



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Joanes Obiero Agalo (Deceased) (Succession Cause
707 of 2009) [2025] KEHC 2527 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 707 OF 2009
MS SHARIFF, J
FEBRUARY 27, 2025
IN THE MATTER OF THE ESTATE OF JOANES OBIERO AGALO (DECEASED)**

BETWEEN

MESHACK AMOLO OSEGE PETITIONER

AND

HANNINGTON OLILO ODARI OBJECTOR

RULING

1. The Notice of Motion application dated 19th November 2021, and filed on 22nd November 2021, brought under Sections 48 & 73 of the *Law of Succession Act* and Rules 44 (1) & 73 of the *Probate and Administration Rules* seek preservative orders:
 - a. Be issued against the Petitioner herein, his family members, agents, employees and/or all other persons claiming to act under his instructions, direction and/or orders from intermeddling, interfering with, destroying, wasting away and/or dealing in land parcel Kisumu/Kanyawegi/429.
 - b. Be issued against the Petitioner and the Land Registrar Kisumu County restricting any other and/or further dealings affecting the registration of the title to the said land parcel Kisumu/Kanyawegi/429.
 - c. That the Grant of Probate or Letters of Administration made or issued to the Meshack Amolo Osege on 19th February 2010 and confirmed on 4th March 2011 be revoked.
2. The application was premised on the grounds on the face of it and the Supporting Affidavit sworn by the Hannington Olilo Odari, the Objector herein, on 19th November 2021. He avers that he is the brother to the deceased herein who died intestate without a wife and children and he was the original owner of land parcel Kisumu/Kanyawegi/429. He deposed that the Petitioner herein proceeded to



Court to obtain Grant of Letters of Administration by making false allegations and without the consent of the family members and on obtaining the Confirmed Grant he proceeded to transfer the whole parcel of land to himself. He deposed that the Petitioner herein is no relative of the deceased and that he lied when he described himself as his son.

3. In opposition to the application, the Petitioner filed a Replying Affidavit sworn on 6th April 2022, in which he avers that the deceased herein died on 11th October 1990 and that Pius Ogola Ndong'a and Paulo Okelo Agalo, who are brothers, on 20th January 2003, sold to him L.R. NO. Kisumu/Kanyawegi/429 at an agreed price of Kshs. 13,000.00/= as per the availed sale agreement annexed and marked as MA0-3. He deposed that upon acquisition of proprietary interests in L.R. No. Kisumu/Kanyawegi/429, he took over actual and physical possession of the parcel of land and have been working on it to date.
4. He deposed that to his knowledge Pius Ogola Ndong'a and Paulo Okelo Agalo sold him the parcel as only surviving persons in close consanguinity with the deceased and that he proceeded to petition for a Grant of Letters of Administration of the estate of the deceased with the full knowledge that there was no person falling under Section 39 of the *Law of Succession Act* available to petition the Court.
5. He deposed that the Objector herein has no direct blood relationship with the deceased herein and he is not qualified to be an administrator in his estate. He insisted that he has equitably and legally acquired L.R. NO. Kisumu/Kanyawegi/429.
6. On 13th September 2022, the Objector herein swore a Supplementary Affidavit wherein he avers that his late father was Elijah Odari who was the son of Agalo. According to him, his grandfather had 2 wives and he is from the 1st House while the deceased hailed from the 2nd house. He also avers that his grandfather had a step-brother who bore Paul Okello and Pius Ogola Ndong'a, and he was not aware of the sale of L.R. NO. Kisumu/Kanyawegi/429 at the price of Kshs. 13,000/= by Paul Okello and Pius Ogola Ndong'a to the petitioner.
7. He avers that the information provided by the Petitioner during the succession proceedings with regards to the estate of the deceased are false as he has no direct blood linkage to the deceased herein.
8. He avers that despite an existing order issued on 28th February 2022, by this Court, the Petitioner still continues to cultivate the suit land.
9. The application was heard by way of viva voce evidence based on the witness statements filed by the parties.

Objector's case

10. OB-PW1 was Hannington Olilo Odari, who is the Objector herein. He told the Court that he was given land parcel L.R. NO. Kisumu/Kanyawegi/429 by the deceased herein. According to him, he once sent his children to check on the land only for them to find one Amolo Paul, the father to the Petitioner herein, had transferred the title into his name only for him to warn him never to step his foot into that land.
11. On cross-examination, he told the Court that he went to Maseno Court and the area chief but he had no written document showing that the deceased gave him the land. He told the Court that the deceased only took him to the land and showed it to him indicating that he had given it to him. He confirmed that Paul Amolo Osege is the father of the Petitioner herein. He confirmed that he has seen the family tree chart and it showed he is related to the deceased unlike the Petitioner.



