



REPUBLIC OF KENYA



In re Estate of Pritam Singh Chass aka Pritam Harnan Wasawa Singh (Deceased) (Succession Cause 1967 of 2015) [2023] KEHC 21329 (KLR) (Family) (4 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1967 OF 2015
MA ODERO, J
AUGUST 4, 2023**

BETWEEN

HERJEET KAUR CHASS APPLICANT

AND

JASWANT SINGH CHASS RESPONDENT

RULING

1. Before this Court for determination is the Summons dated May 28, 2021 by which the applicant Harjeet Kaur Chasseeks the following orders.
 - “ 1. The applicant be substituted as executor of the estate of the Deceased.
 2. A new grant of probate be issued to the applicant.
 3. The costs of the Summons be in the Cause”.
2. The Application was premised upon section 65 of the *Law of Succession Act*, cap 160, Laws of Kenya and was supported by the affidavit of even date sworn by the applicant.
3. In response to the summons the respondent Jaswant Singh Chass filed a notice of preliminary objection dated September 24, 2021.
4. The preliminary objection was canvassed by way of written submissions. The respondent filed the written submissions dated August 2, 2022 whilst the Applicant relied upon her written submissions also dated August 2, 2022.

SUBDIVISION - Background



5. This Succession Cause relates to the estate of the late Pritam Singh Chassaka PritamHarnam Waswa Singh(hereinafter ‘the Deceased’) who died at Mater Hospital on April 6, 2014. A copy of the Death Certificate Serial No.0090525 is annexed to the petition for Probate of written will dated July 28, 2015.
6. The Deceased died testate having left a written will dated September 5, 2013. In paragraph 8 of the said written will the Deceased appointed one Surjeet Singh Chassas executor of his Will.
7. The Will further provided that if the said executor was unable for any reason to serve as executor then the applicant Herjeet Singh Chasswas named as an alternate executor.
8. Following the demise of the Deceased Grant of Probate with written Will was on November 9, 2015 issued to Surjeet Singh Chass. Before that Grant would be confirmed the respondent Jaswant Sign Chassfiled an objection to confirmation of Grant. However, before that objection could be heard the Executor named in the Will Surjeet Singh Cahsspassed away on April 17, 2021.
9. The applicant then filed this present application dated May 28, 2021 seeking to be substituted as Executor. In response to the said application the respondent filed a notice of preliminary objection which was premised upon the following grounds:
 - “ 1. The Law of Succession Act does not provide for a substitution of a personal representative;
 2. An application for a new grant can only be presented vide an application as provided under section 51 (1) of the Law of Success Act;
 3. An application for a new grant can only be made upon the revocation of the existing grant under section 76 of the Act and there indeed exists a summons dated July 15, 2016 seeking for the revocation of the same grant still pending”.

Analysis and Determination

10. I have carefully considered the Preliminary objection filed in this court as well as the written submissions filed by both parties.
11. The definition of a preliminary objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd -vs- West End Distributors Ltd* (1969) EA where the court stated as follows:-

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. “..... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion”.
12. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* (2015) eKLR, the Supreme Court of Kenya stated as follows:-

“ A preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record”.



13. Therefore, in order for a preliminary objection to succeed the following tests must be satisfied:
 - (i) The preliminary objection should raise a pure point of law.
 - (ii) The preliminary objection must be argued on the assumption that all the facts pleaded are correct.
 - (iii) The preliminary objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - (iv) A valid preliminary objection ought if successful dispose of the entire suit.
14. Therefore, a genuine and proper preliminary objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
15. The respondent argues that as deceased executor cannot be replaced by way of substitution. That once a sole Executor/Administrator dies then the Grant becomes inoperative and is for revocation.
16. I do agree that there is no specific provision in the Law of Succession Act which provides for the substitution of a sole Executor who has passed away. It is in fact the position that where a single Executor dies before completing the task of distributing the estate then that Grant becomes inoperative and ought to be revoked. Thereafter another person may apply for Grant of letters of Administration 'de bonis non'
17. In Re Estate of George Ragui Karanja (Deceased) (2016) eKLR: Hon. Justice William Musyoka held as follows:-

“The Law of Succession Act does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representatives... It would appear to me that once all the holders of a grant die, Section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the Law of Succession Act, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of Section 51 through to section 66 of the Act”. [own emphasis]

18. Similarly, in the case of Florence Okutu Nandwa & another vs John Atemba Kojwa, Kisumu Civil Appeal No.306 of 1998, the Court of Appeal made it clear that:

“A grant of representation is made in Personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under Section 76 of the Law of Succession Act. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the Law of Succession Act and the Probate and Administration (Rules)...” [own emphasis].

19. Therefore, the application dated May 28, 2021 seeking to substitute the Deceased Executor is defective. The fact that the Deceased in his written Will named an alternate Executor does not mean that this



alternate Executor will automatically succeed the Deceased sole Administrator. The proper procedure must still be followed.

20. The alternate Executor must first seek revocation of the grant issued to the Deceased Executor and thereafter seek to have a fresh grant of probate issued in his name.
21. I therefore, find merit in the notice of preliminary objection dated September 24, 2021. The Summons dated May 28, 2021 is fatally defective and is struck out. No orders on costs.

Dated in Nairobi this 4th day of August, 2023.

MAUREEN A. ODERO

JUDGE

