Awuor & another v Otieno (Civil Appeal 139 of 2020) [2025] KECA 920 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 920 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 139 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MAY 23, 2025

BETWEEN

CHARLES ONDIEK AWUOR .... 1ST APPELLANT

SOSPETER ONYANGO AWUOR .... 2ND APPELLANT

AND

JACOB ODHIAMBO OTIENO .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (Cherere, J) dated 27{{^th}} June, 2019 in HC Succession Cause No. 807 of 2004)

JUDGMENT

1. Inheritance and succession matters often present significant challenges in Kenya. Indeed, Succession disputes not only affect the right to property but also have a profound impact on familial relationships and social justice. Dealing with this succession cause reminds us of the writings of C.S. Lewis, in his book The Four Loves, where he said

> " Family quarrels have a total bitterness unmatched by others. Yet it sometimes happens that they also have a kind of tang, a pleasantness beneath the unpleasantness, derived from the very closeness of kinship,"

2. These disputes highlight the importance of clear legal frameworks and adherence to the provisions of the law especially *the Constitution* and the *Law of Succession Act* to ensure fair distribution of estates while respecting customary practices and the rights of all beneficiaries.

3. The appeal before us is against the judgment and decree rendered by Cherere, J in the High Court of Kenya in Kisumu on 27th June, 2019, in HC Succession Cause No. 807 of 2004. The cause concerned the estate of the late Ongweny Wayungu, ("the deceased") who passed on sometimes on 14th July,

1981. He left behind an estate consisting of Land Parcel Numbers Kisumu/Wangaya I/1954, Kisumu/Wangaya I/1957, and Kisumu/Wangaya I/2555.

4. Following the demise, a grant of letters of administration were issued on 3rd July, 2012 jointly to Charles Ondiek Awuor And Sospeter Onyango Awuor ("the appellants"). On 14th April, 2015, the grant was confirmed to the parties. However, the distribution was contested which led to the filing of the application for the revocation of the grant by Jacob Odhiambo Otieno "the respondent" that culminated in the judgment, the subject of this appeal.

5. The application was dated 29th January, 2016 and was brought pursuant to Section 76 of the *Law of Succession Act*, seeking the revocation of the grant on the grounds that the appellants had disinherited the rightful heirs to the estate of the deceased. That the appellants misled the court by claiming that the deceased only had one wife and no children, while in reality, the deceased had three wives and children, among them the respondent.

6. However due to the respondent's failure to prosecute the application as required, the appellants through a notice of motion dated 16th June 2008, sought the dismissal of the application for want of prosecution. On 17th December 2012 Ali-Aroni J (as she then was) duly allowed the application. Accordingly, the application for the revocation of the grant was dismissed with costs to the appellants.

7. The order of dismissal notwithstanding, the cause somehow found its way back to the cause list before Cherere J. and proceeded to hearing by way of viva voce evidence

8. PW1, Pilista Otieno, testified that her claim to the deceased's estate arose from being the widow of the deceased's son, Cosmas Otieno Ongweny. She acknowledged that her mother-in-law, Ochina Kanga, was first married to one, Otieno Alando and later to the deceased, with whom she had sired two children, her deceased husband, and Monica Ombaye.

9. PW2, Jacob Odhiambo Otieno, son of PW1 testified that the deceased was his grandfather. He claimed that the appellants, who were sons of Joseph Awuor Nyakinda, resided on Land Parcel Kisumu/Wangaya I/2555, which was gifted to their father by the deceased. That the appellants were nephews to the deceased and the respondent being a grandson to the deceased is entitled to inherit the deceased's estate in priority to them.

10. The 1st appellant, on the other hand testified that the deceased and his wife, Hereniah, did not have children. That his father, Joseph Awuor Nyakinda, was the son of Oyondi, who was the deceased's brother, and had two wives. The children from the first wife included himself, Hereniah Awuor (deceased), Peter Awour, and Willis Awuor, while the children from the second wife, Pamela Awuor, included the 2nd appellant, Fredrick Awuor, and Diana Awuor (deceased). He further stated that Cosmas Otieno Ongweny was the son of Otieno Allando's wife, Ochina Kanga, and was not related to the deceased. He produced a sketch of the family trees for the deceased and Allando families.