Petitioner's case

12. PET-PW1 was Meshack Amolo Osege, the Petitioner herein. He relied on his witness statement filed on 14th December 2022, and his list of documents annexed. At his request this Court adopted the same and marked the availed list of documents as OB-Exhibits 1-5 as his evidence in chief. According to him, the Objector has no right to inherit the land parcel L.R. NO. Kisumu/Kanyawegi/429 and that this Court ought to dismiss his objection.
13. On cross-examination, he told the Court that he effected the transfer of title as he had purchased land parcel L.R. NO. Kisumu/Kanyawegi/429 from the owner. He told the Court that the land belonged to the deceased but the same was sold to him by Pius Ogola Ndong'a and Paul Okello Agalo and he is entitled to a share of the same.
14. On cross-examination by the Court, he told the Court that he does not maintain the contents as contained in for P&A 5 as he is not the son of the deceased herein.
15. At the close of the Petitioner's case, only the Objector opted to file written submissions.

Analysis and determination.

16. After careful analysis of the Motion application, the response thereto, the oral testimonies of each party and the respective written submissions of the parties, the main issue for determination is whether the Objector has presented sufficient evidence to warrant revocation or annulment of the Grant and issuance of the preservative orders as prayed.
17. Properly, the application for revocation of a Grant should be by way of Summons for Revocation or annulment of Grant being Form 107 filed under Section 76 of the *Law of Succession Act* and rule 44 of the *Probate and Administration Rules*. Those provisions do not make room for the application being brought by way of a Notice of motion or Chamber Summons or any other form.
18. The filing of the summons in Form 107 is done together with the filing of a Supporting Affidavit in Form 14. After the Applicant has filed those two forms, the Registrar of the High Court issues Form 70 giving notice to the Applicant to attend Court in chambers for the giving of directions as to what persons, if any, should be served, by the Applicant, with a copy of the Summons for Revocation and of the Affidavit in Support and as to the manner of effecting service.
19. The persons who would be named to be served would include the deceased's personal representative, beneficiaries or other dependants/beneficiaries and any other persons who may be affected by the revocation of Grant.
20. In this matter before me, no Summons for Revocation in Form 107 supported by an Affidavit in Form 14 have been filed in Succession Cause No 707 of 2009 under Section 76 of the *Law of Succession Act* and Rule 44 of the Probate and Administration Rules and Forms 70 and 68 have not therefore been used. In short, the procedure I have outlined in previous paragraphs has not been followed. It follows that there is no summons for revocation of Grant for me to properly hear under the provisions of the *Law of Succession Act* and the rules thereof.
21. However, this Court bares in mind that the Objector herein was representing himself and may have been unaware of the appropriate manner to invoke the jurisdiction of this Probate Court under Section 76 of the *Law of Succession Act* and Rule 44 (1) of the *Probate and Administration Rules*. Article 159(2) (d) of *the Constitution* of Kenya, 2010 which also captures the same spirit of the law stipulates that justice shall be administered without undue regard to procedural technicalities. In this regard, the



Supreme Court decision in *Raila Odinga vs. the Independent Electoral and Boundaries Commission and 3 Others* [2013] EKLK is instructive. The Supreme Court had this to say:

“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of *the Constitution* which obliges a court of law to administer justice without undue regard to procedural technicalities. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.”

22. On whether the Objector has demonstrated sufficient grounds for Court to revoke the Grant as provided for under Section 76 of the *Law of Succession Act* which 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 an 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 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 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. The grounds upon which a Grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a Grant to demonstrate the existence of any, some or all the above grounds. A reading of Section 76 shows that the grounds can be divided into the following categories: -

- (a) the propriety of the grant making process;
- (b) mal-administration or
- (c) where the grant has become inoperative due to subsequent circumstances.

24. A reading of the Objector’s application leaves no doubt that the grounds cited fall under section 76 (b) & (c).

25. If a grant was obtained fraudulently by making of a false statement or by the concealment from the Court of something material to the case; or that the Grant was obtained by means of untrue allegation of fact essential in point of law to justify the Grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the Court under section 76 of the *Law of Succession Act* to revoke a grant on its own motion or on application by an interested person. It is important to bear in mind the provisions of Section 47 of the *Law of Succession*



Act which enjoins the High Court to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient. Further under Rule 73 of the Probate and Administration Rules it provides that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

26. The question that arises is whether the Objector is "an interested party" within the meaning of Section 76 and if so, whether he has the legal capacity to bring the application now under determination. It is trite law that any person intending to institute proceedings must have the necessary locus standi in law to do so. The general rule is that the onus of establishing that issue rests upon the Applicant. According to the Objector's Supplementary Affidavit sworn on 13th September 2022, he deposed that his grandfather Agalo, had 2 wives: Yugi Nyakapuonja and Nara Nyagem. According to him Yugi bore two sons his father the late Elijah Odari and Gogi and Nara had the deceased herein and a daughter named Akello. His late father and the deceased herein were brothers from different mothers. From his Supporting Affidavit we establish that the deceased herein died with no spouse and children.
27. The distribution of the estate of a person who died intestate and was not survived by any spouse or children is governed by Section 39 of the Law of Succession Act, which states as follows:-
 1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
 - a. father; or if dead
 - b. mother; or if dead
 - c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
 - d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
 2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”
28. The Objector herein being a child of the brother to the deceased herein he has the locus standi to approach this Court with the revocation of grant application.
29. The Petitioner while petitioning the Court for the Grant of Letters of Administration indicated in form P & A 5 that he was the son of the deceased herein. On 1st July 2024, during the Petitioner's case hearing the Petitioner during Court cross-examination, stated that he does not describe himself as a son of the deceased herein.
30. I have also perused the Petitioner's Replying Affidavit and it indicates that the sellers of L.R. No. Kisumu/Kanyawegi/429 were sons of the brother to Agalo, the father of the deceased herein. It is imperative to note that they did not have any authority to dispose off the estate of the deceased and their actions and those of the Petitioner herein amounts to intermeddling pursuant to Section 45 of the Law of Succession Act.



