



**In re Estate of Ooko Atego (Deceased) (Family Appeal E007 of 2024)
[2025] KEHC 3874 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E007 OF 2024**

**DK KEMEL, J
MARCH 28, 2025**

**IN THE MATTER OF THE ESTATE OF OOKO ATEGO(DECEASED)
AND
IN THE MATTER OF REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION**

BETWEEN

**WILLIAM OTIENO 1ST OBJECTOR
JOHN OMORO 2ND OBJECTOR
ROSELINE AWUOR 3RD OBJECTOR
PERES AWINO 4TH OBJECTOR
HELLEN AKINYI 5TH OBJECTOR
IBRAHIM OMAMO 6TH OBJECTOR
THOMAS ODUOR 7TH OBJECTOR**

AND

JENIFER JUMA AGOLLA PETITIONER

JUDGMENT

1. The Appellants herein who were Objectors in the trial court have lodged a Memorandum of Appeal dated 24th June 2024 seeking to set aside a judgment delivered on 29th May 2024 in Bondo Succession Cause No. 283 of 2019. In the said judgment, the trial court dismissed the summons for revocation of grant dated 9th January 2024 that had been lodged by the Appellants.
2. Aggrieved by the said judgment the Appellants raised the following grounds of appeal:



- i. That the trial magistrate erred in law and in fact in dismissing the objectors' summons for revocation alleging that it lacked merit.
- ii. That the trial magistrate erred in law and in fact in failing to determine whether the beneficiaries of Aoko Otega were lawfully missing.
- iii. That the trial magistrate erred in law and in fact in finding that the chief's letter could not be used to prove who the parents of the objectors in such circumstances are.
- iv. That the trial magistrate erred in law and fact in failing to take into account that the Petitioner acknowledges that the 6th Objector/Appellant is the son of the deceased.
- v. That the learned magistrate erred in law and fact in holding that the objectors failed to discharge their burden of proof that they are the biological children of the deceased.

For the above reasons the Appellants prayed that the trial court's judgment be set aside.

3. This being a first appeal, it is my duty to re-evaluate the entire evidence and subject it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. I have to bear in mind that i did not have the opportunity to hear or see the witnesses and that i must give an allowance for that. (See *Selle & Another vs Associated Motor Boat Company Ltd & Others* [1968] EA 123; *Peters v. Sunday Post Ltd* (1958) EA 424; *Mary Wanjiku Gachigi v. Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA).
4. It is noted that the parties herein proposed in the trial court that the summons for revocation of grant be deemed as the plaintiff while the replying affidavit of the Petitioner /Respondent was deemed as the defense.
5. PW 1 William Otieno Okwach testified on behalf of the objectors. He relied on the affidavit sworn on 9/1/2024 and further affidavit dated 8/2/2024 as his evidence in chief. He produced the annexures as exhibit 1-5 respectively. He stated that the deceased was his biological father while the other two Objectors were his brother and sister. That his mother was Flora Akoth, the 2nd wife to the deceased and who was then deceased and that they were present during her burial. That he was not aware whether succession with respect to his father's estate had been done. That he produced a letter from the area chief that indicated him as a son to the deceased. That they did not produce their birth certificates as some have and some do not have.

On cross examination, he stated that he did not do a DNA to prove paternity but that Flora Akoth was his mother.

On re-examination, he stated that they had not done a DNA test. That his father died in 2001 and that the Petitioner is a wife to his uncle. That he had a letter from the chief confirming his relationship to the deceased. That the production of the chief's letter was not objected to. That he doesn't understand why the Petitioner omitted him in paragraph six of her replying affidavit.

This marked the close of the Objectors' case.

6. DW1 Jenifer Juma Agolla stated that she would rely on her replying affidavit sworn on 31/1/2024 as her evidence in chief. She produced the annexures thereto as exhibits 1 and 2. That the chief called Peter Atego Obedo is the one who wrote her the letter dated 26/4/2021. That Asha Aluoch is an assistant chief where the land is situated at Utonga Sub Location. That she does not know the Objectors. That the deceased was her brother in law and that when he was ailing she was the one taking care of him. That Flora Akoth gave birth to Omamo and Adhiambo who were his children but were not visiting



him. That Florence Akoth came with William, Omoro and another son when she was married to the deceased. That Florence gave birth to Omamo and Adhiambo and that she later deserted the home with all her children. That Flora and her children did not attend the deceased's burial when he died. That it is her husband who commenced the succession and that he looked for Omamo and Odhiambo in vain. That she is willing to give the land to the rightful owner who is Ibrahim Omamo and that she would identify him if he turned up.

On cross examination, the Petitioner stated that she did not include the deceased's children because she did not know their whereabouts. That the chief wrote a letter to the police who forwarded the matter to the DCI for investigations.

