



1. Limited grant - The problem
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IN THE MATTER OF THE ESTATE OF MORARJI BHANJI DHANAK (DECEASED)

RULING

All reference to Section and rules refer to the Succession Act Cap 160 unless otherwise stated:-

A: Limited grants: The problem.

I was assigned to the Probate Portfolio of the High court of Kenya at Nairobi for the month of November, 2000. I noted with concern the procedure in which parties acting in person or through their advocates would come to court when applying for limited grant. This being that each applicant would file an application in order to obtain a limited grant. This position was quite different from when I last dealt with probate matter a year ago in 1999. Secondly, I was concerned that application for limited grant was coming into court by various rules and sections within the Succession Act Cap.160.

For instance, applicants would pray for limited grant by evoking either Section 54, or Section 67 or rule 36. There never was one uniform prayer for coming into court for a limited grant.

I kindly requested about 30 advocates who have applications for limited grants pending before me (see appendix of this ruling) to submit to me on the following points:-

- 1). a) What is the purpose of limited grants?
- b) How many types of limited grants do we have?
- c) What is the procedure to be used to come to court?
- 2). What is a limited grant ad colligeda bona?. What is its purpose and what procedure is used to come to court.
- 3) How do we deal with the urgent hearing of an application and the procedure in which to come to court.
- 4) What substantial laws can be relied on in support of the submission of limited grants.

B) The explanation to the problem

The advocates who appeared before me chose Mr. R. Hira, Miss Majiwa, Mrs. Irungu and Mr. Nelson Kaburu to address me on this

point. Mr. Kaburu made independent submissions as he did not entirely agree with the other advocates.

i) **The Problems**

One of the major problems that arose was an internal memo issued by the Senior Deputy Registrar to all the staff in the registry of the family Division. This memo is dated the 22.3.00. It was copied to the Registrar of the High court of Kenya. It was never copied to any advocates; most of whom were unaware of it. It nonetheless explained the change of procedure in dealing with limited grant.

The internal memo was issued at the directive of the judge then presiding on probate and read as follows:-

"I wish to bring to your NOTICE that the judge now presiding on probate and administration matters has directed that before approving any newly filed matter the following should be in the file:-

- a) Death certificate of deceased and any other person may have benefited from the deceaseds' estate but has passed away (eg spouse, child).
- b) Marriage certificate of a petitioning spouse or letter from chief as proof of marriage to the deceased.
- c) Consents from other beneficiaries. This requirements applied to Limited Grants as well.
- d) Searches in respect of land belonging to a deceased person.
- e) Limited grants to be by way of application before a judge when specific orders will be granted.
- f) All complaints to be direct to the Senior Deputy Registrar and NOT to the judge unless so directed by Senior Deputy Registrar".

(Emphasis my own).

I am not certain why the purpose of this directives was issued but perhaps it may be to curtail the enormous fraud that may often arises in probate matters.

The Advocates argued that the Senior Deputy Registrar had in fact no powers to issue such a memo. This power lies only with the Chief Justice who is permitted to issue a practice rule note.

Mr. Kaburu brought my attention to section 97 whereby the rules committee,

"may make rules of procedure generally for the carrying out, of the purposes and provisions of [this] act . . .".

I believe it is the rules committee who are empowered by the act to make rules pertaining the procedure to coming into court, for example:-

Section 97 (b).

"The procedure to be followed by a court in granting probate or letters of administration."

ii) **The practice before of coming into court**

The past practice that had been in these courts for granting probate or letters of administration is for there to be a petition made by an applicant. The deputy registrar in charge of the probate matters would ensure that the correct forms have been filed. If satisfied that the file is in order the registrar would minute to the Hon Judge in charge of the probate that all the papers are in order and that the matter was ready for gazettelement. The Hon. Judge would give orders that the application/petition for grant should be gazetted.

Thirty (30) days after the gazettment, the deputy registrar would make a minute in the file praying that letters of administration or probate do issue where no objections have been filed.

The Hon. Judge would order and have issued letters of administration or probate.

In the same way, limited grants filed was so done by way of petition and would in fact be minuted in the file by the deputy registrar. The Hon. Judge would make orders granting that limited grant be issued. No parties appeared before the Hon. judge. No notice in the Kenya gazette would be issued under section 67 (1) which exempted limited grant from advertisement. This sections reads as follows:-

"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."

Mr. Kaburu submitted that only limited grant ad colligenda bona are permitted to be issued without prior advertisement. All other grants must be advertised. In fact most of the advocates who have applications before this court want limited grant for filing suit and not for collecting on behalf of the estate. As such the pending application or limited grant should all be struck out as being defective in form.

I had brought to the advocates attention the case of:-

Anthony Njogu Mureithi - deceased In the matter of an application for grant of letters of administration (limited) by Gladys Wakathi Muthui - mother. Succession Cause No.5 of 96 at Mombasa.

