interest within Vihiga County.
- f. The trial magistrate erred in law in failing to revoke the grant on the basis that siblings of the deceased did not renounce the right to file for letters of administration and assume such obligations to the petitioner herein, Daniel Mayaka Okindo.
- g. The trial magistrate failed to provide for the loss of opportunities for the intended purpose of helping

siblings of the deceased with education, which was never done.

- h. The trial magistrate erred in law, failing to direct one Daniel Mayaka Okindo to refund Kshs 105,631.70 cheque No 012231 paid to him from Kenya Commercial Bank on the 20th May 2005, being the estate for Nelson Ong'uti Okindo.
- i. The trial Magistrate erred in law in failing to direct one Daniel Mayaka to refund Kshs. 141, 913 as per records paid on the 4th November 2003
- j. The trial magistrate erred in law in failing to address the monies Kshs. 824,973. 40 so paid to Maureen Kerubo Onguti, being pension money on the estate of Nelson Onguti Okindo, deceased, channeled to Nyaaga Geoffrey Mogendi. The trial court erred in law in failing to consider the perjury committed by the petitioner as to the number of siblings of the deceased when the petitioner indicated 4 instead of the 5 siblings, omitting one Edna Kerubo Onguti.
- k. The trial magistrate erred in law in failing to order the 1st,2nd and 3rd interested party being Kenya Commercial Bank, Gusii Mwalimu Sacco and the Ministry of Finance, to account for all monies paid out from the estate of the deceased.

- l. That the trial court failed to grant loss of opportunity for the said Maureen Kerubo Onguti, who was able to purchase vehicle KBR 505 B Hyundai
  - m. That the letters of administration were defective in that they failed to capture the estate in Land LR Suna East / wasweta 1/8443 as per the agreement between the deceased Nelson Onguti and Nahashon Ototo.
7. The appeal was canvassed by way of a written submission, and at the time of writing this judgment, only the Respondent had filed their submissions, which have been considered by this court.

### **Analysis and determination**

8. Section 76 of the Law of Succession Act provides that a grant of representation, whether or not confirmed, may at any time be revoked if obtained by fraud, concealment of material facts, or if it has become inoperative through subsequent circumstances.
9. In its ruling dated 6<sup>th</sup> June 2018, the trial court averred that once a grant has been confirmed, there is no other application that can be brought before the court. In my view, the trial court erred in making such a conclusion.
10. The law is explicit that revocation may be sought "whether or not confirmed". This position is fortified by the Court of Appeal decision **in In re Estate of Wahome Mwenje Ngonoro (Deceased) [2016] eKLR**, where it was held that "confirmation of a grant does not preclude its revocation if fraud or concealment is proved."

11. Likewise, in In **re Estate of Eliakim Osano Ongow (Deceased) [2025] KEHC 5890 (KLR)**, the High Court reiterated that the process leading to confirmation can be impeached where the administrator failed to disclose all beneficiaries or assets of the estate.
12. Accordingly, the learned magistrate misdirected himself in law by declining jurisdiction to consider the application for revocation merely on the basis that the grant had been confirmed.
13. On the issue of jurisdiction, the Appellant contends that the deceased was domiciled and his property located in Nyamira, not Vihiga County, and therefore the Vihiga court lacked territorial jurisdiction.
14. Section 47 of the Law of Succession Act, read with Rule 7(3) of the Probate and Administration Rules, confers jurisdiction upon a court within the area where the deceased was domiciled or possessed property.
15. This Court agrees that, jurisdiction being fundamental, ought to have been ascertained before confirmation. In **Samuel Kamau Macharia & Another v. KCB Ltd & Others [2012] eKLR**, the Supreme Court emphasised that a court acting without jurisdiction renders its proceedings null. If, as it appears, both the deceased's residence and property were in Nyamira, the proceedings at Vihiga were irregular.
16. The appellant further claimed that Edna Onguti Okindo was a child of the deceased and hence a beneficiary to the estate, and

that she was omitted from the petition for the grant. In In re Estate of Njau Ndugo (Deceased) [2023] KEHC 3366 (KLR), the High Court held that forgery and concealment of beneficiaries strike at the root of the grant process and warrant revocation.

17. Similarly, in the Court of Appeal decision of Meshack Otieno Aidah & Another v. Sharon Atieno Aidah & Others [2020] KECA 299 (KLR), the court emphasised the “paramount duty of full disclosure” under Section 51 of the Act.

18. The record before the trial court shows that the administrator did not include all the children of the deceased , and as such, the omission of a lawful beneficiary is a ground for revocation of a grant.

19. The Respondent in their submission raised the issue that the record of appeal was incomplete and lacked certified copies of the ruling and orders.

20. While a complete record is essential, the Appellant annexed the impugned judgment and presented a clear memorandum of appeal.

21. This Court, therefore, finds that the omission is not fatal, as substantive justice under Article 159(2)(d) of the Constitution must prevail over procedural technicalities.

22. Upon re-evaluating the record in accordance with the appellate duty, this Court is satisfied that the magistrate misinterpreted Section 76 by holding that a confirmed grant cannot be revoked and that the omission of a daughter of the deceased has

brought out an issue that should be addressed to determine if the grant should be revoked or not.

23. Consequently, the appeal succeeds. The judgment of the Principal Magistrate at Vihiga delivered on 2<sup>nd</sup> October 2018 is hereby set aside.

24. The matter is remitted for retrial before a different magistrate at the Vihiga Law Courts, other than Hon. Ongeru, in strict compliance with the following directions:

i. The trial court shall hear and determine a fresh application for revocation of the grant in Succession Cause No. 102 of 2004.

ii. All alleged beneficiaries, including Edna Onguti Okindo, shall be properly notified and afforded the right to participate to confirm if she is a lawful beneficiary.

iii. The lower court shall decide whether it has territorial jurisdiction to entertain summons for revocation.

25. Costs of this appeal shall abide the outcome of the retrial.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF APRIL, 2026**

**S.N MBUNGI**

**JUDGE**

**In the presence of:-**

**CA: Velma**