



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**SUCCESSION CAUSE NUMBER 141 OF 2015**

**IN THE MATTER OF THE ESTATE OF ESTHER FRANCIS THOYA (DECEASED)**

**TABITHA NJERI NJENGA.....RESPONDENT/PETITIONER**

**VERSUS**

**KAHINDI FRANCIS THOYA.....1<sup>ST</sup> INTERESTED PARTY/1<sup>ST</sup> RESPONDENT**

**KALUME FRANCIS THOYA.....1<sup>ST</sup> OBJECTOR/2<sup>ND</sup> RESPONDENT**

**KARISA FRANCIS THOYA.....2<sup>ND</sup> OBJECTOR/3<sup>RD</sup> RESPONDENT**

**MASUMBUKO FRANCIS THOYA.....3<sup>RD</sup> OBJECTOR/4<sup>TH</sup> RESPONDENT**

**JUMA FRANCIS THOYA.....4<sup>TH</sup> OBJECTOR/5<sup>TH</sup> RESPONDENT**

**REHEMA FRANCIS THOYA.....5<sup>TH</sup> OBJECTOR/6<sup>TH</sup> RESPONDENT**

**KADZO FRANCIS THOYA.....6<sup>TH</sup> OBJECTOR/7<sup>TH</sup> RESPONDENT**

**KANZE FRANCIS THOYA.....7<sup>TH</sup> OBJECTOR/8<sup>TH</sup> RESPONDENT**

**SHIDA FRANCIS THOYA.....8<sup>TH</sup> OBJECTOR/9<sup>TH</sup> RESPONDENT**

**GRACE FRANCIS THOYA.....2<sup>ND</sup> INTERESTED PARTY/10<sup>TH</sup> RESPONDENT**

**HADIJA ESSAJEE BHAIJEE.....3<sup>RD</sup> INTERESTED PARTY/11<sup>TH</sup> RESPONDENT**

**RULING**

1. This matter was commenced by way of citation proceedings in which the Petitioner, Tabitha Njeri Njenga issued notice to the 1<sup>st</sup> to 10<sup>th</sup> respondents Kahindi Francis Thoya, Kalume Francis Thoya, Karisa Francis Thoya, Masumbuko Francis Thoya, Juma Francis Thoya, Rehema Francis Thoya, Kadzo Francis Thoya, Kanze Francis Thoya, Shida Francis Thoya and Grace Francis Thoya who are the children of the deceased Esther Francis Thoya (hereinafter simply referred to as the deceased) asking them to accept or refuse letters of administration intestate to the estate of their deceased mother. No response was made to the citation and on 24<sup>th</sup> May, 2016 this court issued a grant of letters of administration intestate to the Petitioner in respect of the estate of the deceased.

2. The Petitioner who claims a purchaser’s interest measuring an acre in L.R. No. Kilifi/Mtwapa/991 registered in the name of the deceased subsequently filed a summons dated 22<sup>nd</sup> June, 2017 together with the 1<sup>st</sup> Respondent seeking to confirm the grant. The application was supported by Hadija Essajee Bhaijee another creditor.

3. When the summons for confirmation of grant came up for hearing, the 3<sup>rd</sup> Respondent allegedly speaking on behalf of the 1<sup>st</sup> to 10<sup>th</sup> respondents indicated that they would be opposing the application. The court gave them time to file the necessary papers and they subsequently filed an objection to the making of grant dated 30<sup>th</sup> April, 2018. The objection is premised on the grounds on its face. The

objection was filed on behalf of the 2<sup>nd</sup> to 9<sup>th</sup> respondents. Indeed the 1<sup>st</sup> Respondent being a party to the summons for confirmation of grant could not turn around to oppose the same. In that regard I am treating the 1<sup>st</sup> Respondent as the 1<sup>st</sup> Interested Party. The 10<sup>th</sup> Respondent who did not join the objection is the 2<sup>nd</sup> Interested Party and the 11<sup>th</sup> Respondent is the 3<sup>rd</sup> Interested Party.

