



REPUBLIC OF KENYA



**KENYA LAW**  
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**Olondo & another v Otieno (Civil Appeal 97 of 2017)  
[2022] KECA 831 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 831 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 97 OF 2017  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
MAY 13, 2022**

**BETWEEN**

**MESHACK ONYANGO OLONDO ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH OKOTH ONYANGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SYPRINE AKOTH OTIENO ..... RESPONDENT**

*(Appeal from the ruling of the High Court of Kenya at Migori  
(Mrima, J.) dated 10th May, 2017 in Succession cause No. 307 of 2015)*

**JUDGMENT**

**JUDGMENT OF KIAGE, JA.**

1. By this appeal, the appellants, who were respondents in the High Court at Migori, challenge the ruling of Mrima, J. by which the learned Judge revoked the grant of Letters of Administration made to the 1<sup>st</sup> appellant in respect of the estate of Shadrack Opala Ojwando (deceased) and the resultant certificate of confirmation. The applicant, now the respondent, had sought a number of other orders including;
  2. That the Registration of Title No. Kamagambo/Kanyajuok/769 in the names of Respondents be revoked upon granting of the prayer 1 above herein;
  3. That there be an order of injunction restraining the respondents herein from intermeddling in any manner whether by sale, lease, mortgage, charge or in any manner detrimental or adverse to the interest of the applicant herein pending hearing and determination of the application herein;
2. The respondent complained in that application that the 1<sup>st</sup> appellant had fraudulently obtained the grant by making false statements and concealing from the court matters material to the case. Particulars



- of the alleged fraud as enumerated in a supporting affidavit sworn by the respondent were that the 1<sup>st</sup> appellant; forged an undated letter allegedly written by one Samwel Omulo Nyagaya, a retired assistant chief and therein that the deceased was survived by nobody, and that the deceased died in 1992 when the deceased had died on 26<sup>th</sup> January 1991. The respondent further averred that the 1<sup>st</sup> appellant misrepresented that he was a cousin to the deceased when he was not related to the deceased in any way, and alleged that the said retired assistant chief had no objection to him obtaining the grant, when that was not the case.
3. The 1<sup>st</sup> appellant filed a replying affidavit, sworn both on his behalf and that of the 2<sup>nd</sup> appellant, his son, in response. He admitted having petitioned for grant of Letters of Administration to the estate of the deceased but denied that it was fraudulent. He maintained that he was a cousin to the deceased, and disputed the claim that the respondent was married to a son of the deceased, contending that she was only a concubine. The 1<sup>st</sup> appellant further deposed that the subject property had been part of a dispute and in 1959, the dispute was resolved in favour of his father, upon which his father gave him the land.
  4. The application was heard by way of *viva voce* evidence. The learned Judge upon evaluating the matter, held that the grant as issued was a result of a flawed process and that the 1<sup>st</sup> appellant had intentionally made a false statement that he was a close cousin to the deceased. The court further found the 1<sup>st</sup> appellant culpable of concealing the fact that their claim to the land was based on fraud and not inheritance.
  5. That ruling aggrieved the appellants and after filing a notice of appeal they followed it up with a memorandum of appeal containing four grounds. However, during the hearing they abandoned two of those grounds. The appellants' remaining complaints are that the learned Judge erred in law and fact; *When he failed to appreciate that this was a land matter and not a succession matter per se, hence would have taken judicial notice to refer it before the Environment and Land Court for determination. By totally excluding the appellants interest on the parcel LR. No. Kamagambo/Kanyajuok/769, a land they had lived, cultivated for a period of over 40 years.*
  6. In consequence, the appellants prayed that the appeal be allowed and the learned Judge's ruling be set aside. They also sought costs.
  7. The parties filed written submissions which were highlighted by counsel at the hearing of the appeal. For the appellant, learned counsel Mr. Odero, faulted the learned Judge for cancelling registration of the suit parcel land LR No. Kamagambo/Kanjuok/769 in the appellants' name, claiming that the jurisdiction to adjudicate over issues of ownership of land lay in the Environment and Land Court. For this argument counsel relied on the decision by the learned Judge in *re Estate of Noreri Chacha(Deceased) [2020] eKLR*, which he cited extensively in his submissions.
  8. For the respondent, learned counsel Mr. Kisera started by pointing out that the appeal was riddled with a massive breach of the Court of Appeal Rules being; the notice of appeal was filed out of time without leave of Court and neither had it been served upon the respondent; the letter requesting for certified copies of proceedings, the record of appeal and the notice for case conference had never been served upon the respondent. Counsel assailed the appellants' contention that the trial court did not have jurisdiction to deal with the matter arguing that the suit land was part of the estate of the deceased person and the appellants having obtained title thereto by way of transmission, the trial court had jurisdiction in the matter. Moreover, it was submitted, the trial court's decision to revoke the grant of letters of administration was correct since proceedings before the trial court confirmed that the appellants were guilty of the three major grounds enumerated in section 76(a)(b) and (c) of the [Law of Succession Act](#) for revocation and/or annulment of grant.



9. Mr. Kisera contended that fraud was apparent as it emerged during proceedings that the introductory letter allegedly authored by the Assistant Chief, claiming that the 1<sup>st</sup> appellant was a cousin to the deceased, had been forged. He indicated that the 1<sup>st</sup> appellant was subsequently charged with the offence of fraud, and his acquittal in the criminal case does not sanitise and validate the said forged introductory letter, as the alleged author testified in court and disowned it. Further, it was submitted, the proceedings revealed that the appellants were not related to the deceased at all, while the respondent was the closest surviving relative of the deceased, being his daughter in law.
10. Counsel defended the learned Judge's holding, positing that upon revoking the grant, the learned Judge rightly cancelled the registration of the suit land in favour of the appellants as the said registration was anchored on the certificate of confirmation of a grant which had been revoked. Ultimately counsel urged that we uphold the decision of the trial court and dismiss the appeal with costs.
11. In this appeal, what is being challenged is the exercise of discretion by the learned Judge. As an appellate court, we are extremely slow to interfere with a first instance court's decision that lies in its discretion, and it matters not that had we been dealing with the matter ourselves, we might have arrived at a different decision. This was well-expressed by Madan, JA. (as he then was) in *United India Insurance Company Limited -vs- East African Underwriters (Kenya) Limited [1985] EA 898* thus;
- "The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."
- See also *Mbogo-vs- Shah[1968] EA 93*.
12. Before I delve into the merits of this matter, I note the respondent's objection to the appeal for being in clear breach of this Court's Rules. Although the appellants did not respond to this protest, for one, I observe that while the ruling was delivered on 10<sup>th</sup> May 2017, the notice of appeal was lodged on 30<sup>th</sup> June 2017 almost 50 days later, contrary to Rule 75(2) of this Court's Rules. Nonetheless, I also note that in the face of such breach, the respondent did not approach this Court for the appropriate remedy as stipulated under Rule 84 of the Court of Appeal Rules. The Rule expressly states;
- "84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time".
13. As we were not so moved, I say no more on the respondent's objection which comes too late in the day when the appeal sought to be impugned is at the hearing stage.
14. The appellants claim that the learned Judge was bereft of jurisdiction in handling the matter because this was not a succession matter *per se* but a dispute over ownership of land which the learned Judge ought to have referred to the Environment and Land Court. From my perusal of the record, however, and as admitted by the 1<sup>st</sup> appellant, the grant of letters of administration over the deceased's estate was at the instance of the 1<sup>st</sup> appellant, and subsequently the suit land was registered in the names of the appellants. It is this grant of letters of administration and the resultant registration that the respondent



sought to revoke/cancel at the trial court, and which orders she was granted. The learned Judge upon evaluating the matter, found that the appellants were not in the line of consanguinity in respect of the deceased, and as such they could not inherit from his estate. The learned Judge further observed;

"It is on the foregone basis that this Court finds that the defendants' involvement in the affairs of the estate of the deceased, in the manner they did, is wanting in law. On realising that 'their' land had been irregularly allocated to the deceased who had long died, the defendants ought to have taken out citation proceedings against any of the family members or relatives of the deceased and thereafter appropriately pursue their claim. Engaging in acts leading to fabricating evidence can only be deemed as highly contrary to law and as such any resultant proceeds of such a process have no legal leg to stand on and must fall".

15. While stating the foregoing, the learned Judge also advised that the claim on ownership of the suit land could be pursued in another forum.
16. I find the learned Judge's holding to be proper. He addressed himself properly on the law and took into account all relevant factors in exercising his discretion. Ultimately, I do not think that the learned Judge committed any error of principle, misdirected himself or was otherwise plainly wrong so as to entitle me to interfere with his exercise of discretion. He arrived at the only decision that accords with justice and good conscience in the circumstances.
17. In consequence, this appeal is devoid of merit and I would dismiss it with costs.
18. As Mumbi Ngugi and Tuiyott, JJA agree, it is so ordered.

**JUDGMENT OF MUMBI NGUGI, JA.**

I have had the advantage of reading in draft the judgment of my learned brother Kiage, JA with which I am in full agreement.

**JUDGMENT OF TUIYOTT, JA.**

I have had the advantage of reading in draft the judgment of my learned brother Kiage, JA with which I am in full agreement.

**DATED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF MAY, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

*I confirm that this is a true copy of the original.*

*Signed*



**DEPUTY REGISTRAR**

