



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 417 of 1992

IN THE MATTER OF THE ESTATE OF:

CHARLES ANYANDA LUYUNDI (DECEASED)

GRACE MWAYITSI LUYUNDIAPPLICANT

VERSUS

EDWARD KAUNDA ANYANDA1ST RESPONDENT

MATHEW LUYUNDI2ND RESPONDENT

AND

MABEL ANYANDA1ST OBJECTOR

MAUREEN KHADIEVI ANYANDA.....2ND OBJECTOR

R U L I N G

This is a very old case with history of its own.

Vide a ruling dated 18th June, 1998 the grant of representation issued to Edward Kaunda Anyanda and Mathew Luyundi (1st and 2nd Respondents herein) was revoked with a direction that the proper legal representatives should apply for letters of Administration.

Thereafter the Petitioner Grace Mwayitsi Luyundi applied for a limited grant of letters of Administration in the estate of the deceased herein and was issued with such grant on 30th September 1998 only for the purposes of collecting rent to pay school fees for the children.

Thereafter Hon. Osiemo J vide his Ruling dated 21st November 2002 directed the parties to take earliest action to distribute the estate.

The Petitioner thereafter filed the summons for confirmation and obtained the order ex-parte on 12th October 2004 which was revoked on 18th February 2005 with a liberty to file affidavits of protest. This affidavit was eventually filed by 1st and 2nd Objectors namely Mabel Anyanda and Maureen Khadievi Anyanda on 7th July, 2005 and affidavit by Mathew Luyundi Anyanda 2nd Respondent was also filed on 7th July, 2005.

When finally this matter came before me on 25th July, 2006 the issue was raised as to validity of summons for confirmation dated 18th December, 2003.

Due to various reasons as set forth the submissions on the said issue eventually were made on 28th September 2007.

The main contention raised is to the effect that the Petitioner was given a limited grant of representation and it being limited in purpose cannot be the basis for the summons for confirmation. It is curiously submitted that under Section 71 of the Laws of Succession Act (Cap. 160) (hereinafter referred to as 'the Act) only grant of letters of Administration can be confirmed.

Before I consider the submissions made by the counsel, it may be appropriate to quote relevant provisions of the Act.

47. "The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by resident magistrate appointed by the Chief Justice."

It gives jurisdiction to the court to entertain any application.

Section 51 stipulates that the application for a grant of representation shall be made in the prescribed forms.

54. "A court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule."

55. "(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death."

I shall note the words "No grant of representation, whether or not limited in its terms" appearing in the said section.

67. "(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 the 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."

The purpose of this section is to give the notice by Gazette to all concerned to avoid fraud and concealment except in the limited grant for collection and preservation of assets.

Section 70 gives the court power to do certain things before making a grant of representation.

Section 71 provides for confirmation of grant of representation.

“71(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or.

I note once again the reference in the said section to **“any grant of representation”**. The definitions of **‘Representation’** **“personal Representation”** and **“administrator”** may be looked at which are:

‘representation’ means the probate of will or the grant of representation and;

‘personal representative’ means the executor or administrator of a deceased person

‘administrator’ means a person to whom a grant of letters of administration has been made under the Act’

73. “The court shall, within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof.”

The court thus has an obligation to give notice to the holder of grant to confirm the same.

It is not in dispute that the Petitioner was issued with a grant of Letters of Administration **ad collingenda bona** under section 67(1) of the Act and as per the procedures provided under Rule 36 of the Probate and Administration Rules.

After this grant, which was issued on 30th September 1998 no further action as regards further representation, is taken by any of the parties even after the direction that the parties should take actions to distribute the estate. It is evident that the deceased died in 1991.

Thereafter the Petitioner filed the Summons for confirmation.

Can she do it under the circumstances or as per the Law.

The matter of **Re Succession – Limited grant** (2002)2 EACK 495, in my humble opinion, cannot be of any help to me so far as the issue before me is concerned, except to accolade the splendid efforts made by Ang’awa J.

In the case of **(1984) KLR 490 Marjaria –vs- Abadalla**, the issue before the Court of Appeal was the representation by the holder of Limited grant in a pending suit and after considering the wordings of the grant, the Court of Appeal allowed the Appeal by giving the holders of Limited grant to represent the deceased in the appeal.

In the case of **Re Kahawa Sukari Ltd. (2004)2 EACAT. 93**, the issue before the court was whether the grant of administration **ad collingende bona** without specifying the purposes for which it was granted was competent. The court found that it was invalid grant in the absence of purposes set forth and thus was void **ab initio**.

Furthermore, the holder of that grant was seeking to be member of the company within section 211 of the Companies Act.

However, the court gave an opinion (**and not the holding**) by stating:-

“Furthermore, even if the grant was a valid one, I am of the opinion that it would not have been sufficient to constitute the petitioner a member of the company within the meaning of section 211 of the Companies Act for the following reasons. First a grant of letter of administration ad collingenda bona cannot in my opinion confer on the grantee the status of a personal representative of the deceased. Under section 2 of the Succession Act, a personal representative is defined as “the executor or administrator of a deceased person”. And Administrator is in turn defined to mean a person to whom a grant of letters of Administration has been made under the Act. To my mind, the grant of

letters referred to can only be a full grant for a limited grant ad colligenda bona cannot and does not confer on the grantee the right to administer the estate of the deceased and accordingly such a grantee cannot be the administrator of the deceased within the meaning of the law.”

On the basis of the above circumstances, the law and submissions, I need to determine an issue which, I do admit, has caused me great anxiety.

In my humble view I shall have to go back to the provisions of the Act to determine the issue.

The power to issue limited grants is donated to the court by section 54 of the Act. The grant in the said section is described as grant of representation. Even the grant under section 67(1) uses the same words.

Section 71(1) of the Act also mentions the confirmation of **any grant of representation** (emphasis mine). It does not exclude the limited grant of representation of the Act.

Section 55 in the similar terms includes the grant of representation limited in its terms and puts the same in the similar position as to the bar to distribution of any capital or to divide the property etc, unless it has been confirmed as per the provisions of section 71 which I have already specified herein before.

Section 72 of the Act, stipulates that no grant of representation be confirmed unless the conditions mentioned therein are fulfilled.

Then section 73 imposes an obligation on the court to give notice to the holder of the grant to apply for confirmation thereof. Once again limited grant is not excepted.

Section 79 of the Act states that the executor or the administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes except limitation has been imposed.

I do note that a personal representative subject to limitation cannot exercise some duties of the personal representative granted as per the provisions of Section 82, simply because the provisions stipulate that limitation or exception specifically. It, however, does not deny the title of “**a personal representative**” to a holder of a limited grant.

In this case I am only invited to determine whether the Petitioner, having been granted a limited grant of letters of Administration, can apply for confirmation under the circumstances of this case.

According to the Petitioner she has been directed by Hon. Osiemo J to divide the estate as per section 73 and it is contended section 71(1) stipulates for confirmation of **any grant of representation**.

To repeat, in my opinion, the definitions of the ‘**administrator**’ and ‘**representation**’ do fit the Petitioner.

There is no doubt that there are several gaps or lacuna in the Act which fail to give clearer picture of the rights or restrictions of the holder of a limited grant.

Specifically in the matter before me, no further grant is made since its issuance made as envisaged in Rule 36(2) of the Probate and Administration Rules. Obviously, the limited grant before me is not limited in time and thus it is a valid **grant of representation** and being only one on record. I also ponder at the use of the words “**a full grant of representation**” in Rule 36(1) of the said Rules which are not envisaged in the Act at any place. Will its introduction in the Rules make the provision ultra vires?

In my opinion, I may be inclined to agree with the Petitioner’s submissions in the circumstances herein, but for the consistency and avoidance of delay, I would use my inherent power under Rule 73 of the Rules as well as rely on Rule 36 (2) of the Rules and under the power vested in section 66 of the Act I do, appoint the Petitioner as an Administratrix of the estate who shall file and serve fresh summons for

confirmation within 14 days from the date of this ruling.

The Respondents and Objectors herein may file their protest as to the distribution of the estate within 14 days of the service of the summons for confirmation.

The summons for confirmation dated 18th December, 2003 is struck out with no order as to costs.

The grant of Letters of Administration shall be issued forthwith with the permission to file the summons for confirmation as directed hereinbefore.

The court has given considerable thoughts before giving these orders looking at the age of the matter and inactivity on the part of the Respondents and Objectors. It shall be in my opinion, just and proper to finalize the matter without undue technicality and delay.

Finally, I shall request the Chairman of Law Reform Commission to look into the problems raised with a request to proposal necessary amendments to the Act.

Dated, Delivered and Signed at Nairobi this 25th day of October 2007.

K.H. RAWAL

JUDGE