4. By agreement of the advocates for the parties, the objection was disposed off by way of written submissions. A perusal of the submissions filed by the advocate for the Petitioner discloses that the Petitioner opposes the objection on the ground that an objection under Section 68 of the Law of Succession Act (L.S.A.) cannot be made once a grant has been issued. The decision of J.A. Makau, J in **Re Estate of Agnes Ogolas Akoth (deceased) [2016] eKLR** is cited in support of the assertion.

5. Counsel for the 2<sup>nd</sup> to 9<sup>th</sup> respondents/objectors did not reply to the Petitioner's submissions. In submissions filed before the Petitioner filed her submissions, counsel for the 2<sup>nd</sup> to 9<sup>th</sup> respondents/objectors concentrated on the grounds in support of the objection to the making of a grant.

6. Before proceeding to consider the grounds in support of the 2<sup>nd</sup> to 9<sup>th</sup> respondents' objection, I must first consider whether the Petitioner's opposition to the objection has any merit.

7. Although the 2<sup>nd</sup> to 9<sup>th</sup> respondents' objection does not disclose the provisions under which the same is made, it is indicated that the same is premised on Form 76 and Rule 17(1). It is presumed that the application is made under the L.S.A. and the rules made thereunder.

8. Section 67 of the L.S.A. requires that before a grant is issued, a notice of the application for such grant inviting objections thereto shall be published. The notice shall be for a period of not less than thirty days from the date of publication. The publication is usually done in the Kenya Gazette.

9. Section 68 then provides the procedure to be followed where an objection has been lodged. It states:

**“68. Objections to application**

**(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.**

**(2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.”**

Thereafter the objection is heard and the court determines the dispute.

10. In fact, the issuance of a grant is not automatic. The court is empowered by Section 70 of the L.S.A. to interrogate the application for grant of letters of administration before issuing the grant.

11. Rule 17(1) of the Probate and Administration Rules provides that:

**“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.”**

12. In the case of **In the Re Estate of Agnes Ogolas Akoth (Deceased) [2016] eKLR** the Court was faced with a situation where an objection was filed after the grant had been made. In dismissing the objection, the learned Judge held that:

**“14. In the instant case the objection was filed when grant had already been made. The delay in filing of the objection of 4 years is inordinate and unexplainable. The objector is objecting to the making of the grant after it has already been made and I find that the objection has already been overtaken by events. The court cannot stop what has already passed. The Law of Succession is crafted in such a manner that the obtaining of the grant is not an end to aggrieved party's rights. One can challenge the grant by seeking its revocation or annulment or even file a protest to the mode of distribution.”**

13. I agree with the learned Judge that once a grant has been issued, an objection under Section 68 L.S.A. is no longer viable. Any person desirous of upsetting a grant that is already issued should therefore look upon the other remedies availed by the L.S.A. An objection is no longer available where the grant is already issued.

14. In the instant case, it is noted that the process was commenced through citation meaning that the 2<sup>nd</sup> to 9<sup>th</sup> respondents were all along aware that the Petitioner intended to take out letters of administration in respect of the estate of their deceased mother. They could have responded to the citation issued but they kept quiet. They did not file an objection within the thirty days given to them in the Gazette Notice. They never applied for enlargement of time for filing an objection. Their objection has therefore been overtaken by events and the merits of the same cannot be considered.

15. The 2<sup>nd</sup> to 9<sup>th</sup> respondents' objection dated 30<sup>th</sup> April, 2018 is therefore struck out. Considering the relationship of the 2<sup>nd</sup> to 9<sup>th</sup>

respondents to the deceased, I will not grant costs against them. Each party is therefore directed to meet own costs of the objection.

**Dated, signed and delivered at Malindi this 17<sup>th</sup> day of December, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**