

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**HIGH COURT FAMILY CIVIL APPEAL NO. E013**  
**OF 2024**

**PAUL ONYANGO**  
**OMBONYA.....APPELLANT**

**VERSUS**

**JUDITH OTIENO**  
**WAJEW.....RESPONDENT**

*(Being an appeal from the ruling of Hon L. Simiyu (SPM) in Siaya CMC Succession Cause No. E080 of 2019 dated 11<sup>th</sup> September 2024)*

**BETWEEN**

**PAUL ONYANGO**  
**OMBONYA.....OBJECTOR/APPLICANT**

**VERSUS**

**JUDITH OTIENO**  
**WAJEW.....PETITIONER/RESPONDENT**

## **JUDGEMENT**

1. The appeal arises from the ruling of Hon L. Simiyu (SPM) in Siaya CMC Succession Cause No. E080 OF 2019 dated 11/9/2024 wherein she dismissed the Appellant's summons for revocation of grant dated 27/3/2024.
2. The Appellant was aggrieved by the aforesaid ruling and filed his Memorandum of Appeal dated 3/10/2024, wherein he raised the following grounds of appeal:

(i) That the learned trial magistrate misdirected herself in failing to make a finding that the Respondent had obtained letters of administration intestate by making false statement and material non disclosure to the court of material facts and omissions.

(ii) That the learned trial magistrate erred in law and fact by failing to find that the Certificate of confirmation of grant for the estate of Oneya (deceased) were issued in clear violation of procedural rules, rendering it legally defective.

(iii) That the learned trial magistrate erred in law and fact by failing to appreciate that the Appellant was entitled to inherit his deceased parent's share of his grandfather's estate through the doctrine of representation.

(iv) That the learned trial magistrate failed to address the disposal by way of sale of East Gem/Nyaminia/224 by the Respondent to the exclusion of other lawful beneficiaries' interests, constituting a grave miscarriage of justice.

(v) That the learned trial magistrate erred by acting on wrong principles and misdirected herself in considering irrelevant issues by finding that the Appellant's cousin Anne Marcella Omolo was awarded a share of the deceased's estate on behalf of the Appellant.

(vi) That the learned trial magistrate erred by failing to consider the Appellant's submissions and established legal precedents, which could have led to a different outcome and prevented the Appellant and other beneficiaries from getting justice.

(vii) That the judgement was against the weight of the evidence.

The Appellant therefore prayed that the ruling of the trial court be set aside and substituted with an order revoking the letters of administration as well as the certificate of confirmation of grant and further that the costs of the appeal be awarded to the Appellant.

- 3.** This being the first appellate court, its duty is to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis and to arrive at its own conclusion as to whether or not to uphold the decision of the trial court. This court must also take into account the fact that it neither saw nor heard the witnesses as they testified

and must therefore make due allowance for that. See **Selle Vs Associated Motor Boat Co. Ltd [1968] EA 123.**

4. The lower court record shows that the Appellant had filed an application dated 27/3/2024 seeking for two orders, firstly, an order restraining the Respondent from transferring, alienating, charging and or dealing with the deceased's land parcel number East Gem/Nyaminia/224 and secondly, that the grant issued to the Respondent on 19/4/2023 be revoked. The Appellant's gravamen was inter alia; that the grant was obtained fraudulently by making of a false statement and concealment of material facts; that the grant was obtained by material non-disclosure and use of untrue allegation of fact essential in point of law to justify the grant; that the deceased left behind four widows who are all deceased and 19 children; that the Respondent omitted several beneficiaries and that she went ahead to seek for confirmation of grant where she excluded the Appellant and other beneficiaries in the distribution of the estate of the deceased.
5. The Respondent filed a replying affidavit sworn on 1/6/2024 wherein she averred inter alia; that all the procedures were followed in filing the succession cause and that all immediate and direct beneficiaries were listed and provided for, including the Objector; that the Objector was well informed of all the stages; that the deceased was survived by four wives and thus the estate was to be divided into four units; that the beneficiaries listed by the Objector and Petitioner are similar to those listed in the chief's letter; that all the beneficiaries were informed of the court process; that the administration of the estate is at an advanced stage and about to come to conclusion; that the application is an afterthought by the Objector who had been aware of the matter all along; that the request for revocation of grant has not met the threshold and should be rejected.
6. The learned trial magistrate considered the matter and came up with the impugned ruling.

7. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
8. Vide submissions dated 23/1/2026, learned counsel for the Appellant submitted that the Appellant did demonstrate a case of material non-disclosure as a ground for revocation of the grant as stipulated under section 76(a), (b), and (c) of the Law of Succession Act. Learned counsel went ahead to cite the provisions of section 76 of the said Act as follows:

*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 to diligently with the administration of the estate, or (iii) to produce to court, within the time prescribed, and any such inventory or account of administration as is required by the provisions of paragraphs (e ) and (g) of section 83 or has provided any such inventory or account which is false in any material particular, or (e) that the grant has become useless and imperative through subsequent circumstances.”*

9. It was also submitted that the Appellant is a grandson of the deceased just like the Respondent herein and that both of them rank equally in priority in taking out a grant in the estate of the deceased and further that the 2<sup>nd</sup> house was not included in the distribution. It was therefore submitted that the acts or omissions of the Respondent match with the circumstances described under section 76 of the Act and that this court should proceed to set aside the impugned ruling. Reliance was placed in the case of *In Re Estate of Moses Wachira Kimotho (Deceased)* [2009] KEHC 3958 (KLR) where the court pointed out the importance of disclosing all material facts before a court of law while seeking for letters of grant of administration and confirmation thereof as follows:

*"I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further, had the Respondents been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interests in the estate of the deceased. As it is therefore, the grant was obtained fraudulently by the making of a false statement and or concealment from court of something material to the cause. The Respondent knew of the applicants interest to the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant.*

10. Vide submissions dated 9/3/2026, the Respondent started off by submitting that a cursory reading of the Appellant's Memorandum of Appeal leads to the conclusion that the Appellant is challenging the aforementioned decision of the trial court ostensibly on grounds of non-disclosure. It then follows that the

attempt by the Appellant to challenge the ruling of the trial court delivered on the 11/9/2024 and faulting the trial court on the same while not demonstrating any material wrongdoing on the part of the Respondent regards to the grounds of revocation of the grant is a misadventure, an afterthought and in equal vein lacking in merit, irregular and incurably hopeless hence the same must not be entertained by this Honorable Court.

It was submitted that section 76 of the Law of Succession Act gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It 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) .....

Reliance was placed in the **Matter of the Estate of L.A.K. (Deceased) [2014] eKLR** in which the Court had this to say in regard to revocation of grants:

"Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was

obtained by an untrue allegation of a fact essential in point of law."

Similarly, in **Jamleck Maina Njoroge V Mary Wanjiru Mwangi (2015) eKLR** the court discussed circumstances when a grant can be revoked. The court observed that:

"The circumstances that can lead to the revocation of a grant have been set out in Section 76 of the Law of Succession Act. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law."

11. The Respondent pointed out that in his application, to which the ruling is the subject of this appeal, the appellant contended that the Petitioner/Respondent had omitted and left out many beneficiaries of the deceased's estate, hence the same amounted to material non-disclosure. She submits that the circumstances in the instant case do not fall within the operation of section 76 of the Law of Succession Act and that the trial court correctly found as such. It is worth noting that the trial court while addressing this issue, correctly found that failing to name the beneficiaries did not mean that they were excluded and or their rights were extinguished and further added that as long as the portion that was due to his father/mother from the distinct household/unit was guaranteed under the representative of the household as was in this case, then the same was not detrimental to the appellant. In fact, the trial court went ahead to include the appellant's name in the title of the portion that was falling within his parents' household/unit.

To fortify the position of the trial court, reliance was placed in the case of Albert Imbuga Kisigwa VS Recho Kawai Kisigwa,

Succession Cause No. 15 8 of 2000, where Mwita J (as he then was) stated:

"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 wrongdoing 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."

12. Governed by the said authority, it was submitted that the court was properly guided and in essence, weighed against the repercussions of revoking the grant against its dismissal in the circumstance. It is worth noting that at the time of the application to ruling is subject of the instant appeal, the property was already administered, and in fact the Appellant had already taken his portion and disposed of the same. It was submitted that the learned trial Magistrate properly directed herself in law and fact in making the foregoing findings and orders. It was therefore submitted that there was no wrongdoing on the part of the trial court to warrant this Honourable Court setting aside the decision of the trial court which was well reasoned and based on the law. It was finally submitted that the instant appeal is without merit and is an afterthought simply actuated by greed grounded on male chauvinism, as the appellant strongly feels that since the Respondent's household only comprises female beneficiaries who should not inherit, and that their share should simply go to the appellant. The Respondent urged this court to dismiss the appeal with costs.

13. I have considered the record of appeal and the rival submissions. I find the issue for determination is whether the appeal has merit.

14. It is noted that the Appellant's application dated 27/3/2024 had sought for a prayer for revocation of the grant that had been

issued to the Respondent on the ground that the Respondent had failed to give the succession court the correct information and further concealed material facts from the said court. It was the Appellant's contention that he is a grandson of the deceased, just like the Respondent, and thus ranked in equal priority with the Respondent regarding the right to apply for letters of grant in the estate of the deceased. It was therefore the Appellant's view that the failure by the Respondent to include him and other beneficiaries warranted revocation of the grant. The Respondent on her part vehemently opposed the application and maintained that the Appellant's name had already been included in Form P & A 5 and was later invited to attend the court proceedings but failed to participate, and that he lost nothing since his share is catered for under the 1<sup>st</sup> house, which has been left in the name of Marcela Odhiambo Omolo. The trial court later directed the parties to canvass the application dated 27/3/2024 by way of oral submissions and thereafter came up with the impugned ruling dated 11/9/2024.

15. Revocation of grants is provided for under section 76 of the Law of Succession as follows:

**“ 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 to diligently with the administration of the estate, or (iii) to produce to court, within the time prescribed, and any such inventory or account of administration as is required by the provisions of paragraphs (e ) and (g) of section 83 or has provided any such inventory or account which is false in any material particular, or (e) that the grant has become useless and imperative through subsequent circumstances.”**

**16.** In the case of **Albert Imbuga Kisigwa VS Recho Kawai Kisigwa**, Succession Cause No. 15 8 of 2000, where Mwita J (as he then was) stated:

**"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 wrongdoing 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."**

Again, in the case of **In Re Estate of Moses Wachira Kimotho (Deceased) [2009] KEHC 3958 (KLR)** the court pointed out the importance of disclosing all material facts before a court of law while seeking for letters of grant of administration and confirmation thereof as follows:

**"I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further, had the Respondents been forthright and candid and included the applicants as beneficiaries of a portion of**

**the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interests in the estate of the deceased. As it is therefore, the grant was obtained fraudulently by the making of a false statement and or concealment from court of something material to the cause. The Respondent knew of the applicant's interest to the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant."**

17. I have gone through the lower court record and note that the Respondent had indicated the names of the family members vide the requisite Form P & A 5 and which indicated the names of the children of the deceased from the four houses. Again, the chief's introductory letter dated 10/2/2022 listed all the 19 children of the deceased and that the family resolved to allow the Respondent herein to proceed and take out letters of grant of administration intestate. The summons for confirmation of grant dated 14/11/2022 has listed the Appellant as one of the beneficiaries as a grandson from the 1<sup>st</sup> house and that the consent to distribution was signed by 13 out of 18 beneficiaries and that the Appellant was one of those who did not sign from the 1<sup>st</sup> house while Anne Marcela Omolo also from the said house and who held the share in trust for their family duly signed it.

18. I have seen that the trial court distributed the sole property East Gem/Nyaminia/224 measuring 5.6 Ha between the four houses and that each took a share of  $\frac{1}{4}$  thereof. Looking at the large group of beneficiaries and the several houses of the deceased, I find that an equal distribution among the houses is quite appropriate and that the share of each house be held by one of the family members who will eventually arrange to transfer the same to those members. The Appellant's grouse is that he ought to be in the same rank as the Respondent and to administer the estate. Indeed, the family had already settled on

the Respondent to take out letters of grant and which she had duly performed. The Appellant had the opportunity to challenge the appointment of the Respondent as administrator by resorting to the provisions of section 71 of the Law of Succession Act. He did not do so and further failed to file a protest if any during the confirmation of grant proceedings. The fact that the Appellant's own family member Anne Marcela Omolo participated in the proceedings and agreed to hold in trust the share of the 1<sup>st</sup> house, leads me to come to the conclusion that the Appellant had been aware of the court proceedings. In any event, the share to the 1<sup>st</sup> house has not been snatched by the Respondent and that each house has to share the portion allocated to them through their representatives. Hence, I find that no prejudice was suffered by the Appellant. I am inclined to believe the Respondent's concerns that the Appellant and his group are opposed to her and other female family members on the basis that she and the others are female children who should not play any role let alone receiving land from the estate. One cannot see any problem suffered by the Appellant as their house has the quarter (1/4) share of the 5.6 Ha to share amongst themselves as there is no inequality whatsoever. Further, the Appellant's share is not extinguished in view of the fact that his father/mother's share is still intact and will be transferred by the family member who holds it in trust. The request for revocation of grant would not have served the interest of justice as it could have delayed the final distribution of the estate which was at an advanced stage and that it could have set the parties back in time. It is instructive that none of the family members supported the Appellant's lone ranger moves to destabilize the speedy distribution of the estate and hence I am persuaded that the Appellant's application had been filed in bad faith and meant to checkmate the Respondent regarding the estate of the deceased. Finally, it is noted from the trial court's order No. 3 that the Appellant's name was to be added to the title deed, resulting to the unit where he belongs to hold in trust for all descendants in that unit. The Appellant has silently kept quiet about this order granted by the trial court and which took care of

his concerns. The Appellant should cooperate with the Respondent in the finalization of the distribution of the estate so that the beneficiaries get their entitlement under the estate.

19. In view of the foregoing observations, it is my finding that the Appellant’s appeal lacks merit. The same is dismissed. Each party to bear their own costs.

**Dated and delivered at Siaya this 8<sup>th</sup> day of May 2026**

**D.KEMEI  
JUDGE**

**In the presence of:**

**M/s Wagumba for Odeny.....for Appellant**

**Judith Otieno Wajewa.....Respondent**

**M/s Mourine.....Court Assistant**