



REPUBLIC OF KENYA



**In re Estate of LNOL (Deceased) (Succession Cause E024 of 2021)
[2022] KEHC 14367 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
SUCCESSION CAUSE E024 OF 2021
F GIKONYO, J
OCTOBER 27, 2022
IN THE MATTER OF THE ESTATE OF LNOL (DECEASED)**

IN THE MATTER OF

**SNLL 1ST ADMINISTRATOR
JNL 2ND ADMINISTRATOR
LK 3RD ADMINISTRATOR**

RULING

1. By Summons for Revocation of Grant of letters of administration dated April 20, 2022 expressed to be brought under Section 76(b) of the *Law of Succession Act*, and Rule 44(1) of the Probate and Administration Rules, the applicant is seeking the following orders: -
 - a. That the special limited grant issued to SNLL, JNL and LK on the December 20, 2021 be revoked.
 - b. That all other grant issued by this honourable court be and are hereby revoked.
 - c. That an order for the administrators to account for and reimburse the amount disbursed from the client's account in the firm of Gikera & Vadgama Advocates.
 - d. That fresh grant be issued including PSM as an administrator on account of her being a legally recognized wife to the deceased.
 - e. That the costs of this application be in the cause.
 - f. That any other order that the court may deem fit.
2. The application is supported by the affidavit of PM sworn on April 20, 2022.



3. The grounds in support of the prayers sought were that LNOL died on September 3, 2021 and a special limited grant was issued to SNLL, JNL and LK on December 20, 2021. However, the administrators fraudulently obtained the special grant by failing to reveal to the court that the deceased was survived by a second widow as well as two adopted daughters. The court issued the orders granting the special limited grant oblivious to the existence of the second wife and dependent daughters and the overall circumstances of the case. That the applicant is a second wife and beneficiary of the deceased having undergone a customary marriage with the deceased in September 2016. That she lived with the deceased as husband and wife from the aforesaid date as until his unfortunate demise on September 3, 2021. They built their matrimonial home on parcel No 7644 of Cis Mara/Ilmashariani Morijo/XXX. That during his ailment she personally took care of the deceased in her capacity as his wife. As a matter of fact, on August 18, 2021, when the deceased developed general weakness while in his house, they rushed him to Medicitia hospital in Narok town after which he was transferred to Aga Khan hospital. It was only after his untimely demise that the deceased first family took over the burial proceedings without her inclusion treating her like a complete outsider. That at all material times, the administrators were aware of her existence and her status as a co-wife to SNLL. That in fact they have had several forums in the presence of the local administrators seeking to resolve the family disputes. Furthermore, the applicant through her advocates, she sent a letter to Gikera & Vadgama advocates, the advocates on record for the administrators informing them of her presence and seeking their indulgence not to distribute the funds held in the client account pending hearing and determination of the succession matter. At all material times being the wife of the deceased, the applicant together with her two daughters whom he took up as his own were fully dependent on him. That evidently, the applicants as well as their advocates were well aware of her existence and that of her family but deliberately opted to conceal this fact to steal a match and embezzle the deceased's estate to her suffering and disadvantage. That she has an equal right to the grant of representation and she did not consent to the making of the special limited grant to the administrators herein. That this court should allow the application in the interest of justice.
4. The administrators/ respondents opposed the application vide a replying affidavit sworn on June 22, 2022 by the 1st Administrator/ respondent. She deponed that the deceased married the respondent on December 13, 1969 in accordance with the Maasai customs. Later on, January 23, 1977 they conducted a Christian marriage which was registered under *The African Christian Marriage and Divorce Act* cap 151. The 1st administrator/respondent and the deceased were blessed with 4 children; SPL, JNL, KL and PL. Up to the time of the demise of the deceased, the 1st administrator/respondent and the deceased were married and there were no divorce proceedings filed seeking to annul their union. It was therefore impossible for the deceased to have married the applicant in 2016 when their marriage was still valid. That she is aware that in September 2016 when the applicant alleges to have undergone customary marriage with the deceased, she was married to one HK. The marriage between the applicant and HK was dissolved on August 15, 2017 in Narok SPMC Divorce Cause No 3 of 2016. That as at September 2016, the applicant lacked capacity to contract any other marriage. That the deceased did not have adoptive children as alleged by the applicant or at all. That the applicant has not provided any evidence of adoption or dependency. That it is not true that there was any customary marriage conducted between the applicant and the deceased because of a) according to Maasai customs if a man wishes to marry a second wife, he is required to seek permission of the first wife and the children who are above 18 years. The deceased did not inform her or any of her 4 children all of whom are adults that he intended to marry or had married the applicant. b) the deceased did not pay any dowry for the applicant. c) there was no marriage ceremony conducted for the applicant. The applicant has not presented any evidence that such ceremony was ever conducted. The applicant is therefore misleading the court and she prayed that the applicant should not be allowed to benefit from the estate of the



deceased. That there was no misrepresentation on the part of the respondent when she applied for the special limited grant dated December 20, 2021. All her children are aware of these proceedings and those who are not named as administrators have given their consent. The special limited grant dated December 20, 2021 was obtained solely for the purposes of maintaining and preserving the estate including paying utilities and operational costs incidental to the running of the deceased estate which includes a dairy and agricultural farm, residential houses and to provide for upkeep pending the making of a full grant. She prayed that this court dismisses the applicant's application with costs.

Applicant's submissions.

5. The applicant submitted that the union between her and Mr K be construed to have ended on account of presumption of divorce notwithstanding that no decree nisi was obtained from the court to have the marriage dissolved. Both the applicant and Mr K since their separation continued with their lives as single adults capable of contracting subsequent marriages even in the absence of the decree absolute. That in light of the circumstances of the case in issue, this court ought to take a de novo approach and determine the matter with due regard to common sense and sensible policy.
6. The applicant submitted that she was validly married to the deceased under Maasai customary law and she underwent a customary /cultural process of divorce that set her free to be married by another man. That though the deceased was still married to the 1st administrator/respondent at the time they had fallen out and had lived separately. That the deceased was fully aware of the two daughters under the applicant's care; that is after the split custody the former husband took custody of the two sons leaving the applicant with full custody of the two daughters. The deceased gladly took the two daughters as his own where he assumed full paternal responsibility including paying their school and living expenses. Therefore, the applicant and the two daughters are dependants and have beneficial interest over the deceased's estate.
7. The applicant submitted that the petition for special limited grant was not presented in good faith before this court as it failed the legal test set out in Section 76 as there was concealment of material facts concerning the deceased's estate. That the petition for special limited grant did not disclose the applicant as a wife to the deceased. That no notice was issued to the applicant informing them of the respondent's petition for special limited grant over the deceased's estate. The applicant and her two daughters had equal rights to the deceased's estate and therefore they were entitled to be notified and their consent sought before petitioning the probate court. As a result, the special limited grant should stand revoked.
8. The applicant has relied on the following authorities;
 - i. [Re Estate of Jecinter Njoki Okoth \(Deceased\) \[2020\] eKLR.](#)
 - ii. Section 119 of the [Evidence Act.](#)
 - iii. Section 16 of the [Marriage Act.](#)
 - iv. [Tukero Ole Kina v Attorney General & Another \[2019\] eKLR](#)
 - v. In [Re Estate of Oloikampai Sarapae Sanguti \(Deceased\) \[2018\] eKLR](#)
 - vi. Section 3(1), 29, 3(2) and 76 of the [Law of Succession Act.](#)
 - vii. Rule 26(1) of the [Probate and Administration Rules.](#)
 - viii. [In The Matter of The Estate of LAK \(Deceased\) \[2014\] eKLR](#)
 - ix. [Re Estate of Moses Wachira Kimotho \(Deceased\) Succession Cause 122 of 2002 \[2009\] eKLR.](#)



- x. [*In Re Estate of Julius Ndubi Javan \(Deceased\) \[2018\] eKLR.*](#)
- xi. [*Albert Imbuga Kisigwa v Recho Kawai Kisigwa Succession Cause No 158 of 2020.*](#)

Respondents' submissions

9. The respondents submitted that the applicant was not a spouse. That at the alleged time when the applicant claims the customary marriage was celebrated; September 2016, the deceased was in a monogamous marriage with the respondent which was contracted on January 23, 1977 under the [*African Christian Marriage and Divorce Act*](#) cap 151. It was therefore not possible for the deceased to contract a marriage with the applicant as alleged. That the applicant admitted to have been married to K at the time she claims under went the customary marriage with the deceased. Her divorce was finalized on August 15, 2017 when the decree absolute was issued. Therefore, she could not have had capacity to contract a marriage before that date.
10. The respondents submitted that the applicant has not adduced evidence or called any witnesses to support her claim of customary marriage which is held in public. The only witness is her father.
11. The respondents submitted that the authenticity of the two photographs of the applicant and the deceased are in doubt. That the said photos are not sufficient proof of marriage.
12. The respondents submitted that no evidence of marriage ceremony, dowry negotiations between the family of the applicant and that of the deceased have been provided.
13. The respondent submitted that the applicant was not a dependant, that the receipts showing payment of school fees of the applicant's daughters are unclear who was making payments. There is nothing linking the receipts to the deceased. That is also not true that the deceased constructed a matrimonial home for the applicant on land parcel No Cis Mara/Ilmashariani Morijo/XXX.
14. The respondents submitted that the deceased was survived by only one widow, SNLL to whom he got married under statute and with whom they were blessed with 4 issues.
15. The respondents submitted that the applicant lacked the capacity to contract the alleged marriage with the deceased since she was married to HK at the time, she alleges the deceased married her.
16. The respondents submitted that the applicant has not demonstrated dependency fraud, concealment of misrepresentation to warrant the revocation of the special limited grant issued on December 20, 2021.
17. In the end, the respondents submitted that there was no concealment or misrepresentation of any fact. She prayed that this court exercises its discretion and dismiss the application dated April 20, 2022 with costs.
18. The respondents relied on the following authorities;
 - i. Section 76, and 29 of the [*Law of Succession Act.*](#)
 - ii. Section 9(a) of the [*Marriage Act*](#), 2014.
 - iii. [*Machani v Vernoor \[1985\] eKLR.*](#)
 - iv. [*Re Estate of Giovanni Gremmo \(Deceased\) \[2019\] eKLR.*](#)
 - v. [*Re Estate of Ruiru Muchobi Gikonyo \[2022\] eKLR.*](#)
 - vi. [*Milena Bora v Liana Tamburelli \[2016\] eKLR.*](#)



- vii. [Macfoy v United Africa Co \[1961\] 3 ALL ER 1169 At Page 1172.](#)
- viii. [Sakina Sote Kaittany & Another v Mary Wamaitha \[1995\] eKLR.](#)
- ix. [MWK v AMW \[2017\] eKLR.](#)
- x. [Re Estate of JMW \(Deceased\) \[2020\] eKLR.](#)
- xi. Section 107 Of the [Evidence Act.](#)
- xii. [Re Estate of The Late M'ibigai Muchangi \(Deceased\) \[2020\] eKLR.](#)
- xiii. [Albert Imbuga Kisigwa v Recho Karai Kisigwa \[2016\] eKLR.](#)

ANALYSIS AND DETERMINATION

19. I have considered the summons, the affidavit in support, replying affidavit, the rival written submissions by parties and authorities cited. For reasons that will become clear, the key issue for the Court's determination is should stem from the very last prayer in the application, to wit;

... any other order that the court may deem fit.

20. I have cast the issue in form of “any other order that the court may deem fit” for good reasons. This is a petition for limited grant which is ordinarily limited in scope, function or purpose and is time-bound. In this realization, I ordered inter alia the petitioners to file a substantive succession cause within the time specified in my orders made on December 20, 2021. And, prudence has it that, claims such as; i) the applicant’s capacity to contract a marriage; ii) adoption of her children by the deceased; and iii) dependency; are better litigated in the substantive cause which provides a more intense and intrusive plenary or forum. Notably I ordered the filing of a substantive succession cause-which ought to have been filed already.
21. In light thereof, litigating such complex and pertinent issues in a petition for limited grant perforce causes unnecessary delay to administration of the estate of the deceased.
22. And, to obviate any prejudice to the applicant I will not evaluate the substantive issues in the application.
23. I will draw upon the power of the court in section 47 and rule 73 of the [Law of Succession Act](#) and [Probate and Administration Rules](#), respectively in fashioning appropriate orders herein.
24. Of great value here is that; I will determine this matter by considering the nature of the limited grant herein, the orders I issued on December 20, 2021 and in interest of justice.
25. The orders of December 20, 2021 were as follows: -
- 1. That the petition be and is hereby certified urgent.
 - 2. That a special limited grant is issued to SNLL, JNL and LL AND LK.
 - 3. That the grant is limited to collecting and preserving the Kshs 5,000,000/= held in the client’s account in the firm of Gikera & Vadgama Advocates.
 - 4. That the said firm of advocates shall pay the said sum of money into an estate account so designated by the bank in the names of the three petitioners within 21 days of this order.



5. That except a sum towards immediate needs of the widow which should not exceed Kshs 200,000 no other money shall be paid out of the estate account opened in accordance with (4) above unless with the order of the court pursuant to (6) below.
 6. That the petitioners shall file in court the estimated widow's expenses for the farm within 21 days of today for consideration and order by the court.
 7. That the grant herein shall be drawn in accordance with the specific terms stated herein.
 8. That the grant shall specifically indicate that it does not vest the power of distribution of the estate.
 9. That the petitioners shall file a substantive petition for grant of letters of administration within 30 days.
26. Orders number 3,4 and 5 hampers the major purpose and scope of the grant herein.
27. The grant is limited to collecting and preserving the sum of Kshs 5, 000,000 which was being held in the clients' account in the firm of Gikera & Vadgama Advocates into an estate account in the names of the petitioners. Except, a sum of Kshs 200,000 was to be paid out for immediate expenses of the widow herein. At least, in the words of the applicant the widow herein is the 1st wife of the deceased. And payment of the said sum is within her right and upon the order of the court. No prejudice should be read in that kind of payment in respect of the estate property or rights of other beneficiaries. I am only concerned with due observance of my orders by the petitioner, and I do not expect any breach thereof, for there is no order preventing them from complying. The letter by the applicant has no legal force or authority- and legal counsel herein know this- to stop compliance with the court orders herein. It bears repeating, orders inter alia were collection and preservation of the funds in question into an estate account. The grant was replete with all safe valves in law.
28. Now, therefore, I find no reason to revoke the limited grant. I direct the applicant to file her application in the main cause I ordered the petitioners to file. In that connection, the petitioners shall appear in court on a date to be appointed to confirm full compliance with my earlier orders of December 20, 2021. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
27TH DAY OF OCTOBER, 2022**

F Gikonyo M

Judge

In the presence of:

1. Shikanda for the applicant
2. Ms Opondo for Petitioners
3. Mr Kasaso – CA