This marked the close of the Petitioner's case.

7. The appeal was canvassed by way of written submissions. The Objectors/Appellants submitted on the grounds of appeal emphasizing the fact that the onus was on the Petitioner/Respondent to prove that the Objectors were indeed missing and declared as such before petitioning for a grant for letters of administration. They submitted that the court has to satisfy itself with the evidence presented before proceeding to issue a grant.

They relied on the case of *In the matter of Pius Mukono Murage (Presumed deceased) (2019) eKLR*.

In conclusion, they submitted that the entire judgment be set aside.

8. The Respondent submitted that the Objectors ought to have proved paternity by producing birth certificates or conducting a DNA test. They relied on the case in *Re estate of Mbuti Mungushi Gira(deceased) (Succ E 875 of 2022 (2024) KEHC 5216(KLR) by Nyakundi J*.

In conclusion, she prayed that the appeal be dismissed.

9. I have considered the lower court record plus the rival submissions and find the issue for determination is whether the Objectors proved their case against the Petitioner to warrant revocation of the grant.

10. Section 76 of the *Law of Succession Act* provides 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.

11. Section 29 of the *Law of Succession Act* provides that

For the purposes of this Part, "dependant" means—

- (a) the wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

12. Upon analysis of the entire evidence, it is not in dispute that the Petitioner is a sister in-law to the deceased while the Objectors are biological and or adopted children of the deceased. In accordance to section 29 of the Ac as stated above, the children of the deceased whether or not maintained by the deceased prior to his death, rank higher as dependants of the deceased as compared to a sister in law who has her share from her husband's estate.

The record likewise shows that the Petitioner did not disclose that the deceased had other dependants who are his children. Furthermore, even the children that she acknowledged to know them as biological to the deceased were not included in the grant as beneficiaries. This in my humble view depicts bad faith and ulterior motives on the part of the Petitioner at the time of applying for the grant. It came out quite clearly that the Petitioner exhibited arrogance and malice when she claimed that she did not know the whereabouts of the alleged two biological children of the deceased and that she would cater for them if they showed up but went ahead to reject them when they turned up in court. The Petitioner's lame excuse is that no DNA analysis has been conducted. I find that even if the Petitioner/ Respondent sought for the same, the Objectors were not given an opportunity to present and agitate their claim to the estate. The trial court therefore was in error when it failed to give the Objectors an opportunity to contest the grant and agitate their case. By dismissing the summons for revocation of grant, the Objectors were completely locked out and lost an opportunity for redress. I find 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. The Petitioner/ Respondent ought to have listed all the family members of the deceased both biological children as well as those adopted and/or catered for by the deceased.

13. It is noted that the Objector/Appellants' summons for revocation of grant had sought for a raft of prayers some of which required the Petitioner to render an account in addition to being barred by an order of injunction from interfering with the estate. I find that the issue of accounts could as well be revisited at a later stage when need arises. Further, it is noted that the Petitioner though a sister in law of the deceased has handled the estate in the absence of the Objectors herein and hence in the event of an



order of revocation of grant, it is appropriate to maintain her as one of the administrators as the estate is distributed afresh. This will prevent a situation whereby the process of the estate is severely affected. It is expected that the new administrators would work together as a team and ensure that the estate of the deceased is fully distributed to the rightful beneficiaries. It is also proper to have the properties of the deceased that have changed hands restored back in the deceased's name so that the parties can battle out on the question of who gets what.

14. In view of the foregoing observations, it is my finding that the Appellants' appeal has merit. The same is allowed. The trial court's judgment dated 29/5/2024 is hereby set aside and substituted with an order that the Appellants' summon for revocation of Grant dated 9/1/2024 is allowed in the following terms:
- i. The Grant issued to the Petitioner/Respondent herein on 15/10/2021 is hereby revoked.
 - ii. The Certificate for Confirmation of Grant issued to the Petitioner/Respondent herein on 11/2/2022 is hereby cancelled.
 - iii. The title to Land parcel Number North Sakwa/Maranda/1213 is hereby ordered cancelled and that the same do revert back in the name of the deceased Ooko Atego and be made available for distribution among the beneficiaries.
 - iv. A fresh Grant be and is hereby issued in the names of Jenipher Juma Agolla, William Otieno and Ibrahim Omamo.
 - v. The new administrators are ordered to file fresh summons for confirmation of the fresh Grant within thirty (30) days upon issuance.
 - vi. Matter is fixed for mention on 7/5/2025 before the trial court at Bondo to confirm compliance and for further directions.
 - vii. Each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 28TH DAY MARCH, 2025.

D. KEMEI

JUDGE

In the presence of:

N/A Ochiengfor Appellants

Oreda.....for Respondent

Mboya.....Court Assistant