11. DW2, Joseph Ogallo Ambira, chief of Nyang'oma Location, confirmed that the deceased and the parties involved hailed from his location. He confirmed that the appellants were sons of Joseph Awuor Nyakinda, son of Oyondi, who was the deceased's brother. He also testified that the deceased had inherited Ochina Kanga and from that union begot Cosmas Otieno Ongweny, the respondent's father.

12. In his submissions, the respondent contended that his father, Cosmas Otieno Ongweny, was the son of the deceased, born out of an inheritance union, and therefore a child of the deceased by virtue of Section 3(2) of the Act, making him a beneficiary of the deceased's estate. He argued that the appellants' proposition that a child born out of an inheritance union is not entitled to the estate of the man who inherits its mother under Luo Customary Law was repugnant to *the Constitution*, justice, and morality.

13. The appellants, in their submissions, argued that Cosmas Otieno Ongweny, the respondent's father, was not a biological son of the deceased, neither resided on the deceased's land, nor was he maintained by the deceased, and was therefore not a beneficiary of the deceased's estate.

14. Upon considering the evidence and submissions presented, the trial court in the end was satisfied that the grant was obtained fraudulently by making false statements and by concealing the existence of all the beneficiaries of the deceased's estate from the court which merited its revocation. The trial court accordingly revoked the grant confirmed. The 1st appellant and respondent were then appointed joint administrators of the estate and were, required to apply for confirmation of the grant within thirty (30) days.

15. Aggrieved by the judgment and decree, the appellants filed the instant appeal. In their memorandum of appeal dated 12th April, 2025, the appellants raised six grounds, to wit that the trial court erred both in law and fact when: it held that the appellants' father Cosmos Otieno Ongweny was the biological son and was entitled to benefit from the estate of the deceased; condemned the appellants to pay costs to the respondent; proceeding with a cause that had been dismissed for want of prosecution; it did not properly analyze the evidence on record and failed to consider the submissions and arguments of the appellants hence arriving at a wrong decision and lastly that the decision was against the weight of evidence.

16. When the appeal came up for hearing, Mr Omondi T., learned counsel, appeared for the appellants whilst Mr. Yogo, learned counsel, was present for the respondent. Upon the court inquiring whether the appellants were appealing against both the ruling and the judgment as per the intitlement record of appeal which speaks to both an appeal from the judgment dated 27th June 2019 and a ruling dated 21st November, 2019, Mr. Omondi T. informed the court that the ruling had been overtaken by events and they only preferred to pursue the appeal against the judgment and decree. Respective counsel opted to rely entirely on their filed written submissions and did not wish to orally highlight.

17. Counsel for the appellant emphasized that there was no evidence indicating that the late Cosmas Otieno had any relationship with the deceased. They asserted that Cosmas was the son of Otieno Allando, whose lineage belonged to the Nyokech clan, while the appellants were from the Bolo clan, which had no relation to the Nyokech clan. The family trees of Allando and Wayungu, as well as the parcels of land associated with each clan, were exhibited in evidence. Counsel submitted that the trial court incorrectly introduced the issue of inheritance when the respondent's father, Otieno Allando, had assumed responsibility for his children. He further argued that the deceased, had a wife, Herinia Agwa Ongweny, who did not bear any children, and that upon her death, the closest persons to inherit the deceased's estate were the appellants. Counsel maintained that there was no proof that the deceased had three wives, as claimed by the respondent. Counsel referred to Section 29 of the *Law of Succession Act*, which outlines different categories of dependents, emphasizing that only the wife/ wives and children of the deceased are out rightly entitled to the deceased's estate. All other relations must prove that they were being maintained by the deceased. The appellants cited the case of In re-Estate of M'Muthania Mwendwa (Deceased) (2016) eKLR, to drive the point home.

18. Furthermore, counsel accused the respondent of being an intermeddler, citing the case of Gladys Nkirote M'itunga v Julius Majau M'itunga [2016] eKLR to support their argument. Counsel also submitted that the application for the revocation of the grant had been dismissed by Aroni J. on 17th December, 2010, for want of prosecution and no application for reinstatement by the respondent had been made nor prosecuted. In the premises, the subsequent proceedings based on the said application were a nullity. On the aforesaid arguments, counsel urged this Court to allow the appeal in its entirety.

