

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 76 OF 1995

IN THE MATTER OF THE ESTATE OF MALAKI ODAWO OMBOGO -

DECEASED

PHANUEL ODAWO OLANGO OBJECTOR/APPLICANT

- VERSUS -

SAMUEL OCHOLLA ODAWO PETITIONER/RESPONDENT

R U L I N G

1. This succession cause relates to the estate of **MALAKI ODAWO OLANGO** (“the deceased”) who died on the **10/3/1986**. The respondent applied for and obtained Grant of Letters of Administration on **30/5/1995** and had it confirmed on the **5/12/2007**.
2. Eighteen years later, the applicant has moved this Court vide Summons dated **3/6/2025** seeking the revocation of the grant on the grounds that the respondent failed to disclose all the legal beneficiaries and survivors of the deceased. He seeks that the suit property, **LR No. Kisumu/Marera/964**, be reverted back to the name of the deceased.

3. The said summons was brought under **article 159 of the Constitution, sections 45, 47 and 76 of the Law of Succession Act and Rules 63, 70 and 73 of the Probate and Administration Rules.**
4. The summons was anchored on the grounds therein as well as the supporting affidavit of **Phanuel Odawo Olango** sworn on the **3/6/2025**. The applicant contended that he was the biological son of one **George Edward Olango Odawo**, a son to the deceased who died on **4/2/1991**. The latter was a brother to the respondent.
5. That the deceased's estate consisted of **LR No. Kisumu/Marera/964** measuring 2.8 Hectares, which land was ancestral land and thus he and his siblings are entitled to it.
6. That the respondent took advantage of their tender ages and succeeded the deceased's estate taking control of the entire estate whilst disinheriting them after which the respondent subdivided the suit property into 3 and embarked on the indiscriminate selling of the suit property.
7. In response, the respondent relied on a replying affidavit sworn on the **13/10/2025** wherein he contended that the suit property was expressly promised to him by the deceased during his lifetime as his portion of inheritance vide an oral will made in the presence of the family in the presence of the deceased's entire family.

8. Further to the above, that the deceased had distributed his estate to his sons prior to his demise which was done long before the applicant was born. That the applicant's father was similarly given land by the deceased where he resided prior to his death and which land the applicant continues to occupy.
9. That the applicant being a grandson of the deceased was not entitled to a direct benefit of the deceased's estate unless he claims through his father's share which had already been given to the deceased prior to his demise.
10. That after confirmation of the grant, he sub-divided the suit property and proceeded to dispose of the said land to bona fide purchasers for value and as such any revocation of grant will not affect these transactions.
11. That the allegations of fraud, concealment, or misrepresentation made by the Objector/Applicant are unfounded, as all material facts were disclosed to the Court at the time of petitioning for the grant, and the estate was administered in accordance with the law.
12. That the grant of letters of administration was confirmed in the year 2007, and the current application for revocation is being brought in 2025, approximately 18 years later and this inordinate delay militates against the grant of the extraordinary remedy of revocation as it causes prejudice to the respondent and third parties who have acted in good faith relying on the

validity of the grant. Further, that the doctrine of laches applies, and the delay undermines the Applicant's claim.

13. The Summons was disposed off by way of written submissions. The applicant submitted that the respondent failed to disclose the existence of the applicant and his siblings who were rightful heirs to the estate of the deceased which omission amounts to a fraudulent concealment.
14. That by sub-dividing and disposing of the suit property the respondent clearly demonstrated a fraudulent intention to disinherit other rightful heirs.
15. On his part, the respondent submitted that the applicant had not adduced any credible evidence to demonstrate fraud, concealment or defective proceedings in obtaining the grant as all material facts were disclosed at the time of petitioning of the grant.
16. That the applicant's father was alive at the time of distribution and received his share of the deceased's estate and the applicant being a grandson of the deceased cannot benefit directly from the estate. Further, that the ***Law of Succession Act at section 42*** recognizes lifetime gifts and takes the same into consideration in the distribution of the estate.
17. That the delay of 18 years in bringing the instant application vitiates against the grant of the remedy of revocation as it will cause prejudice to the

respondent and third parties who have acted in good faith relying on the validity of the grant.

18. That any property or assets of the estate that have been transferred to bona fide purchasers for value remain legally vested in them and cannot be reclaimed by the estate even if the grant is later revoked as was held in the case of **William Onkoba Matundura & Another v Julius Moracha Matundura & Another (Succession Cause No. 62 of 2009) eKLR.**

19. I have considered the rival contestations. The sole issue that presents itself for determination is whether the applicant's application meets the threshold for the revocation of a grant within the meaning of ***Section 76 of the Law of Succession Act. Section 76***, 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.”

20. In **Albert Imbuga Kisigwa v Recho Kavai Kisigwa Succession Cause No. 158 of 2000** Mwita J (as he was then) stated as follows: -

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.” [Own emphasis]

21. The applicant alleges that the grant was obtained fraudulently by concealing a material fact to wit the existence of himself and his siblings who are grandchildren of the deceased.
22. This dispute revolves around the distribution of the parcel of land known as **Kisumu/Marera/964** which property belonged to the deceased – this fact is not in any dispute. The applicant claims that the said parcel was ancestral land on which their deceased father also has a share whereas the respondent asserts that the deceased made an oral will wherein he apportioned the suit property to himself having already distributed other parcels to the respondent’s other siblings.

23. It is trite law that he who alleges must prove. In law, the burden of proof lies upon the party who asserts the existence of a fact or set of facts. **Section 107 of the Evidence Act CAP 80 Laws of Kenya** provides: -

“107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

24. In **Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR**, it was held that: -

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the Evidence Act Chapter 80, Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the law of proof of that fact shall lie on any particular person ...” [Own emphasis]

25. The provisions of **section 5(1) of the Law of Succession Act** stipulate that any person who is of sound mind and is not a minor may dispose of all or

any of his free property by will. See **In Re Estate of G.K.K (Deceased) 2013 eKLR**

26. The relevant Section of the Law is *section 9 of the Law of Succession Act* which provides that: -

9 (1) No oral will shall be valid unless:

(a) It is made before two or more competent witnesses and

(b) The testator dies within a period of three months from the date of making the will.”

27. While contemplating the requirements of a valid oral will, Musyoka J in **re Estate of Evanson Mbugua Thong’ote (Deceased) Succession Cause 2519 of 1998 [2016] eKLR** stated that *“An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will.”* The Honourable judge continued *“... The other consideration is that the utterance ought to be made in the presence of two or more persons”*.
28. In **Re Rufus Ngethe Munyua (deceased) Public Trustee v Wambui (1977) KLR 137** and **Beth Wambui and Another v Gikonyo and others (1988)**

KLR 445, the courts instances held, *inter alia*, that if the witnesses present during the making of an oral will make a record of the terms of the oral will, so long as it meets the requirements of **Section 9**, of being made in the presence of two or more competent witnesses and the maker dies within three months, then that oral will would be considered valid.

29. The totality of evidence presented by the respondent herein does not prove the existence of an oral will made by the deceased prior to his deceased. There is no evidence on when, where before whom the alleged will was made. Further, the existence of the alleged other properties of the deceased which were allegedly willed to his siblings by the deceased was not established.
30. Accordingly, the suit property herein, **Kisumu/Marera/964**, constituted the entirety of the deceased's estate and was open to distribution to the deceased's beneficiaries.
31. As to the status of the applicant, it is not in doubt that he is a grandson of the deceased. At the time of the deceased's death, the applicant's father was still alive and only passed away on the **4/2/1991**, almost 5 years after the deceased's passing. The respondent subsequently applied for and was issued with Grant of Letters of Administration on the **30/5/1995** and confirmed on the **5/12/2007**.

32. As properly held by J. Musyoka in Nairobi, **In the matter of the estate of Veronica Njoki Wakago, Succession cause No.1974/2008**, grandchildren can inherit from their grandparents, indirectly through their own parents. The applicant and his siblings thus would not have inherited from their grandfather if the mother and father were alive. The judge stated as follows:

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“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July, 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents. In this case, the applicant’s mother survived the deceased. She is the one entitled under Part V to inherit her mother, the applicant’s deceased grandmother. The applicant clearly has no claim under Part V so long as his mother survived the deceased.”

33. Accordingly, in this case, the applicant and his siblings can inherit directly from the deceased's estate because their parents are deceased. It is therefore clear that the respondent ignored the applicant and his siblings in commencing and sustaining succession proceedings.
34. The consequence of the foregoing is that the respondent, participated in fraudulent concealment. The grant was obtained by untrue allegations and fraudulently.
35. What about the issue raised by the respondent that the instant summons has been defeated by laches due to the gap in instituting the current application? *Section 76 of the Law of Succession Act* does not impose any limitation of time within which an application for revocation of grant ought to be filed. Abiding by the respondent's assertion that the instant Summons is defeated by laches would leave the court in a precarious position whereby the court upholds an illegal proceeding and sanctifies a fraud.
36. The upshot of the above is that the Grant of Letters of Administration issued on the **30/5/1995** and confirmed on the **5/12/2007** cannot be sustained and is hereby revoked. Therefore, the registrar of lands is hereby directed to cancel all entries made in the register of parcel number **Kisumu/Marera/964** and the same to revert in the deceased's name. Let the parties apply for a fresh grant in the normal manner.

It is hereby so ordered.

DATED and **DELIVERED** at Kisumu this 30th day of **April, 2026**.

A. MABEYA, FCI Arb

JUDGE