In which my brother Waki J outlined the requirements of the court of appeal case of :-

TROUSTIC UNION INTERNATIONAL & ANOTHER V JANE MBEYU & ANOTHER

CA/4590 (unreported).

It required that it was necessary to obtain letters of administration before an action could be brought to court.

He nonetheless recommended that the procedure to be followed is that once formalities have been complied with

"the file is placed before the Deputy Registrar to confirm their propriety and a minute is addressed to a judge to append his signature ... The applicant need not file chamber summons to appear before the judge"

I would be persuaded only on procedure by the above decision and hold that the proper format to come to court for a limited grant be in the same way as one would come in for a grant of probate or letters of administration. Namely, that once a petition is filed then the deputy registrar would minute to the Hon. Judge who would grant the orders or otherwise for a limited grant to issue.

I believe this procedure was initially adopted due to the numerous numbers of application which require to be and are filed.

iii) **Urgency in bringing an application**

If there is a certificate of urgency, the file should first go to the deputy registrar to minute then to the Hon. judge. i

v) **Limited grants**

This brings me to the fourth issue. Namely,

a) **How many types of limited grants are there?**

I formed the impression that majority of the advocates who appeared before me were not aware of the different types of limited grants there are. Most advocates would come seeking for prayers for limited grant for filing suit yet their petition would be for letters limited for ad colligenda Bona.

From the submissions made before me, the following seems to be different types of Limited grant. These are:-

- 1)Limited grants ad colligenda bona
- 2)Limited grant ad colligenda bona defuncti
- 3)Limited grant administration pendente lite
- 4)Limited grant ad litem

In our Kenyan law of Succession, limited grants ad colligenda can only be issued by the High court of Kenya sitting at Nairobi, Mombasa, Kisumu, Nakuru and Nyeri only (see section 47, rule 36(3) LN 223/92).

The magistrates court have jurisdiction to hear succession matters only if the respective magistrate (not less than a residence magistrate) is appointed by the Hon. Chief Justice to so act on behalf of the High Court. If that magistrate is stationed where there is a High court in existence, then the High court has exclusive jurisdiction.

The act recognises that there are remote areas in Kenya where parties may wish to have estates less than Ksh.100,000/- to be administered. In such a situation a resident magistrate may issue letters of administration and grant. This would include a limited grant where the value of the estate is less than Ksh.100,000/-.

No magistrate is permitted to deal with a probate matter where the High court is established in the same station, no magistrate is allowed to hear a matter involving revocation of grant and no magistrate is permitted to issue limited grant colligenda bona unless it is of apparent urgency and only limited to collection of assets situated within his areas and for payment of debts. The estate is not to exceed Ksh.100,000/-.

The act state under section 54, one of the forms of grant as being limited grant.

"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 5th schedule."

It seems that there is an argument that section 54 states the limited grant whilst section 67 out lines its procedure. I do not think this is the position. There is most certainly a difference. This section reads:-

"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 . . . "

Under the probate and administration rules, it deals with limited grant ad colligenda Bona. Rule 36 reads as follows:

"36(1) where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the

making of a grant of administration ad colligenda bona defuncti of the estate of the deceased"

It is section 67(1) that describes the above rule.

What then is a colligenda bona defuncti? (See above).

Mr. Kaburu was able to provide the definition of this from his authorities. There are infact two words:-

i)ad colligendum

ii)ad colligenda means "For collecting; as an administrator or trustee ad colligendum".

iii)ad colligenda bona defuncti means. "For collecting the goods of the deceased".

It therefore means that rule 36(1) is specifically on the collection of the deceaseds goods and preserving the same.

Ad colligenda bona under the Indian succession act:-

"where it is to the benefit of the absent or unknown next of kin, the court will direct an administrator ad colligenda bona . . . under special circumstances limited to collect the personal estate of the deceased, to give receipts for his debts or the payment of the same, renew lease of his business premises which would expire before a general grant could be but without powers to dispose of the lease..."

I am aware that the rules require that each time the court issues a limited grant ad colligenda bona defuncti it must be recorded in a register kept at the registry.

The applicant is to file Form P & A 85, petition and form P & A 19 the affidavit which is provided for under rule 12 of the probate and administration rules.

Now the advocates are not interested in collecting the goods of the deceased or to administrator the estate perhaps. What they wish to do is to obtain a grant for purposes of filing suit

. I believe they require to rely on section 54 which takes us to the 5th schedule of the act. This schedule outlines four types of limited grant.

A) **Grant limited in duration - (para 1-3)**

This provides for a situation where a will is lost or misplaced; in possession of a person outside Kenya or for a will that cannot be found.

A limited grant under this para may be issued pending the original will being found.

B) **Grant for the use and benefit of others having right.**

Where the executor is absent from Kenya; whether there is a will, letters of administration, will annexed or in a case of intestacy (see para 4-6).

Where the executors are minors or of unsound mind (See para 7,9).

Where a suit is pending touching validity of will. In this latter situation (para 10) it is a situation known as administration pendente lite. (see 3 above).

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 (see 4 above) 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 5th schedule para 11-16. It has been described as Grant for Special purposes.

C) Grant for Special Purposes

a) Where an executor is appointed for a limited purpose specified in the will (see para II). Where an executor gives authority to an Attorney specified to a particular purpose.

Where a sole surviving trustee dies leaving no general representative or one who is unable or unwilling to act as such (normally referred to as de Bonis non (see para 20 form 87 and 19 in rule 12).

Where a deceased being party to a pending suit dies and the executor or the person entitled is unable or unwilling to act - a representative requires to be appointed (see para 14).

Where the person to whom probate or letters of administration has been made is absent from Kenya, a limited grant may be given for the purpose of enjoining a party to a suit brought against the administration (see para 15).

Where it appears to the court to be necessary or correct to appoint some person not normally entitled to administer an estate or part thereof as the court thinks fit.

The other grant is Grants with exception.

D) Grants with exception

Para 17,18 and 19 provides for situation where grant be made subject to certain exceptions.

Under what rules should a person intending to file suit where the deceased having been or intended to file suit dies?

Mr. Hira argued that as the estate has remained unadministered, limited grant colligenda bona is sufficient to preserve the estate. If one applies under this grant then such a party has a right to file suit. That is what I understood the arguments submitted as being.

Mr. Kaburu on the other hand described this as administration ad litem. This is equivalent to paragraph 14 of the 5th schedule. It is equivalent to section 222 of the Indian Succession Act 1865 (later section 251 of the same act) and section 162 of the judicature act 1925 of England. The words in all the three acts are identical. Namely, administration limited to suit:-

"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 administrator is unable or unlikely to act, letters of administration may be granted to the nominee of a party the suit, limited for the purpose of representing the deceased herein 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".

The Indian Succession Act (1865) Section 222 was applicable in Kenya. It was considered in a Mombasa High court case of Hadija v Iddi 1974 EA 50 by Sir Dermont Sheridan J.

In the above case, the "defendant was appointed the personal representative of a deceased driver against

whom a claim was to be made. The plaintiff filed suit seeking for the letters of administration be set aside arguing that letters can only be issued when there is a pending suit.

It was held by the high court, in interpreting section 222 of the Indian Succession Act, which is identical to para 14 of the 5th Schedule, that the appointment of a personal representative may be made even when there was no suit pending. (The case of Gibbs v Roy 85 CLJ 280 was considered).

Although this authority was dealing with a different aspect to para 14, it most certainly noted that in order to apply for a grant limited to filing suit the rule becomes applicable.

In contrast, I did rule in the estate of Nyamondi Succession cause case that the application for limited grant was not entirely correct.

A corporation filed suit against the deceased whilst she was still alive. The deceased died. Her husband had predeceased her. The only person entitled to the estate were her adult children. All of them refused to take letters of administration intestate. The limitation of time in bringing a personal representative was running out. The corporation applied, under a certificate of urgency to file an application under para 14 praying for this court to appoint the children as administrators.

I decline to do so as the rules require that the corporation nominate a person to take up the letters limited to the suit. This could have been the Public Trustee or even an advocate, which had not been done.

b) **Procedure for Limited Grant**

What I find is that advocates wishing to apply for limited grant for purposes of filing suit should come under para 14 of the 5th schedule. I would agree with Mr. Kaburu that this para applied to intending or proposed plaintiffs.

Although the act is clear on the affidavit to be filed as prescribed in rule 12, namely form P & A 19, the petition has not been prescribed to. The nearest form is the of P & A 90 which is for grant pendente lite.

The act is not silent on such situation. Where it comes to the forms to be applicable rule 70 is most helpful. It reads:-

"The forms set out in the first schedule, with such adaptations, additions and amendments as may be necessary shall, when appropriate be used in all proceeding under these Rules:-

Provided that the Chief Justice may by notice in the Gazette vary the forms and prescribes such other or additional forms as he thinks fit".

This means that any applicant may modify, adapt or add to the form.

"Section 72 of the Interpretation and General Provision Act Cap.2 provides that, save as is otherwise expressly provided, whenever any form is prescribed by any written law an instrument or document which purports to be in that form shall not be void by reason of any deviation there from which does not affect the substance of the instrument or document and which is not calculated to mislead.

Although the collection of forms in this Schedule does not purport to provide for every circumstance that may arise it contains the majority of the forms which, adapted when necessary will be found to be of general use by legal practitioner and members of the public".

(Emphasis my own)

It therefore means that both the legal practitioner and members of the public may adopt the forms to suit the petition they are to bring in, if it has not been provided.

As stated earlier form P & A 90 is the nearest form to which limited grants may be adopted. I believe the parties can use this with the following modification below.

I have attempted to outline petition for letters of administration ad litem with the sole purpose of filing suit. I have also outlined the type of grant that should normally be issued and similar to form P & A 47.

(Sample)

Form
90(B)

(5th Schedule para 14, r12)

Petition for letters of administration where there is a will petition is a will petition for grant of letters ad litem

ad Litem (b)

(Heading as in Form 1)

1 CD of.....

Hereby petition this Honourable court for a grant of letters administration ad litem of the estate of the above named AB who died domiciled in (state where)..... on the..... , 20limited to my filing suit (or to approving KL as personal representative for purpose of filing suit and without power of distribution of the estate.

and say as follows:-

- 1) There is now pending in this Honourable court a suit against (the deceased estate, for the deceased estate) being suit No.(state case number)
- 2) I present this petition in my capacity as.....
- 3)That a grant of administration ad litem do issue limited for the purpose (of filing suit/defending a suit or representing suit).
- 4) That I have no powers to distribute an estate under this grant. Signed by the above named IDIn the presence of E.J.

Signature

Advocate of (address)

or In the presence of GH

.....

Signature

of address and description

an IJ

Signature

of addressed and description

(Sample)

Form
47(b)

Para 14 5th Schedule

Limited Grant of letters Administration ad litem

Be it know that letters of administration ad litem of all the estate of the above name AB, late of..... who died domiciled in (state were)on the2000, which devolves to and vests in his personal representative but limited to the purpose only for filing suit (or as representative in suit (state court and number).

Issued as in Form 41.

I would propose the above forms to be used.

Nonetheless as a general rule, a person entitled to a grant should not apply for a limited grant but a full grant.

The other issue is whether or not limited grant should be gazetted?

Mr. Kaburu argued that all grants must be gazetted Section 67(1) was clear on the issue of publication. The only exeption are grants limited ad colligenda bona.

There has been recommendations from the committee looking into the establishment of the Family Court that all limited grants be gazetted. That there must be consent from all the beneficiaries for making of such grants.

I believe that gazettelement of limited grant should be recommended and dealt with by the rules committee. I also believe that limited grant should not issue unless it is under such special circumstances at to allow it to be so issued at the discretion of the court.

As stated earlier full grants should always be applied for in order to limit duplicity of grants unless otherwise stated.

In conclusion I hold the following:-

a)That the procedure in coming to court by limited grant be by way of petition and affidavit. That the procedure be administratively done.

It is recommended to the rules committee, that the consent of all concerned be obtained and that the committee look into the issue of gazetting limited grants.

b)That there are two categories of types of grants.

I) Limited grant under section 54; 5th Schedule.

I) grant in duration

ii)Grant of the use and benefit of others having rights

iii)Grant for special purpose

iv)Grant with exemption

For ease of clarification grant for special purpose, para 14 of the 5th Schedule is the grant ad litem for filing suit.

Grant for use of the benefit of others includes grant of administration pendente lite (para 11).

II) Limited Grant

I) Ad colligenda bona

ii) ad colligenda bona defuncti

i) Grants ad colligenda bona as per the law of Succession

by Anthony R. Mellow's 2nd Ed London Butherworth 1973.

"This grant is intended to give the administrator power only to get in the estate of the deceased, and to do such acts as are necessary in order to preserve it, and it is usually limited in this way. A grant in these terms does not give a power to invest money collected in, nor to sell the assets even where a sale is necessary because the assets is wasting. It is anticipated that powers in this nature will be required, they maybe expressly included in the grant upon application being made to the court."

ii) Ad colligenda bona defuncti

For purpose of collecting the deceased goods.

III) Forms

The correct forms of petition to use are:-

i) Grant for special purposes

Modified forms duly adapted as near as possible to form P & A 90 and to form P & A 19 as read with rule 12.

Form 47 as modified above to issue for the letters administration ad litem.

ii) Grant ad collicienda bona Petition form P & A 85 and P & A 19 as read with rule 12. The grant be issued on form P & A 47 as prescribed.

C) Recommendations

i) It is the rules committee under Section 97 that are empowered to make such rules as outlined in that section.

ii) It is the Chief Justice under rules 70 who would prescribe the type of new forms to be used.

Nonetheless parties are permitted to adapt and modify the forms to suit their circumstances.

I have before me the various files as per the annexed schedule. I hereby struck out all the applications and petitions filed for purposes of filing suit as being defective in form with no orders as to costs.

Leave be and is hereby granted for a fresh application to be filed.

I thank the advocates for their most invaluable submissions on this point.

Dated this 30th day of November, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE