



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Mercy Kagige Kamundi (Deceased) (Succession Cause  
E045 of 2021) [2022] KEHC 15684 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15684 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
SUCCESSION CAUSE E045 OF 2021**

**LW GITARI, J**

**NOVEMBER 22, 2022**

**IN THE MATTER OF THE ESTATE OF THE  
LATE MERCY KAGIGE KAMUNDI (DECEASED)**

**BETWEEN**

**FREDFRICK NJERU KAMUNDI ..... PETITIONER**

**AND**

**KAMUNDEH KIMATHI MWIRABUA ..... 1<sup>ST</sup> RESPONDENT**

**ELIPHELET MICHENI KAMUNDE ..... 2<sup>ND</sup> RESPONDENT**

**DOYNE KAGENI MUGAMBI ..... 3<sup>RD</sup> RESPONDENT**

**MARYSTELLA GAKII MUTEGI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The petitioner filed a petition for letters of administration pendente lite that is dated and was filed on August 23, 2021. The petitioner sought that this court to issue to him a grant of letters of administration pendente lite of the estate of the late Mercy Kagige Kamunde (the 'deceased'), limited for the purpose of continuing with a suit namely, Nyeri Court of Appeal, Civil Appeal No 79 of 2017; Mercy Kagige Kamunde –v- Eliphas Mugambi Kamunde & 3 Others until further representation is granted.
2. The petition is supported by the affidavit sworn by the petitioner on August 23, 2021 and his further affidavit sworn on August 8, 2022. He deposed that he presented the present petition in his capacity as the son and legal representative of the deceased. He further deposed that the deceased was the appellant in Nyeri Court of Appeal, Civil Appeal No 79 of 2017; Mercy Kagige Kamunde –v- Eliphas Mugambi Kamunde & 3 Others (heineafter the 'Court of Appeal Civil Appeal No 79 of 2017') and that following the death of the deceased on May 15, 2020, no grant of representation has been issued. According to



- him, the death of the deceased created a situation where no suit can be prosecuted further unless a grant is issued.
3. Contemporaneous with filing the said petition he filed summons dated the same August 23, 2021 which seek for one sole order, that is:
    - a. That the petition for a grant of administration pendente lite of the estate of the late Mercy Kagige Kamunde be allowed.
  4. The respondents opposed the application vide the replying affidavit sworn by the 1<sup>st</sup> respondent on April 27, 2022, on his own behalf and on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents. The 1<sup>st</sup> respondent deposed that on the strength of his advocates advice, which advice he believed to be true, a limited grant of pendente lite is issued pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration. He further deposed that the issue raised in Court of Appeal Civil Appeal No 79 of 2017 is not one touching on the validity of the deceased's will or revoking of any probate.
  5. According to the 1<sup>st</sup> respondent, Court of Appeal Civil Appeal No 79 of 2017 is an appeal against the judgment of this court which dismissed the suit for want of prosecution and does not fall within the purview for seeking a limited grant of pendente lite. It was the respondents stand that a grant limited ad litem is the one normally used for prosecuting or defending proceedings instituted before a court.
  6. Further, the 1<sup>st</sup> respondent deposed that the petitioner's allegation that he is the legal representative of the deceased's estate is not based on any evidence. In any case, it is the 1<sup>st</sup> respondent argument that the petitioner is not fit to be appointed the legal representative of the subject estate as he is allegedly the main cause of the family wrangles that led the deceased to institute Court of Appeal Civil Appeal No 79 of 2017. The 1<sup>st</sup> respondent further deposed that the petitioner did not bother to inform or seek the consent of any family members before filing this petition. This, according to the 1<sup>st</sup> respondent, is evidence of the level of contempt that the petitioner has for his family members. The 1<sup>st</sup> respondent then proceeded to give several cases in point of alleged acts by the petitioner which, to him, amount to the intermeddling of the deceased's estate. The 1<sup>st</sup> respondent thus urged this court to dismiss the petitioner's petition for letters of administration pendente lite dated August 23, 2021, with costs.
  7. The application was disposed off by way of written submissions. Below is a summary of the respective submissions by the parties.

### **Petitioner's submissions**

8. It was the petitioner's submission that the opposition to the application by the respondents is based on three misapprehensions. The first misapprehension is that the respondents do not understand that the petitioner is not seeking to distribute or obtain a grant to administer the estate of the deceased. According to him, he merely wishes to complete litigation which the deceased had commenced in the High Court in the course of administering her late husband's estate.
9. The petitioner submitted that the second misapprehension by the respondents is that distribution of the deceased's estate will take place if the grant sought is issued. This according to him, could not happen as no one has to date obtained a grant in respect of the deceased's estate. Finally, the petitioner submitted that the third misapprehension by the respondents is that the respondents have failed to understand the role of a probate court in the administration of the estate of a deceased. According to the petitioner, the issues raised in Court of Appeal Civil Appeal No 79 of 2017 require determination by the court as they concern the administration of the estate of their father. To buttress his submissions, the petitioner relied on the case of *Trouistik Union Internation & Anor v Mbeyu & Anor [1993] eKLR*;



Rhoda Wairimu Karanja & Anor v Mary Wangui Karanja and Anorr, Court of Appeal at Nairobi, Civil Application No 69 of 2014; Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another [1987] eKLR; and In Re the Matter of the Estate of Morarji Bhanji Dhanak (deceased) [2000] eKLR. The petitioner thus urged this court to allow the said summons dated August 23, 2022 as prayed and issue him a grant pendente lite.

### **Respondents' submissions**

10. It was the respondents' submission that the petitioner is not a legal representative of the deceased's estate as such an allegation remains unsubstantiated. According to the respondent, a grant ad litem was the proper grant to be sought by the applicant if he requires a grant limited for purposes of continuing to prosecute Court of Appeal Civil Appeal No 79 of 2017, as expressed in the present application. The respondents relied on the cases of Re The Matter of the Estate of Morarji Bhanji Dhanak (Deceased) [2000]eKLR and In re the estate of Helena Wangechi Njoroge (deceased) (2015) eKLR in submitting that the present summons for a limited grant pendente lite is not properly before this court and that the same ought to be dismissed with costs.

### **Issue for determination**

11. I have considered the summons application dated the same August 23, 2021, the affidavits presented in support and opposition of the application, as well as the respective submissions by the parties. The main issue for determination is whether the petitioner has presented a case to warrant the grant of letters of administration pendente lite of the deceased's estate to him.

### **Analysis**

12. The present summons application is expressed to be brought under the provisions of section 54 of the Law of Succession Act (the 'Act') and rule 49 of the Probate and Administration Rules.
13. Section 54 of the Act provides as follows:

' A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the fifth schedule to this Act.'

On the other hand rule 49 provides for the manner in which an application not otherwise provided for in the rules may be filed.

14. The fifth schedule to the Act provides for the different forms of limited grants that a court can issue. The 5<sup>th</sup> schedule of the Act makes provision for various types of limited grant. These are:-
  1. Grant limited in duration where a will is lost or misplaced and there is a copy of the will which has been preserved. Probate may be granted of the copy or draft limited until the original or an authenticated copy is produced.
  2. Grant for the use and benefit of others having a right. This is issued where any executor is absent from Kenya and there is no executor within Kenya willing to act. A limited grant and letters of administration with the will annexed may be issued limited until he shall obtain probate or letters of administration granted to him. The grant is issued where the executor(s) is a minor or is of unsound. The grant is also issued pending any suit touching on the validity of the will of a deceased- this is the grant of administration pendente lite. It is issued pending determination of the validity of a will or for obtaining or revoking any probate or any grant of



letters of administration. It is issued where there is litigation over the estate without authority to distribute.

3. Grant for special purposes: It is issued for any purpose that may be specified in the will be limited for that purpose only.
4. Grant with exception: The grant will be issued subject to certain exceptions.
5. Grants of the rest: It is the grant for the remainder of the deceased's estate to the person who is entitled.
6. Grants of effects unadministered: Issued where the executor passes away leaving some estate unadministered or a limited grant expires while part of the estate is unadministered.

Rule 10 of the fifth schedule to the Act describes the situations where administration pendente lite arises in the following terms:

' Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate, and the administrator shall be subject to the immediate control of the court and shall act under its direction.'

15. The respondents' argument is that there is a distinction between a grant of letters of administration pendente lite and a grant of letters of administration ad litem.

The grant limited in duration is described under rules II of the 5<sup>th</sup> schedule.

16. The limited grant of letters of administration ad litem is provided for under rule 14 of the fifth schedule to the Act and deals with administration of an estate limited to a suit. The said provision states as follows:-

' 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 such suit, limited for the purpose of representing the deceased in the said suit, 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.'

17. From the foregone, it is clear that a limited grant of letters of administration ad litem is usually used when the estate of a deceased person is required to be represented in court proceedings. (See the case of *Greenway vs Mc Kay (1911) 12 CLR 310*).

18. In *Oduor Hawi Ambala & another v Marvin Opiyo Ambala & 4 others [2014] eKLR* the Court of Appeal, at paragraph 25 of that decision, held that rule 10 of the fifth schedule to the Act, cited herein above, 'can only be invoked to issue a limited grant pendente lite pending determination of such dispute as specified in the rule.' It follows that the essence and purport of a limited grant pendente lite is administration of an estate when there is a pending suit touching on the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration.



19. In the persuasive case of *In Re The Matter of the Estate of Morarji Bhanji Dhanak (Deceased)* [2000] eKLR, the court expressed itself as follows with regard to the distinction between a grant of letters of administration pendente lite and a grant limited ad litem:

' Where a suit is pending touching validity of will, it is a situation known as administration pendente lite.

The meaning of administration pendente lite is where a grantee is appointed simply to administer the estate of the deceased during litigation. For instance, if the will of the deceased is being contested, pending the determination of that dispute the court may appoint a grantee pendente lite to continue to administer the estate so as it is not wasted. The grantee is not permitted to distribute the estate but merely manage the same pending litigation.

The grant limited ad litem, is one normally used for prosecuting or defending proceedings began in a court of justice. This type of grant is covered within our succession act in the 5<sup>th</sup> schedule para 11-16. It has been described as grant for special purposes.'

20. A perusal at the copy of the memorandum of appeal in Court of Appeal Civil Appeal No 79 of 2017 that is attached to the present application reveals that the appeal seeks the setting aside of the judgment and decree of the High Court made on November 3, 2016 and substitution in its place, with an order that summons for confirmation be heard by a judge other than by Honorable Justice Mabeya.
21. As submitted by the respondents, the pending suit in this case, Court of Appeal Civil Appeal No 79 of 2017, does not involve issues of validity of a will of the deceased, and it is also does not involve the issue of obtaining or revoking any probate or grant of letters of administration. From the grounds given by the petitioner in support of the grant sought, I would agree with the respondents that the proper application should have been for administration ad litem and not pendente lite.

### **Conclusion**

22. From the above analysis, it is my view that petitioner has not laid a basis for the issuance by this court of the grant of letters of administration 'pendente lite' in the present petition and the summons which are both dated August 23, 2021. The same lack merit. I order that the summons and the petition be dismissed with costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 22<sup>ND</sup> DAY OF NOVEMBER 2022.**

**L.W. GITARI**

**JUDGE**

**22/11/2022**

Ruling has been read out in open court.

**L.W. GITARI**

**JUDGE**

**22/11/2022**

