



Kibisu v Wairimu & another; Public Trustee (Interested Party) (Succession Cause 552 of 2019) [2022] KEHC 14033 (KLR) (Family) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 14033 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 552 OF 2019
M THANDE, J
SEPTEMBER 23, 2022

BETWEEN

ROBERT TOM MARTINS KIBISU APPLICANT

AND

JACQUELINE WAIRIMU 1ST RESPONDENT

DANIEL NGIGI WANYOIKE 2ND RESPONDENT

AND

PUBLIC TRUSTEE INTERESTED PARTY

RULING

1. Before this Court for determination is a Summons dated February 15, 2022 by which Robert Tom Martins Kibisu seeks rectification of grant of letters of administration (the Grant) issued to the Public Trustee on January 30, 2020, in respect of the estate of Tabitha Njoki Ngigi (deceased).
2. The Summons is supported by the Applicant's affidavits sworn on February 15, 2022 and March 17, 2022. The Applicant contends that on December 18, 2019, the Court *suo moto* nominated the Public Trustee as administrator of the estate of the deceased "for purposes of preserving the estate until the issues herein as who are the beneficiaries of the estate, what properties constitute the estate, who should administer the estate and how should the properties be distributed are determined." The Applicant further states that the Grant is a limited grant for the aforesaid purpose. He further stated that the intended rectification is administrative and that if the error is not rectified, he will be condemned unheard resulting in a travesty of justice.
3. The Applicant further stated that once the orders in question were issued, the Court became *functus officio* and the orders remained binding upon it. Further that in his ruling of June 30, 2020, Onyiego, J



ordered that “parties shall then proceed and prosecute the objection proceedings to determine on who is entitled to take out a grant of representation” which is yet to take place. The Applicant contended that mandatory procedures including gazetteement were not followed in the issuance of the Grant and this should be addressed. Further, that the objection to making of grant and answer to petition and petition by way of cross application all dated September 11, 2019 are properly before the Court and ought to be heard and determined on merit.

4. The Application is opposed by Jacqueline Wairimu Wanyoike, the 1st Respondent, *vide* her replying affidavit sworn on March 3, 2022 . Her position is that the issuance of the Grant to the Public Trustee by Onger, J on January 30, 2022 was informed by the acrimonious nature of the dispute herein and the need to preserve the estate, pending the hearing and determination of the issues in controversy. On March 2, 2021 , Thande, J directed the Public Trustee to file summons for confirmation and all parties to file responses for hearing by way of *viva voce* evidence. The directions were intended to give a chance to every party to be heard prior to confirmation and to expedite the just resolution of the matter. The 1st Respondent further contended that the summons herein is misconceived as the Grant does not contain errors regarding names, description of any person, thing or dates. As such no lawful basis for rectification exists. She urged that the Summons be dismissed with costs.
5. The background of this matter as indicated in the ruling of February 4, 2022 is that the deceased died on November 3, 2018 . The record shows that she was survived by 3 adult children Jacqueline Wairimu, Samuel Wainaina Wanyoike and Daniel Ngigi Wanyoike. She was also survived by Angel Hannah Wangui Mlamba, a minor. On August 22, 2019, Jacqueline and Daniel, the Petitioners, filed a petition seeking to be appointed administrators of the estate of their late mother. Shortly thereafter, the Applicant filed an objection dated September 11, 2019 stating that he was the husband of the deceased. He also filed an answer to petition and a petition by way of cross application both dated September 11, 2019. The following month, the Applicant filed a summons dated October 24, 2019 against ITSL Company Limited and Jane Juma, seeking a monthly sum of Kshs 50,000/= as reasonable provision from the deceased’s group life benefits.
6. By an order of December 18, 2019, Onger, J directed inter alia that “the Deputy Registrar to refer this matter to the Public Trustee to be seized of administration and to take measures to preserve the Estate until the contested issues herein are determined.” The contested issues related to beneficiaries, the administrators, the properties of the estate, and distribution thereof. Notably, the grant issued on January 30, 2020, was not a limited grant ad colligenda bona for collecting and preserving the estate, but a full grant of letters of administration intestate.
7. On June 30, 2020, Onyiego, J delivered a ruling on the Applicant’s summons for reasonable provision and dismissed the same. The learned Judge directed that parties proceed to prosecute the objection proceedings to determine who was entitled to take out a grant of representation. The grant issued on January 30, 2020 remained intact.
8. On March 2, 2021, this Court noted that the objection proceedings have been overtaken by events as a grant had been issued to the Public Trustee. The Court then directed the Public to file a summons for confirmation of Grant and further directed the parties to put in their responses and a hearing date by way of *viva voce* evidence was fixed. The Public Trustee filed the summons for confirmation of grant dated August 26, 2021 which elicited the Applicant’s preliminary objection. Not being satisfied, the Applicant file the present Application.
9. Parties filed submissions which I have duly considered.



10. The Applicant contended that following the orders of Onger and Onyiego, JJ this Court became functus officio. He cited the case of [John Gilbert Ouma v Kenya Ferry Services Limited \[2021\] eKLR](#) where Mwangi, J stated:

20. The Supreme Court of Kenya in the case of [Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others \[2013\] eKLR](#), cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “[The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law](#)” (2005) 122 SALJ 832 which reads: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

11. The doctrine of functus officio gives expression to the principle of finality and prevents a Court from merit-based re-engagement on a matter in which final judgment has been entered and a decree issued. The doctrine does not however bar a court from entertaining a case it has already decided on. In the present case, the orders of the 2 Judges did not render this Court functus officio. If that were the case, the Applicant would not have filed the present Application. Further, this matter is far from concluded. Still pending are the issues of the Applicant’s entitlement to the estate of the deceased and the distribution of the estate to the rightful beneficiaries. Notably, the [Law of Succession Act](#) empowers the Court to entertain certain applications on matters in respect of which orders have been given, such as an application for review, rectification and revocation of a grant, even after confirmation. Accordingly, this Court cannot be said to be functus officio on account of the previous orders.

12. It is the Applicant’s case that there is an error in the purpose of the Grant which should be rectified to accord with the order issued on December 18, 2019. He relied on Sections 74 of the [Law of Succession Act](#) and Rule 43 of the Probate and Administration Act.

13. The Respondents oppose the Application claiming that what the Applicant seeks rectified in not one of the errors envisaged in Section 74 of the [Act](#). The Respondents relied on the cases of [In the Matter of the Estate of Hasalon Mwangi Kabero \[2013\] eKLR](#) and [In the Matter of the Estate of Geoffrey Kinuthia Nyamwinga \(Deceased\)\[2013\] eKLR](#), where the Court stated that omission of a person or property cannot be said to be an error that can be rectified under Section 74.

14. Section 74 of the [Act](#) makes provision for errors which may be rectified by the Court as follows:

Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly. (emphasis mine).

15. The errors which may be rectified include names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant. Rule 43 provides the procedure to be followed in applying for rectification.



16. A careful reading of Section 74 will show that other than errors in names and descriptions, or time and place of the deceased's death, the law provides that rectification of an error in the purpose in a limited grant may be made. In this case, the Applicant asserted that the Grant ought to have been a limited grant, pending the hearing and determination of the objection proceedings. The order by Onger, J on December 18, 2019 was in the following terms:

In view of the circumstances of this case, I direct the Deputy Registrar to refer this matter to the Public Trustee to be seized of administration and to take measures to preserve the Estate until the contested issues herein are determined.

17. It would appear that the intention of the Court at the time was that the grant be limited for the purpose of preservation of the estate, pending determination of contested issues. Among those issues for determination, was who should administer the estate. However, on January 30, 2020, Onger, J proceeded to issue the Grant. There is no indication on the Grant that the same is a limited grant. The Grant issued is a full grant which is due for and capable of confirmation.

18. Where a limited grant issued contains an error on the purpose thereof, such grant may be rectified on application by a party, as in the present case. Given the circumstances herein, the Applicant is well within his right and within the law to seek rectification of the Grant.

19. The Applicant asserted that he has been condemned unheard because the Grant was issued before the hearing of his objection, answer to petition and petition by way of cross application. Section 69 of the Act provides that the Court must first hear and determine the objection, answer to petition and petition by way of cross-application that have been filed, before issuance of a grant. This is what ought to have been done herein.

20. It is the Applicant's further contention that no gazettelement was done in this case, contrary to the provisions of Section 67 of the Act which provides:

1. No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.
2. A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.

21. The purpose of publication of a notice of the application for a grant of representation is principally to notify any person who may have an interest in the estate of a deceased in respect of which the application for a grant of representation has been made. The requirement in Section 67 for publication is couched in mandatory terms. The notice enables such persons as may themselves be interested in applying for a grant to file an objection and their own cross application for grant. In the present case, the Applicant being a person interested in making an application for a grant is well aware of the proceedings and has raised his objection. The purpose of the publication of the notice he seeks, has therefore already been served.

22. A grant issued without gazettelement therefore is liable for revocation under Section 76(a) of the Act which provides:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-



- a. that the proceedings to obtain the grant were defective in substance;
23. The circumstances herein are that the Grant was issued to the Respondents without gazettelement and without hearing the pending objection, answer to petition and petition by way of cross-application filed by the Applicant. This renders the proceedings to obtain the Grant defective in substance.
 24. The question that this Court must ask itself in the circumstances, is, what orders would best assist the parties to move this matter forward and bring it to a close without further delay. If the Grant were to be rectified as sought by the Applicant or revoked under Section 76 of the Act, the matter would return to point zero and hearing of the objection proceedings would have to be dealt with first. The Applicant will then have an opportunity to be heard on his entitlement or otherwise, to the grant. Upon determination of the objection proceedings, the Court will then issue a grant to such person as it shall determine. Thereafter an application for confirmation will be filed, heard and determined.
 25. If on the other hand the Court moves to the hearing of the summons for confirmation of the Grant on record, the Applicant will still have an opportunity to ventilate his entitlement to the estate of the deceased. The Court after hearing all the parties, will then make a final determination on all issues.
 26. When I consider the 2 options and the amount of judicial time already expended in this matter, I am of the view that it will be more expedient for all concerned, to proceed in the latter manner. In any event, the orders for rectification sought under Section 74 of the Act are discretionary. Similarly, the powers of the Court under Section 76 of the Act to revoke a grant are discretionary. Further, under Section 66 of the Act, this Court has the final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. The Court in exercise of its discretion issued the Grant to the Public Trustee, a neutral entity, quite capable of administering the estate of the deceased. Moreover, no useful purpose will be served in rectifying or revoking the Grant. If anything, it will further delay this matter thereby contravening the provisions of Article 159(2)(b) of the Constitution, which provides:
 - (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (a) ...
 - (b) justice shall not be delayed;
 - (c) ...
 27. As this Court stated in its ruling of February 4, 2022, the issue that is in contention is whether the Applicant was a husband to the deceased as he claims and therefore entitled to the estate, or a mere boyfriend as is claimed by the Respondents. It will be noted that this Court has repeatedly stated that this issue will be determined at the hearing of the summons for confirmation of the Grant. The Applicant will be given an opportunity to be canvass his claim by way of oral evidence. It is not clear why, even after the Court pronounced itself on February 4, 2022 on the very issues raised by the Applicant, he has chosen a path that will further delay the just and final determination of the matter herein.
 28. In the end and in view of the foregoing, I make the following orders which are necessary for the ends of justice:
 - i. The Summons dated February 15, 2022 is hereby dismissed.



- ii. The matter shall proceed to oral hearing of the summons for confirmation of grant dated August 26, 2021, where all issues in dispute shall be ventilated and finally determined.
- iii. No further applications shall be filed in this matter.
- iv. Mention on 17.10.22 for directions.
- v. There shall be no order as to costs.

DATED AND DELIVERED IN NAIROBI THIS 23RD DAY OF SEPTEMBER 2022

M THANDE

JUDGE

In the presence of:-

.....for the Applicant
.....for the Respondents
.....for the Public Trustee
.....Court Assistant

