

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

SUCCESSION APPEAL NO. E044 OF 2021

IN THE MATTER OF THE ESTATE OF KIPCHULBEI ARAP

YOSEI (DECEASED)

BETWEEN

JULIUS ROTICH..... 1ST APPELLANT

**BENARD KIPKOECH ROTICH 2ND
APPELLANT**

VERSUS

JOHNSTONE KIMUTAI MIBEI RESPONDENT

(Being an Appeal from the Ruling dated 16th November 2021 of Senior Resident Magistrate, Omwange J. at the Magistrate's Court at Sotik, Succession Cause Number 48 of 2019)

J U D G M E N T

1. In this matter, the Grant of Letters of Administration Ad Litem was issued to Johnstone Kimutai Mibeu (then

Petitioner) on 15th January 2021. The Appellants (then Objectors) filed an Application for revocation of the Grant of Letters of Administration Ad Litem. In a Ruling dated 16th November 2021, the trial court dismissed the Application.

2. Being aggrieved with the Ruling of the trial court, the Appellants filed their Memorandum of Appeal dated 10th December 2021 in which they wanted the impugned Ruling set aside.

3. My work as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused in the Court of Appeal case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)**.

4. I shall briefly summarize the parties' cases in the trial court and their respective submissions in the present Appeal in the succeeding paragraphs.

The Appellants'/Objectors' case.

5. The Appellants stated that they were the only sons of the deceased and that the Respondent was a stranger to the deceased's estate. That the Grant Ad Litem was obtained fraudulently as the Respondent concealed material facts from the court while obtaining it. The Appellants further stated that the contents of the Introduction Letter by the Chief were false.

6. It was the Appellants' case that the Respondent had not filed a Citation to cite the beneficiaries of the deceased's estate hence he could not purport to be a beneficiary. That they were apprehensive that the Respondent may intermeddle with the deceased's estate and expose it to unnecessary costs and litigation.

7. Through their written submissions dated 29th August 2025, the Appellants submitted that the failure to file a Record of Appeal did not make the Appeal null and void. That the Record of Appeal was a creature of the Court of Appeal. They relied on **Order 42 Rule 1, 13 of the Civil Procedure Rules, Rule 84 of the Court of Appeal Rules, Kodienny v Kananu (Civil Appeal 164 of 2019) [2023] KEHC 27596 (KLR) (24 November 2023) (Ruling) et.al.** The Appellants further submitted that once a Decree of a Judgement had been filed as required by **section 79 of the Civil Procedure Act**, then the Appeal was ready for hearing.

8. It was the Appellants' submission that the trial court failed to address the key issue of *locus standi*. That the Respondent was not a beneficiary of the deceased's estate. It was the Appellants' further submission that **section 66 of the Law of Succession Act** provided the list of preference of people to administer a deceased's estate and that the Respondent

was not a beneficiary. They relied on **section 29 of the Law of Succession Act, re Estate of George Murithi Gitahi (Deceased) (2019) eKLR** and **re Estate of Festo Akwera Kusebe (Deceased) (2019) eKLR**.

9. The Appellants submitted that the Respondent was neither a spouse or child of the deceased and further that the Respondent did not seek consent from the Appellants when taking out the Grant Ad Litem yet they had preference over the Respondent. That they had proved that the Respondent lacked *locus standi* to take out the Grant Ad Litem. The Appellants further submitted that they had met the grounds required to revoke the Grant Ad Litem.

10. It was the Appellants' submission that the Respondent acquired the introductory letter pursuant to a court order and that the contents contained in the letter were false. That paternity was a question of fact that had to be established through proper evidence and not through the Chief's letter. It

was the Appellants' further submission that the impugned Ruling should be set aside.

The Respondent's/Petitioner's case

11. Through a Replying Affidavit dated 16th June 2021, the Respondent stated that he was the deceased's son and was issued with an introductory letter by the Chief which indicated that he was the deceased's son. The Respondent further stated that the Grant he obtained was for the purpose of filing a suit hence there was no Grant to be revoked.

12. Through his written submissions dated 24th October 2025, the Respondent submitted that the Appeal was defective for not following the provisions of **Order 42 Rule 13 of the Civil Procedure Rules** which were mandatory.

13. It was the Respondent's submission that he was the deceased's eldest son from the 1st house and the Appellants were his brothers from the 2nd house. That he produced the

Chief's letter as proof. It was the Respondent's further submission that the Appellants also produced the same letter as evidence and this gave credence to the fact that he was the deceased's son.

14. The Respondent submitted that **section 66 of the Law of Succession Act** provided a general guide on who was to take out a Grant of representation. That in the present case, there was no spouse of the deceased and thus the beneficiaries had equal rights to take out the Grant. The Respondent further submitted that taking out of the Grant Ad Litem did not require the consent of other family members and further that Grant Ad Litem did not fall under **sections 51 and 76 of the Law of Succession Act.**

15. It was the Respondent's submission that the Appellants failed to prove that he was not the deceased's son. That this court should rely on the evidence produced.

16. I have gone through and carefully considered the trial court Record; the Record of Appeal and the respective parties' written submissions. Two issues arise for my determination: -

- i) Whether the Appeal should be struck out for want of filing a Record of Appeal
- ii) Whether the Grant Ad Litem issued on 15th January 2021 should be revoked.

(i) Whether the Appeal should be struck out for want of filing a Record of Appeal

17. It was the Respondent's case that the Appeal should be struck out for want of the Appellants filing a Record of Appeal, a position that the Appellants challenged. The Appellants were of the view that the Record of Appeal was a creature of the Court of Appeal and was not strictly applied in Appeals emanating from the lower court to the High Court.

18. **Order 42 Rule 13(4) of the Civil Procedure Rules** provided as follows: -

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

- (a) the memorandum of appeal;**
- (b) the pleadings;**
- (c) the notes of the trial magistrate made at the hearing;**
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**

Provided that—

- (i) a translation into English shall be provided of any document not in that language;**
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).**

19. I have gone through the court record and note that the existence of a Memorandum of Appeal dated 10th December 2021 that was filed on 20th December 2021 and which is the basis of this Judgement. While I appreciate the contents of **Order 42 Rule 13(4) of the Civil Procedure Rules**, I am cognizant of **Article 159 (2) (d) of the Constitution of Kenya** which provides for administration of justice without undue regard to technicalities. In light of the above, I am of the view that the lower court file which this court possessed was sufficient enough for this court to proceed with the Appeal. The main document in this instance and as stated

above was the Memorandum of Appeal which contained the grounds of Appeal the Appellants relied on.

20. I note that despite the Respondent asking for the Appeal to be dismissed for lack of a Record of Appeal, he went ahead and elaborately submitted against the grounds contained in the Memorandum of Appeal. The aim of courts is always and at all times deliver substantive justice. Dismissing this Appeal because of a lack of the Record of Appeal in the Record of Appeal would be draconian.

21. It is my finding therefore that the Appeal is competent for determination.

(ii) Whether the Grant Ad Litem issued on 15th January 2021 should be revoked.

22. The law on revocation of Grants is provided for in **Section 76 of the Law of Succession Act** which states that: -

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.

23. In the present case, the Appellants anchored their prayer for revocation on the issue of *locus standi*. The Appellants stated that the Respondent was not the son of the deceased and hence a stranger to the deceased's estate. From the

onset, the Appellants bore the burden **Section 107 of the Evidence Act** describes the burden of proof as follows: -

(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. I have keenly gone through the record and I must agree with the trial court. The Appellants did not lead or produce any evidence to buttress their claim. The Respondent while obtaining the Grant Ad Litem produced a Chief's Letter dated 24th November 2020 which indicated that the Respondent was the deceased's son from the 1st household while the Appellants were the deceased's sons from the 2nd household. The Appellants stated and submitted at length at how the Respondent was a stranger to the deceased's estate but

crucially failed to prove it. It is salient to note that a court is guided by evidence adduced before it and that is the bedrock of any decision it makes. In the present case, there was no evidence indicating that the Respondent was a stranger to the deceased's estate.

25. I also agree with the trial court's findings that the Appellants and the Respondent had equal priority in taking out the Grant Ad Litem and there was no legal requirement for the Respondent to cite the Appellants.
26. Flowing from the above, it is my finding that the Appellants failed to discharge their burden of proof. They did not meet the requirements of revocation as captured in **section 76 of the Law of Succession Act**. The final analysis is that I uphold the trial court's Ruling dated 16th November 2021.
27. In the end, the Appeal dated 10th December 2021 has no merit and is dismissed. Each Party to bear its own costs.

**Judgment delivered, dated and signed at Bomet
this 6th Day of May, 2026.**

.....
HON. JULIUS K. NG'ARNG'AR
JUDGE

**Judgment Delivered in the presence of;
Susan/Siele Court Assistant
Miruka for the Respondent
Owich for Moses Kurgat for the Appellants**