



REPUBLIC OF KENYA



**In re Estate of Jackton Ocharo (Deceased) (Succession Cause
2 of 2022) [2023] KEHC 2520 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 2 OF 2022
PN GICHOHI, J
MARCH 28, 2023
IN THE MATTER OF THE ESTATE OF JACKTON OCHARO
(DECEASED)
SUMMONS FOR ISSUANCE OF A LIMITED GRANT
(UNDER RULES 36 AND 49 OF THE PROBATE & ADMINISTRATION RULES)**

RULING

1. The applicant/petitioner in the summons dated July 7, 2022 and filed on July 21, 2022 seeks orders:
 1. That the petition for a grant of administration *pendente lite* of the estate of the late Jackton Ocharo be certified urgent.
 2. That the said petition be allowed.
2. The grounds on the face of the application are mainly that;
 - i. Robinson Mose Ocharo, a son of the late Jackton Ocharo who died sometime in January 2022, has declined to apply for a grant of representation in respect of the deceased's estate.
 - ii. The deceased was the 1st defendant in Kisii ELC civil suit No 10 of 2021: Charles Ratemo Nyambati (Suing as the legal representative of the estate of Samson Nyambati Nyamweya v Jackton Ocharo & others.
 - iii. The suit is pending before ELC court at Kisii.
 - iv. Rule 14 of the fifth schedule of the *Law of Succession Act* provides for a limited grant for purpose of prosecuting a suit and the petition has been brought for that purpose.
 - v. It is in the interest of justice that the limited grant applied for be granted to the said Dr Robinson Mose Ocharo.



3. That application is said to have been brought under a certificate of urgency dated July 13, 2022 as a petition for a limited grant. That the petitioner is the plaintiff in the ELC suit No 10 of 2021 which is a part- heard but the relatives of the deceased have not applied/ declined to apply for a grant of representation. He states that he has no one to prosecute against upon the death of the deceased.
4. The application is supported by affidavit sworn on July 13, 2022 by Charles Ratemo Nyambati as the petitioner and his supplementary affidavit which he swore on December 2, 2022 and filed with the leave of the court so that he could explain how he came to know the said Dr Robinson Mose Ocharo as the son of the deceased.
5. In the supplementary affidavit, the petitioner states that his advocates that is, Kamau Kuria & Co Advocates, wrote a letter to the area chief where the deceased hailed requesting for information touching of the deceased but the chief did not respond. His advocates then applied for proceedings in Kisii CMCC No 4 of 2022 : Jane Nyaboke v Robinson Mose Ocharo & 7 others in respect of a burial dispute touching on the deceased.
6. The petitioner states that among the documents in the pleadings in that case proving that Prof Robinson Mose Ocharo is the son of the deceased are a letter of authority dated January 24, 2022 authorising him to act for them in relation to “any court case concerning the burial of our father , Mzee Jackton Ocharo”; and replying affidavit which he swore on February 16, 2022 and his supplementary affidavit he swore on April 4, 2022.
7. There was no attendance by said Prof/Dr Robinson Mose Ocharo despite being served and there were no written submissions in this case. In his address to court, Mr Munyori for the petitioner/ applicant urged the court to allow the application as the ELC case No 10 of 2021 is pending a mention before the judge to confirm the status of this application.

Determination

8. To start with, this court is moved under rules 36 and 49 of the *Probate & Administration Rules*. Rule 36 refers to grant *ad colligenda bona* under section 67 of the Act and provides as follows;
 1. Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration *ad colligenda bona defuncti* of the estate of the deceased.
 2. Every such grant shall be in form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.
 3. Application for such a grant shall be by petition in form 85 signed by the applicant in the presence of not less than two adult witnesses supported by an affidavit containing the material facts together with the reasons for the application and showing the urgency of the matter and shall be made at the principal registry or at the Mombasa, Kisumu, Nakuru, Nyeri, Kisii, Kakamega, Meru, Machakos, Eldoret and Bungoma registries.
 4. The provisions of rule 7(4) shall not apply to applications under this rule.
 5. Copies of the proceedings and of the grant when issued shall be served upon such persons (if any) and in such manner as the court shall direct. [emphasis added]



9. From the material presented by the petitioner, there is no doubt that Prof/Dr Robinson Mose Ocharo is a son of the deceased as the Authority annexed to the pleadings in the burial dispute Kisii CMCC No 4 of 2022 : Jane Nyaboke v Robinson Mose Ocharo & 7 others is signed by persons who refer to the deceased as their father.
10. The issue for determination is whether said Prof/Dr Robinson Mose Ocharo can be granted the grant of administration *pendente lite* or grant ad colligenda as sought by the petitioner.
11. Since the petitioner has used both terms in this application, does it mean that ad colligenda is the same as grant of administration *pendente lite* as the petitioner uses both? In my view, the two are not clearly the same.
12. A grant of administration *pendente lite* may be issued so as to permit the administration of the estate of the deceased person awaiting conclusion of a dispute as to who full grant should be issued. This is for example where there is a will and its validity is an issue. On the other hand, it is clear that rule 36 is in reference to a grant ad colligenda for a specific purpose, for example, collecting goods of the deceased, preserving and accounting for them.
13. Be that as it may, the reasons the petitioner is seeking that the grant be issued to Prof/Dr Robinson Mose Ocharo is that the petitioner, being the plaintiff in the pending ELC case No. 10 of 2021, has no one to prosecute since the 1st defendant (Jackton Ocharo) is deceased. It appears to this court that Jackton Ocharo is one of the defendants in that case.
14. Even if the deceased was the only defendant, none of the beneficiaries of the deceased including Prof/ Dr Robinson Mose Ocharo are willing to take out any form of grant for the estate of the deceased, as admitted by the petitioner.
15. A look at the letter of authority dated January 24, 2022 and cited by the petitioner does not relate “any case.” The said letter of authority is strictly an authority “in all matters connected with or relating to any interests of whatever nature in relation to any court case concerning the issue of the burial of our father Mzee Jackton Ocharo here after called “the matter” ...on our behalf to do and execute any of the following acts, deeds and things that is to say:-
 1. To act on his own initiative on my/our behalf as freely as ourselves could do in “the matter”.
 2. To scrutinize , verify and sign court documents in relation to ‘the matter”, that is to say, witness statements affidavit and any other document in relation thereof.”
16. Rule 49 of *Probate and Administration Rules* cited by the petitioner is in relation to applications not otherwise provided for and it provides as follows;

“ A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these rules shall file a summons supported, if necessary, by affidavit.”
17. In support of this petition, the petitioner therefore relies on rule 14 of the 5th schedule of the *Law of Succession Act* and says that the petition herein is for that purpose. This rule refers to administration limited to suit and provides;

“ When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased therein, or in any other cause or suit which may



be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

18. The relevance of the five -bench Court of Appeal decision in the case of *Trouistik Union International & another v Jane Mbevu & another* [1993] eKLR cited by the petitioner is only relevant in so far as it held that an administrator of the estate of a deceased person is defined by section 3 of the *Law of Succession Act* that; “ administrator means a person to whom a grant of letters of administration have been made under the Act,” that is the *Law of Succession Act*. This supports the petitioner’s averments that Prof/Dr Robinson Mose Ocharo has to be issued with a limited grant before being substituted for his deceased father who was the 1st defendant in the ELC case pending before Environment and Land Court.
19. This court is satisfied that Prof/Dr Robinson Mose Ocharo has notice of this petition as he was duly served. the question here is, can the plaintiff nominate him to be issued with a limited grant under rule 14 above as sought by the plaintiff?
20. The answer is in the negative and for the following reasons;
 1. As earlier stated above, the letter of authority dated January 24, 2022 did not extend to other cases including his nomination to take out letters of administration whether full or limited for a specific purpose including defending the ELC case No 10 of 2021 ELC case pending before Environment and Land Court here in Kisii.
 2. Even if such authority included nominating him to take out any type of grant in respect of the estate of the deceased, there is no citation filed before any court, either by the plaintiff or anyone else, against Prof/Dr Robinson Mose Ocharo or against the children of the deceased to accept or refuse to take out such letters of administration of the estate of the deceased herein.
21. In the circumstances, the petition herein, whether seeking letters of administration ad colligenda, *pendente lite* or otherwise cannot lie in law. It cannot also be converted into a citation provided for explicitly under rule 22 (1) of *Probate and Administration Rules* that;

“ A citation may be issued at the instance of any person who would himself be entitled to a grant in event of the person cited renouncing his right thereto.”
22. In the upshot, the petition dated July 7, 2022 and filed on July 21, 2022 is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 28TH DAY OF MARCH, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Munori for Applicant

N/A for Respondent

Kevin Isindu, Court Assistant