31. I am therefore not persuaded by the Objector's arguments that the Petitioner that the Grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case and that the Grant was obtained by means of untrue allegation of a fact essential in point of law to justify the Grant notwithstanding that the allegation was made in ignorance or inadvertently. I find that pursuant to Section 76 of the Law of Succession Act, the Objector has satisfied the Court by making a case to warrant the revocation of the Grant on 19th February 2010, and confirmed on 4th March 2011.
32. On preservative orders as prayed, the High Court is vested with wide powers under the Law of Succession Act to make such orders as may be necessary to preserve the estate pending distribution to the legitimate heirs and to ensure that the ends of justice are met.
33. Section 47 of the Law of Succession Act, states that the Court has power to preserve the assets of the deceased's estate if it is being wasted. The Section reads as follows:-
- “The High Court shall have jurisdiction to entertain any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient, provided that the High Court may for the purpose of this Section be represented by the Resident Magistrate appointed by the Chief Justice.”
34. In Re Estate of Simon Kimendero (deceased) [2020] eKLR, the Court noted that of specific significance to preservative order in respect of estate property is that: -
- a. The Applicant has an arguable case;
 - b. The property is estate property; and
 - c. The property is likely to be dissipated or wasted away.
35. Additionally, In Re Estate of Jeremiah Ngiri Kibati (Deceased) [2019] eKLR and Re Estate of Elijah Ngari (Deceased) [2019] eKLR, the Court in dealing with the issue of issuance of conservatory orders in succession matters cited with approval the decision of the Court in Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria [2012] eKLR noting that an Applicant in an application for preservative orders has to satisfy the following conditions: -
- a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the Applicant unless preservative orders of inhibition are issued.
 - b. That the refusal to grant orders of inhibition would render the Applicant's suit nugatory.
 - c. That the Applicant has arguable case.
36. In the present case, the Objector alleges that since the deceased died on 11th October 1990, the Petitioner acquired the land from the deceased step brothers as alleged and has been in exclusive use and control of all the deceased's assets in exclusion of him the lawful beneficiary and have been intermeddling with the free assets of the deceased.
37. Particularly, he alleges that the Petitioner has been cultivating on the land and despite court orders issued on 28th February 2022, instructing him to cease any dealings on the said parcel until determination of this application, the Petitioner has continued cultivating.



38. Further, the Objector has established that the manner in which the Objector acquired the land parcel was from intermeddlers who lacked the authority to sell off the asset comprising of the estate of the deceased. In Re Estate of John Gakunga Njoroge [2015] eKLR Murithi J held: -

“A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act”

39. It is clear from the material placed before the Court that the actions of the Petitioner in one way or another may result in the dissipation of the deceased’s estate. It is my view that they have established that they have a prima facie case. I agree with the Objector that further wastage and alienation by any of the Petitioner should be curtailed. It is important that this Court makes orders to preserve the estate pending the final determination of the succession proceedings as to be instituted by the Objector and taking into consideration the guidance provided under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to meet the ends of justice. Thus, this Court makes the orders that:

- a. Preservatory orders hereby issue against the Petitioner herein, his family members, agents, employees and/or all other persons claiming to act under his instructions, direction and/or orders from intermeddling, interfering with, destroying, wasting away and/or dealing in land parcel Kisumu/Kanyawegi/429.
- b. d. Preservatory orders hereby issue against the Petitioner and the Land Registrar Kisumu County restricting any other and/or further dealings affecting the registration of the title to the said land parcel Kisumu/Kanyawegi/429.
- c. That the Grant of Probate or Letters of Administration made or issued to the Meshack Amolo Osege on 19th February 2010 and confirmed on 4th March 2011 is hereby revoked.
- d. A fresh grant to issue in the names of Hannington Olilo Odari.
- e. The new administrator is directed to file fresh summons for confirmation of grant within 30 days from the date hereof.
- f. Mention on 26.3.2025 to confirm compliance and to take directions on the intended summons for confirmation of grant.
- g. Given that this is a family matter, parties to bear their own costs.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF FEBRUARY 2025.

SHARIFF MWANAISHA SAIDA

JUDGE

In the presence of :

..... for Petitioner
..... for Objector
..... Court Assistant