19. Counsel for the respondent in opposing the appeal, flagged two issues for determination whether: the respondent's father, Cosmas Otieno Ongweny, was a biological son of the deceased and therefore entitled to benefit from the estate of the deceased; and whether the Grant of Letters of Administration of the estate of the deceased issued to the appellants was obtained through concealment of material facts.

20. On the first issue, counsel submitted that the High Court was right to hold that Cosmas Otieno Ongweny was a biological son of the deceased. He referred to Section 3(2) of the *Law of Succession Act*, which defines a child to include any child whom a person had expressly recognized or accepted as his own. He further cited Section 29(a) of the *Law of Succession Act*, which describes children of the deceased as dependants irrespective of whether they were maintained by the deceased prior to death or not. It was submitted that the respondent gave oral evidence corroborated by his mother, which established that Cosmas Otieno Ongweny was a biological child of the deceased. He also relied on the case of Ngengi Muigai & another v Peter Nyoike Muigai & 4 others (2018) eKLR, to assert that Cosmas Otieno Ongweny did not need to prove dependency.

21. On the second issue, counsel argued that the Grant of Letters of Administration was obtained fraudulently by the appellants through concealment of material facts. He referred to Section 76 of the *Law of Succession Act*, which allows for the revocation of a grant obtained by fraudulent means or concealment of material facts. It was the respondent's case that the appellants misled the court by claiming that the deceased only had one wife and no children, while in reality, the deceased had three wives and children. Counsel relied on the cases of Sophia Salim Gathaka & Another v Mbuve Abdalla & Others (2016) eKLR and Samuel Wafula Masike v Hudson Siniyu Wafula (*CA No. 161 of 1993*), which emphasized that a grant obtained through falsehoods and without the consent of rightful beneficiaries warrants revocation.

22. Counsel concluded by urging the court to dismiss the appeal with costs and uphold the judgment and decree pronounced by the trial court which was sound.

23. We have considered the record of appeal, the respective submissions, authorities cited and the applicable law. This being a first appeal, the jurisdiction of this Court is to re-evaluate and subject the evidence tendered in the trial court to afresh and exhaustive analysis so as to reach an independent conclusion. In doing so, the court should no doubt appreciate the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore make due allowance for the same. (See Peters v Sunday Post Ltd [1958] EA 424, Selle vs Associated Motor Boat Co. [1968] EA 123 and Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR).

24. That said, the issues that we discern for our consideration are whether the subsequent proceedings following the dismissal of the objection proceedings for want of prosecution were a nullity; whether the trial court erred in holding that Cosmas Otieno Ongweny was the biological son entitled to the estate of the deceased; and whether the trial court properly analyzed the evidence and submissions of the appellants.

25. On the first issue, the appellants claimed that the application for revocation of the grant had earlier been dismissed by Aroni, J. on 17th December 2010, for want of prosecution. That this order of dismissal was never reviewed nor set aside. Accordingly, the subsequent hearing and determination of the application was a nullity in the absence of an order of reinstatement. We note that the respondent skirted around the issue. He did not at all respond to the issue in his written submissions. As this was a serious issue going to the jurisdiction of the trial court, one would surely have expected some sought of response. In the absence of such response, it can only be taken that the assertion is true. Indeed, our own perusal of the record confirms that by a notice of motion dated 16th June 2008, the appellants sought the dismissal

of the application for the revocation of the grant filed by the respondent. The application came for interpartes hearing before Ali-Aroni J. on 17th December 2012 and it was allowed.

26. There is no evidence that the order of dismissal was ever vacated, reviewed or set aside. In other words, there was no order of the court reinstating the application for revocation of the grant. In the absence of an order of reinstatement, there was no valid application for the revocation of the grant alive that could subsequently be considered by the court. In our view, a dismissal order for want of prosecution effectively ends a lawsuit or appeal because of the inaction by the party responsible for its progress. This means that the court has dismissed the case due to lack of activity, often a prolonged delay in advancing the case. The effect of this order is to close the case, preventing further proceedings unless reinstated by the court. As already stated, in the absence of an order of reinstatement of the application, subsequent proceedings over the same by the trial court were a nullity. This conclusion effectively determines this appeal and there is no need to consider the other issues framed for determination.

27. Consequently, the appeal is allowed. The judgment and decree of the trial court is set aside and substituted with the order declaring subsequent proceedings following the dismissal of the application for the revocation of the grant for want of prosecution a nullity. Each party shall bear their own costs.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR