



**In re Estate of Daniel Omungweso Omudeku alias Omundeku (Deceased)
(Succession Cause 252 of 2013) [2024] KEHC 7831 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 252 OF 2013
SC CHIRCHIR, J
JUNE 27, 2024**

BETWEEN

WYCLIFFE NANDWA OMUNGWESO APPLICANT

AND

STEPHEN OKELLO OMUNGWESO 1ST RESPONDENT

JACKSON OMUKUNDA NYIKULI 2ND RESPONDENT

RULING

1. The proceedings herein relate to the Estate of Daniel Omungweso Omudeku alias Omundeku, and what is coming up for determination is the Notice of Motion dated 6/1/2023 by the 1st Petitioner Wycliffe Nandwa Omungweso (The Applicant).
2. The same is brought under section 80 of the [civil procedure Act](#) and Order 45 Rule 1 of the civil procedure rules. It seeks for a review of the ruling delivered on 1/8/2023 by this court(Musyoka J) on account of an apparent error in the face of the record.
3. It is the Applicant’s case that the ruling delivered on 1/8/2023 was based on grant of representation that does not exist; that the court based its decision on a grant which was allegedly issued on 5/7/2023, yet no such grant exists.
4. The Applicant further states that the ruling delivered on 1/8/2023 should have been in respect to the Grant of representation issued on 5/10/2017. The Applicant further argues that if the court meant to refer to the grant that was issued on 8/7/2013 the said grant was revoked on 29/9/2016 in any event, and a fresh one issued on 5/10/2017.
5. It is further stated that in the grant of 5/10/2017 the Applicant and one Stephen Okello Omungweso were appointed as Administrators of the deceased’s estate.



6. The Applicant further points out that , when the court reinstated the petition pursuant to the consent order entered on 22/10/2010(sic), the grant that was effectively reinstated was the one made issued on 5/10/2017
7. The Applicant concludes by stating that to the extent that the court based its finding on grant that had already been revoked, it was erroneous on the face of the record.
8. The Application was not opposed.

Applicants Submissions

9. By way of submissions, informed the court that he was relying on his affidavit in support of the application in its entirety.

Determination

10. Order 45 rule 1 of the civil procedure rules sets out grounds upon which a party may apply for a review. The Applicant must prove that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made, or that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
11. The ground for review in this case is that there was an error on the face of the record. And the error occurred when the court referred to a grant that had been revoked in arriving at its findings in the determination of the summons for confirmation of grant .
12. I have perused the ruling delivered on 1/8/2023. The ruling was to determine the summons for confirmation of grant dated 12/2/2019 , filed by the Applicant herein.
13. The opening paragraph of that Ruling reads as follows “The Administrators of the Estate of the deceased herein are Stephen Okelo Omungweso and Jackson Omukenda Nyikuli, who were appointed by letters of administration intestate made herein on 5/7/2013 and the grant issued to them dated 8/7/2013. I revoked that grant by my orders of 24/10/2013. The revocation orders were unmade by a consent recorded on 22/10/2019 whose effect was to reinstate the grant made on 5/7/2013”
14. I agree with the Applicant that the opening statement was erroneous and this error had a direct effect on the outcome of the Judge’s decision.
15. The correct position is that a grant of letters of Administration intestate was issued to Stephen Okelo Omungweso and Jackson Omukemdo Myikuli on 8/7/2013. This is the Grant of representation which the Judge referred to in the opening paragraph of the aforesaid ruling. However, this Grant was revoked by way of a consent recorded between the parties on 29/9/2016. Through the said consent the grant issued on 8/7/2013 was revoked and the parties consented to a new one being issued in the names of Stephen Okelo Omungweso and the Applicant therein. The new grant was issue on 5/10/2017.
16. On 22/10/2018 the court revoked the grant and closed the file on account of the administrators’ failure to apply for confirmation of grant.
17. The Applicant herein then filed an Application dated 12/2/2019 seeking for the reinstatement of the petition. That Application was allowed by consent of the parties on 22/10/2019. The substantive prayers in the Application dated 12/2/2019 were as follows:



- a). That the orders for the closure of this matter and revocation of Grant issued herein for non-confirmation on 24th October, 2018 be set aside and both the case and grant issued be reinstated for the Application for confirmation.
 - b). That the annexed draft of the Application for confirmation of grant be deemed as duly filed upon payment of the requisite fees.
18. Thus the effect of the consent entered on 22/10/2019 was to reinstate the petition and the grant. The court made an error by stating that the reinstated grant was the one issued on 8/7/2013. That grant had however been revoked on 29/9/2016 and replaced by the one issued on 5/10/2017. The subsisting grant therefore at the time of closure of the file, and hence at the time of reinstatement was the one that was issued on 5/10/2017. It follows that, that was the Grant that was due for confirmation, and not the one for 8/7/2013
19. The court further ruled that the Applicant herein had no right to seek for confirmation of the grant as he was not an Administrator of the Estate. Obviously that conclusion was arrived at because the court had made reference to a grant that had already been revoked. The correct position, however, is that as per the Grant that was issued on 5/10/2017 the Administrators were the Applicant herein, and Stephen Okello Omungweso and therefore the Applicant herein being one of the Administrators had a right to file summons for confirmation.
20. I agree that there was an error on the face of the record. The prayer for review is therefore warranted and it is hereby allowed.

Summons for confirmation

21. The applicant's summons for confirmation dated 12/2/2019 attracted a protest from his Co-administrator and brother, Stephen Okelo Omungweso.
22. In the summons for confirmation, the applicant had listed the deceased children as himself, Julius Omungweso Omboko and the Protestor herein. The only asset of the Estate was given land parcel No. Butsotso/Eshibeye/572 (The suit property).
23. The Applicant proposed that the property be shared equally between the three of them, with each getting 3.67 Acres. Accompanying the affidavit of distribution was a consent dated 12/2/2019 signed by the three beneficiaries.
24. In his affidavit of protest sworn on 29/1/2019 the protestor stated that the beneficiaries of the Estate included one Jackson Omukundi Nyikuli, who had purchased two acres of the suit property from the deceased. He attached sale agreements dated 30/8/2007, 24/12/2006, 8/8/2006, 22/10/2005 and 17/10/2005 in support of the sale.
25. He further stated that the deceased had distributed the suit property as follows:-
- a. Julius Ombaso Omungweso -3 acres.
 - b. Wyclife Nandwa Omungweso- 2 ½ acres.
 - c. Stephen Okelo Omungweso- 3 ½ acres.
 - d. Jackson Omukendo Nyikuli- 2 acres
26. He further stated that there are distinct boundaries between the three portions. He denied ever signing the consent for distribution filed by the Applicant and accuses the Applicant of forging his signature.



He goes further to suggest that there should be an investigation to what he considered as a forgery of his signature.

27. The summons was prosecuted by way of Affidavit and Oral evidence.

The Evidence

28. The protestor was the first witness. He told the court that the deceased had distributed his land as set out in paragraph 25 hereof, and that the deceased was the one who drew the boundaries. He denied that he signed the consent that the Applicant had submitted to court. He told the court that the suit property was 11 acres.
29. On cross- examination, he denied the suggestion that the deceased only distributed 2 acres to each of the sons, and retained 5 acres(sic). He further denied being the one who authored the agreements that he has submitted in evidence. He told the court that his role was simply to witness the said Agreements; that in any event he only witnessed the one dated 17/10/2005 .
30. He admitted that the Identification number of the buyer and seller were missing in the agreement. He also admitted that some of the agreements were signed by his mother, not the deceased. He further told the court however, that his mother was illiterate that 'they', signed for her. He insisted that the said Jackson should get his entitlement of 2 acres.
31. PW2 was Jackson Omukendu Nyikuli the alleged purchaser. He told the court that the deceased sold 2 acres to him at a total cost of Ksh. 116,000/= . He first paid Ksh 58,000/= then later cleared the balance. He later stated that he had already built a house on the suit land by the time the deceased died.
32. On cross- examination he told the court that the deceased did not sign a transfer for him ; that he had not fully paid the money by the time the deceased died. He reiterated that he resides on the suit property and that his house is between that of Okello and the Applicant herein. He denied the suggestion that the protestor is the one who sold the two acres to him. He further admitted that first agreement did not indicate the said parcel that was being sold.

The Applicant's case

33. DW1 was the Applicant herein. He told the court that the deceased left three children only, and he would like the suit property to be divided equally between the three . He denied that the deceased sold land to Jackson , and that it was the respondent herein who sold a portion of the land to the said Jackson.

Protestor's submissions

34. It is the protestors submissions that one Jackson Omukinda was given 2 acres from the deceased and was given vacant possession of that portion. He further submits that there are agreements evidencing the sale.It is further submitted that the purchaser has been in occupation of the two acres for a period of 17 years; that all the heirs of the deceased, save the applicant herein, are in support of the said Jackson getting a share of the property. He finally submitted that Jackson is a liability to the estate and it is the responsibility of Administrator to settle said the liability before distributing the Estate.

Applicant's submissions

35. It is the applicant's submissions that the protestor intermeddled on the estate by selling a portion of the deceased land to Jackson Omukinda Nyikuli. He further submits that the suit property should be



distributed equally between the heirs of the deceased with each getting 3.67 acres, and that it is upon the protestor to settle any dues to Jackson

Determination

36. I have considered the pleadings, the evidence tendered and parties submissions. The following issues arise for determination:
- a. Whether one Jackson Omukinda Nyikuri is a liability to the estate.
 - b. The mode of distribution.

Whether Jackson Omukinda Nyikuri is a liability to the Estate:-

37. It is the respondent's case that the deceased had sold a portion of suit property to the one Jackson Omukinda (PW2). He produced in evidence 4 agreements. I have carefully studied the said agreements. The first agreement is dated 17/10/2005. In that agreement, the deceased declared that he had sold 2 acres at a cost of Ksh. 58,000 each. The Agreement also states that the purchaser had paid Ksh 73,000/= leaving a balance of Ksh 43,000/=. It is signed by the deceased, and the purchaser, and witnessed by the respondent, among others. However the agreement makes no reference to any parcel of land. To conclude that it was in respect of the suit property herein will therefore be speculative.
38. The agreement dated 22/10/2005 is of the same subject matter:- sale of land by the deceased. In that agreement, the parcel number is indicated as Butso/so/Echibeye/572. The price per acre was indicated as ksh. 58,000. In the said agreement, the deceased acknowledged receipt of Ksh 93,000. It also includes a rider that in his absence, the remaining balance is to be paid to Mary Omungweso. The agreement is witnessed by the deceased's wife, the protestor herein, the purchaser and two others.
39. The pertinent question at this point is, why was there a need for a 2nd agreement in respect to one sale? . If the intention was to identify the property being sold, it makes no reference to the agreement dated 17/10/2005. Therefore there is nothing to show that the agreement of 22/10/2015 was an addendum to the one of 17/10/2015.
40. The last three agreements signed on 8/8/2006, 24/12/2006 and 30/8/2007 were in form of acknowledgment of the balance, and were all signed after the deceased had died. The agreement dated 8/8/2006 has a thumb print but the thumb print is not accompanied by a name and therefore the owner of the thumb print is unknown. The agreement dated 24/2/2006 has the name of Mary Omupaka against the thumb print. The last one of 30/8/2007 also has a thumb print against the name of Mary.
41. In the first two agreements, where Mary omungweso appears as a witness, she has signed the documents, but in the last three, she used a thumbprint. When the protestor was questioned on this anomaly during cross-examination, he admitted that his mother was illiterate and could not sign her signature. It raises the question of how she was able to sign the agreement of 22/10/2005 and 17/10/2005. The answer to this question came from the protestor. He told the court that "they" just wrote for her. The "they" were not identified.
42. All the above gaps, and inconsistencies cast doubts on the authenticity of the alleged sale agreements.
43. Further, on the last three purported sale agreements the deceased's wife lacked the legal capacity to receive the money on behalf of the Estate as no grant of representation had been given to her. That was a case of intermeddling on the deceased's Estate.



44. PW2 told the court that he had been in occupation of a portion of 2 acres of the suit property , but later contradicted himself by stating that he does not occupy the whole of the two acres.
45. In a nutshell, the evidence presented, is insufficient to prove that the purported purchaser is a liability to the estate. This claim which instructively, is not brought by the claimant himself, is therefore dismissed.

Distribution

46. It is common ground that the deceased left behind three heirs, the applicant, the protestor and one Julius Omungweso Omboso. From the certified copy of the register of Title No. No. Butso/ Shibeye/572 , the size of the land is indicated as 4.45 hectares (approximately 11 acres). The applicant has proposed equal distribution of the property between the 3 heirs, a proposal which I consider appropriate in the circumstances of this case.
47. The protestor talked about his mother purportedly signing the Agreements for sale but none indicated to the court whether their mother is still alive . The distribution of the Estate will have to be either in accordance with section 35 of the *law of succession Act*, which gives a life interest to the deceased's surviving spouse or under section 38 of the Act, which contemplates the presence of children, but no surviving spouse.
48. In the circumstances , and in the interest of justice, I hereby proceed to make orders as follows:
 - a. The Application for review is allowed.
 - b. The Protestor's protest is hereby dismissed.
 - c. Title No. Butso/ Shibeye/572 will be distributed as follows.
 - i). Wycliffe Nandwa Omungweso – 3.67 acres.
 - ii). Stephen Okello Omungweso – 3.67 acres.
 - iii). Julius Omungweso Ombaso -3.67 acres.Mary Omungweso shall have a life interest over the property and will be distributed as aforesaid;- if she is dead; in the event of her death, or re-marriage.
 - d. The certificate of confirmation of grant to issue forthwith.
 - e. Each party to meet their own costs
 - f. Right of Appeal 28 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF JUNE, 2024

S. CHIRCHIR

JUDGE

In the presence of:

Godwin – Court Assistant

