



REPUBLIC OF KENYA



**In re Estate of Otengo Wadenya (Deceased) (Succession Cause
161 of 2004) [2025] KEHC 4959 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 161 OF 2004
WM MUSYOKA, J
APRIL 25, 2025**

IN THE MATTER OF THE ESTATE OF OTENGO WADENYA (DECEASED)

RULING

1. On 10th November 2023, I delivered a ruling on an application for revocation of grant, where I revoked the grant dated 4th May 2005, set aside orders confirming that grant, appointed new administrators and directed the filing of a summons for confirmation of their grant, in proceedings that should include all the children of the deceased, including daughters.
2. One of the administrators that I had appointed in the ruling of 10th November 2023, Sospeter Onyango Otengo, was dead. An application, dated 26th April 2024, was filed, for his substitution as administrator. It is that application which is the subject of this ruling.
3. The said application is at the behest of Everlyne Awour Okoth, who I shall refer to hereafter as the applicant. She avers to be a widow of the late Sospeter Onyango Otengo. She has attached a certificate of death, serial number 1713461, to indicate that he died on 17th August 2019. She has also attached a grant ad litem, dated 19th April 2024, issued in Busia CMC Misc. SC No. E042 of 2024, to indicate that she had a limited authority to file a suit. She expresses an intention to substitute him as administrator in this estate.
4. Albert Ogutu Juma filed a response to that application. His affidavit was sworn on 4th June 2024. I shall refer to him as the respondent. He avers that the applicant was not a spouse of the late Sospeter Onyango Otengo, but his sister. He avers that the limited grant ad litem was obtained fraudulently, and that there was pending revocation application in the cause where it was made. He argues that there is a scheme to disinherit the lawful beneficiaries.
5. The applicant swore a further affidavit on 24th July 2024. She concedes that Sospeter Onyango Otengo was her brother, and that the reference to him as his spouse was a typing error. She asserts that she was one of the rightful heirs of the deceased herein. She states that she does not even know the respondent and says that he was not related to the deceased. She has attached documents to her affidavit, being the papers that were filed in Busia CMC Misc. SC No. E042 of 2024.



6. Directions were taken on 12th February 2025, for canvassing the said application, by way of written submissions. Both sides have filed their respective written submissions. I have read them and noted the arguments made.
7. There appears to be no dispute that Sospeter Onyango Otengo died. Indeed, he was dead 4 or so years by 10th November 2023, when I was appointing him as an administrator. That is testimony to the fact that most of the time succession proceedings are conducted in a cloud of insufficient disclosure, for none of the parties disclosed to the court that he had died when the application the subject of that ruling was being heard, for the only disclosure made was that he was one of the children of the deceased from the second house.
8. Since he is dead, his appointment cannot hold. In that event, 2 things may happen. The first is that, going by section 81 of the [Law of Succession Act](#), Cap 160, Laws of Kenya, the other administrator, David Ouma Otengo, may be confirmed as the sole administrator. The second is that the court may appoint another administrator to take the place of Sospeter Onyango Otengo.
9. So, which of those 2 options should I take? I believe I should take the second option, by appointing another administrator, in the place of Sospeter Onyango Otengo, to work alongside David Ouma Otengo. The intention of the court, in appointing 2 administrators, was to have the administration of the estate in the hands of individuals from the 2 houses of the deceased, after it emerged that David Ouma Otengo was from the first house and Sospeter Onyango Otengo was from the second house. It should follow, upon the demise of Sospeter Onyango Otengo, that another person from the second house should be appointed as administrator to take care of the interests of that house in the administration.
10. So, who should be appointed from that house? There is no dispute that the applicant is a sister of Sospeter Onyango Otengo. There is no assertion that she and Sospeter Onyango Otengo came from the same house. I cannot tell whether that is so or not. Neither the applicant nor the respondent have made that all important disclosure. I cannot just make presumptions. Whether the two were full or half siblings is a matter of fact. That fact should have been made clear. There is also no disclosure as to whether there were other survivors from that house. For if there are, then their consents, to the appointment of the applicant to stand in for the second house in the administration, ought to have been obtained.
11. The respondent has raised issues as to the legibility of the applicant to take the place of Sospeter Onyango Otengo. The respondent concedes that she is a sister of Sospeter Onyango Otengo, which would make her a child of the deceased. The deceased herein died in 1997. The [Law of Succession Act](#) came into force in 1981. The administration of the estate herein would be subject to the [Law of Succession Act](#). Distribution of the estate of a parent, under the Act, is meant to be to the children, equally, by dint of sections 35(5) and 38. There is no differentiation of the children, between sons and daughters. They are entitled equally. The applicant has no lesser right to inherit her father's estate, and, consequently, she has no lesser right to administer his estate, by virtue of section 66, as read with Part V of the [Law of Succession Act](#).
12. It was argued that her involvement in these proceedings would be perpetuation of a fraud against the legitimate beneficiaries. I do not understand that argument. Under the provisions of the [Law of Succession Act](#), a daughter is a lawful survivor and a beneficiary of the estate of her father. Her involvement in its administration cannot possibly be an act of fraud.
13. There were arguments about substitution. I agree with those arguments. The [Law of Succession Act](#) and the Probate and Administration Rules do not provide for substitution of dead administrators. To that



extent there would be no basis of talking about substitution. However, the spirit of the application is clear, that the person that the court purported to appoint from the second house was dead, and there was need to appoint another person, from that house, to take the place of that dead person. Substantive justice would require me to go by the spirit, rather than being a slave of the technical rules.

14. There were arguments around the grant ad litem. I shall avoid being drawn into that debate. The applicant is a child of the deceased. She needed no grant of representation, in respect of the estate of Sospeter Onyango Otengo, to enable her to intervene in these proceedings. She needed no grant of whatever shape or colour. Therefore, all those arguments around the propriety of the grant ad litem, that she obtained in Busia CMC Misc. SC No. E042 of 2024, are wholly irrelevant, for the purposes of these proceedings.
15. I shall go on to appoint a person from the second house of the deceased herein. However, there are grey areas in the application, as detailed in paragraph 10 hereabove. Let the applicant address those concerns and gaps, through a supplementary affidavit, to be filed within 14 days, so that I can make the final orders. This matter shall be mentioned on 6th May 2025, for compliance. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA ON THIS 25TH DAY OF APRIL 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Nabulindo, instructed by DK Nabulindo & Company, Advocates for the applicant.

Mr. Nabende, instructed by Blayer & Company, Advocates for the respondent.

