



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Mutobera Imbai Alexander(Deceased) (Succession Cause
79 of 2008) [2023] KEHC 22984 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 79 OF 2008
SC CHIRCHIR, J
SEPTEMBER 29, 2023**

BETWEEN

**TERESIA MUSIZI ASHONO ALIAS TERESINA MUSINZI
IMBAYI APPLICANT**

AND

GERALD OKANG'A MUTOBELA RESPONDENT

RULING

1. Before this court is the summons dated 30/3/2022. It seeks for the following orders:
 1. That Gerald Okang'a Imbayi be substituted in place of Dyphina Khatonde Mutobela.
 2. That the names of Rita Imbayi be removed from the Letters of Administration issued on the 12th March 2014.
 3. That a fresh Grant of Letters of Administration issued to Gerald Okang'a Mutobela and the Applicant Teresina musinzi Ashono alias Teresina Musinzi Imbayi.
 4. That in the alternative a fresh Grant do issue in the names of Teresina musinzi Ashono alias Teresina musinzi imbayi.
 5. That pursuant to the issuance of a fresh Grant in prayer 3 above, an Amended Certificate of Confirmation do issue in accordance with the courts Judgement delivered on 27th February 2014 with the shares allocated to Dyphina Khatonde Mutobela being (2.7 ha out of land parcel no Isukha/Mukhonje/336 allocated to her substitute Gerald Okang'a Mutobela and 1.5 ha out of land parcel no Isukha/mukhonje/336 being a share of Rita Imbayi & Teresina Musinzi Ashono alias Teresina Musinzi Imbayi be allocated to the Applicant herein.



The Applicant's Case

2. The Applicant has deponed that by a judgment delivered on 27/2/2014 this court (Chitembwe J) distributed Land parcel No Isukho/Mukhonje/336 between herself , Rita Imbayi and Dyphina Khatonde Mutobera and a certificate of confirmation of Grant was subsequently issued. That Dyphina Khatonde Mutobera and Rita imbayi have since died and tha Respondent herein , Gerald Okenda Mutobela is the personal Representative of Dypina Khatonde Mutobera.
3. That she is willing to administer that estate solely if the respondent is unwilling to do so.

Respondent's case

4. The Application is opposed through the affidavit of the respondent. It is the respondent's case that the Application is moot as the same has been overtaken by events;that Dyphina Khatonde Imbayi, had already sub-divided the suit property pursuant to her appointment as the Administrator of the Estate on 18/4/2009;that the Estate property has since been transferred to other persons following the said sub-division.
5. That any order issued by this court would only serve academic purposes.
6. The application proceeded by way of written submission

Applicant's submission

7. It is the applicant's submission that an amended Grant was issued to her and 2 others on 12/3/2014 and that the other two Administrators have since died. That the Estate property had been redistributed and an amended Grant was issued. That the Grant which was issued on 12/3/2014 nullified the one that has been issued to Dyphina Khatonde Mutobela.
8. It is further submitted that the certificate of confirmation of grant cannot be enforced due to the demise of the other two Administrators.
9. The respondent did not file any submissions.

Determination

10. I have considered the application, the Replying affidavit and the Appellant's submission. A brief background to this Application is necessary.

Background

11. The Applicant herein and her sister, one Rita Imbayi applied for and were Granted orders to be administrators of the Estate of Putobela Imbayi in Kakamega High Court Succession case no. 511 of 2003 The grant was made on 4/3/2009.
12. On the other hand, one Dyphina Khatonde Mutobela filed a separate cause being succession cause no 79/2008 in respect of the same estate. The Grant was issued to her and confirmed on 22/7/2010.
13. Dyphina Khatonde Mutobela was described as the deceased's wife while the applicant and her sister Rita Imbayi were the deceased's sisters.
14. Following an application dated 2/6/2011, by the Applicant herein, the 2 causes here consolidated. The same Application sought for the revocation of the Grant issued to Dyphina Khatonde Mutobela.



15. Justice Chitembwe delivered a judgement on 27/2/2021 in which he ordered that for the issuance of a certificate of a confirmed Grant to issue in the names of Dyphina Khatonde Mutobela, Rita Imbayi and the Applicant herein Terezine Musinzi Imbayi.

The Present Application

16. It is the Applicant's case that the other 2 administrators have since died; that is Dyphina Khatonde Mutobela and Rita Imbayi. That consequently, the two should be removed from the Administration and a fresh Grant be issued to her or jointly with the Respondent, who she states is the personal representative of Dyphina Khatonde Mutobela. The applicant has annexed a burial permit for Dyphina Khatonde Mutobela. There is no such or permit submitted in respect of Rita Imbayi. However, I have seen on record a burial permit in respect of the said Imbayi issued on 11-6-2020. The fact of death of these 2 administrators has also been impliedly admitted by the respondent in paragraph 4 of his replying Affidavit.
17. Section 81 of the *Law of Succession Act* provides as follows:
- “Power and duties of personal representatives to vest in survivor on death of one of them;
upon the death of one or more of several Executors or Administrators to whom a grant of representation has been made all powers and duties of the executors or administrators shall become vested in the survivors or survivor of them. “
18. There is however an exception where there is a continuing trust. Where there is a continuing Trust , an additional Administrator is a mandatory requirement.
19. In the present case, there has been no mention or indication of a continuing trust. The Prayer for re-appointment or additional Administration is therefore misplaced. Such additional appointment is not necessary where there is no continuing trust. The powers of Administration automatically vests on the surviving Administrator. That is the gist of the provisions of the aforesaid section 81 of the *Law of Succession Act*. The Applicant has the right and Authority to continue with the administration of the Estate.
20. Further, the Respondent has not expressed any interest in being enjoined as an Administrator. It cannot be forced on him. Indeed he has opposed the entire application.
21. For the avoidance of doubt, the Applicant , being the surviving Administrator remains the lawful Administrator of the Estate, and has the full and exclusive mandate to undertake all affairs of the Estate of the late Mutobera Imbayi Alexander.
23. This court however appreciates that for purposes of effecting transmission of properties and other Assets of the Estate, the Applicant may need to be armed with a document evidencing her sole Administration of the Estate. For this purpose the Applicant does not need a fresh Grant but an Amended one. Mindful of this court's duty to dispense justice without undue regard to technicalities (see Article 159(2) (d) of the *constitution*), this court will instead issue orders for Amendment of, as opposed to a fresh Grant .
23. Prayer 5 of the Application is about redistribution of the property. That prayer cannot be granted mainly for two reasons:
- a). Firstly, the prayer is about redistribution of the respective shares of the now deceased Administrators/ beneficiaries namely Dyphina Khatonde Mutobela and Rita Imbayi to the Respondent and Applicant respectively. The applicant has not explained why the deceased



persons' share should go to them and not to any other survivors or beneficiaries of the Deceased Administrators. The Applicant has not demonstrated that the Respondent and herself are the only survivors or beneficiaries of the two deceased persons. This court has not been informed that the deceased's persons had no other heirs or beneficiaries. In short, the Applicant has not laid a basis for the proposed redistribution. Any transmission of the deceased Administrators' shares must go through the usual process of Administration.

- b). Secondly, from the respondent's response, it is clearly evident that parcel no /Isukha/ Mukhonje/ 336 has been sub-divided. This can be seen in the Annextures nos 3(a), 3(b), 3(c), 3(d), 3(e),3(g), 3(f), to the respondent's replying affidavit. The sub-division and transfers were apparently affected on 11-1-2012. The said sub- division was done despite the existence of orders issued by the court on 6/7/2011 and confirmed on 26/9/2011. The ownership of the properties has since changed. Thus, even if this court was to grant prayer 5 of the Application, it would not cure the illegality that has since been committed.
23. The Applicant's remedy, in the face of the intermeddling that took place is not an order for redistribution. The remedy lies elsewhere.
24. In conclusion, the summons dated 30/3/2022 partly succeeds and consequently I make the following orders:
- a). The Grant of letters of Administration granted on 27th February 2014 is hereby amended by removing the names of Dyphina Khatonde Mutobela and Rita Imbayi and retaining the name of Teresina Musinzi Imbayi as the sole Administrator of the Estate of the late Mutobera Imbai Alexander.

DATED, SIGNED AND DELIVERED IN AN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF SEPTEMBER 2023.

S.CHIRCHIR

JUDGE

