



In re Estate of Philip Munyao Mutisya (Deceased) (Succession Cause E050 of 2024) [2025] KEHC 1420 (KLR) (21 January 2025) (Ruling)

Neutral citation: [2025] KEHC 1420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE E050 OF 2024**

NIO ADAGI, J

JANUARY 21, 2025

IN THE MATTER OF THE ESTATE OF PHILIP MUNYAO MUTIYSA (DECEASED)

IN THE MATTER OF

JOHN BOSCO MUTISYA PETITIONER

RULING

1. The Applicant herein approached this court by way of a Notice of Motion dated the 15th day of August 2024 brought under Articles 22 (1),(2), 22 (2) 9a)(b), 23(1),165 (2) (b) (i) of the Constitution of Kenya, 2010 and all enabling provisions of the Law basically seeking for orders directing Co-operative Bank of Kenya, the Interested Party herein through account name Odyssey Opticians Limited account number 01192XXXXXX400 belonging to the deceased to pay impugned workers their pending salaries through their mobile numbers, Landlords through their respective bank accounts and fund restocking of Odyssey Opticians Limited pending hearing and determination of the Petition. The Applicant also prayed for a temporary order to be issued preventing any further dealings including transfer of funds from and or ownership of the account name Odyssey Opticians Limited, account number 01192XXXXXX400 at Co-operative Bank of Kenya, Kenyatta Avenue Branch unless under a lawful Court Order.
2. The application is supported by the affidavit of the Applicant herein sworn on even date wherein he deponed that he is the Petitioner and the father to the late Philip Munyao Mutisya (deceased).
3. The Applicant depones that the deceased died on 11/04/2024 and he has applied for letters of Administration in this matter but no directions have been given. That the deceased was the owner and manager of Odyssey Opticians Limited which holds account number 0119XXXXXX400 held at Co-operative Bank of Kenya, Kenyatta Avenue Branch, Nairobi.
4. Upon being served with the application, the Interested Party filed a Replying Affidavit sworn on 16/09/2024 by Teddy Ochieng, a Business Banker at the Interested Party's Bank (hereinafter referred to as "the Bank") who confirmed that account number 01192XXXXXX400 is held by



Odyssey Opticians Limited domiciled at the Kenyatta Avenue Nairobi Branch and that the Bank is the custodian of the said account. That as at 04/09/2024, the current account balance was Kshs.3,670,524.78 and Statement dated 09/04/2024 to that effect is annexed. It is the Bank's position that the Administrator ought to have appropriately apply for a Special Limited Grant to access the funds in the account and that allowing the application would be tantamount to conferring the Bank the duties of an Administrator and dragging the Bank into the Succession proceedings yet its interest is only limited to being a custodian of the account.

5. The Bank depones that in any event, as disclosed by the statement of account dated 09/04/2024, the account balance is Kshs.3,670,524.78 which is not sufficient to cater for all expenses prayed for and demonstrated in the application and accruing expenses pending the appointment of the Administrator(s). That the Bank is not a Party to the Succession proceedings for the Grant of Letters of Administration intestate for the deceased Estate and its appearance in these proceedings has been necessitated only by the instant application and hence seeks costs of these proceedings.
6. I have considered the application as well as the Replying Affidavit filed on behalf of the Bank. The two issues that I have to determine are whether the application is merited and whether the Bank is entitled to costs.

a. whether the application is merited

1. As a general principle of the Law of Succession, grants may only be made with notice under Section 67 of the [Law of Succession Act](#) which provides as follows:-

“ 67. Notice of application for grant

- (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 such 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.”

8. This position has been invoked in many cases including. In Re Estate of Mary Syokwia Kyalili [2015] eKLR and Mary Waithera v Ann Ndegwa & Another [2014] eKLR.
9. However, where special circumstances exist, the [Law of Succession Act](#) allows application for a Limited Grant of Letters of Administration ad colligenda bona for purposes of collecting and preservation of the Estate. This is entrenched under Rule 36 of the Probate and Administration Rules which provides that:

“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 defunct of the Estate of the deceased.”

10. I note from the application and the affidavit in support thereof and the Applicant's submissions by counsel on record that the Applicant primarily seeks orders directing Co-operative Bank of Kenya, the Interested Party herein through account name Odyssey Opticians Limited account number



01192XXXXXX400 belonging to the deceased to pay impugned workers their pending salaries through their mobile numbers, Landlords through their respective bank accounts and fund restocking of Odyssey Opticians Limited pending hearing and determination of the Petition. The Applicant also prayed for a temporary order to be issued preventing any further dealings including transfer of funds from and or ownership of the account name Odyssey Opticians Limited, account number 01192XXXXXX400 at Co-operative Bank of Kenya, Kenyatta Avenue Branch unless under a lawful Court Order.

11. I note also that there is an Order which was issued on 10/06/2024 in the Chief Magistrate's Court at Kangundo in MISCSUCC E022 of 2024 in which the Bank herein was ordered to pay school fees for the Children of the deceased directly to the school upon issuance of a valid fee structure and the Applicant to file the substantive Petition for the Estate of the deceased to be able to manage all other running concerns effectively otherwise he was likely to be a victim of Section 45 of the Law of Succession Act. There is no doubt that issues pertaining to the education of children are issues that require the attention and urgency of the court, considering that it pertains to the rights of children especially the right to education. This is a right entrenched under Article 53(1) of the Constitution which underlines the fact that children are entitled to compulsory basic education and thus, this Court appreciates that the payment of school fees and related expenses is an urgent matter which may necessitate the issuance of the Orders in terms of Rule 36 (1) of the Probate and Administration and I agree that the Orders the Chief Magistrate's Court at Kangundo in MISCSUCC E022 of 2024 were properly issued following an application for grant of letters ad colligenda bona.
11. Turning to the application before court, there is no dispute that the Applicant is the father of the deceased Philip Munyao Mutisya. There is also no contention that there were workers working for Odyssey Opticians Limited and Landlords for various premises rented by the said Company which is alleged to be owned by the deceased.
12. The issue is that the Applicant has not listed before this court all the beneficiaries of the deceased, whose consent he has obtained to file the instant application. He has also not told this court where the deceased's wife is or provided any document of proof that the deceased was the sole Director and Manager of Odyssey Opticians Limited and that the only liabilities over the Estate are salaries and rent.
13. In addition, this court cannot allow the application in the manner sought. The Applicant having filed the substantive Petition in this Cause would have been expected to appropriately move the court under Rule 36 of the Probate and Administration Rules for a Special letters of administration Ad colligenda bona.
14. Thus, the estate of the deceased must be preserved until all assets and liabilities are identified and the beneficiaries are listed so that any expenditure is accounted for. There is nothing exhibited by the Applicant to show the amount of the demanded rent on each of the premises rented out by Odyssey Opticians Limited or to confirm employment by Odyssey Opticians Limited of the persons listed in the various compiled schedules annexed to the application.
15. This court is alive to the fact that Intestates have a myriad of issues and this court refuses to be trapped into any issues that may arise after the order for withdrawal or payment of funds from the deceased's account is issued and money is withdrawn or paid out as sought in the application.
16. Where there are contracts entered into by the deceased or his Company, these contracts will be performed after the estate is administered in the normal way, with the list of creditors being placed before court.



17. For the above reasons, I would decline to allow the application and more so the withdrawal of any monies for salaries and or settling of rent to Landlords of odyssey Opticians Ltd until a full grant and full disclosure of the assets of the Estate and their beneficiaries is made. I am of the view that these are issues that can be fully dealt with at hearing of the succession cause which hearing should be expedited by the Applicant.
18. Alternatively, the Applicant may move the court appropriately for a Special letters of administration Ad colligenda bona as provided for under the Law of Succession to deal with any urgent issues over the Estate herein.
19. Consequently, pending hearing and determination of the Petition herein, an order is hereby issued preventing any further dealings including transfer of funds from and or ownership of the account name Odyssey Opticians Limited, account number 01192XXXXXX400 at Co-operative Bank of Kenya, Kenyatta Avenue Branch, save for compliance with the Order issued on 10/06/2024 in the Chief Magistrate's Court at Kangundo in MISCSUCC E022 of 2024 or unless under any other lawful Court Order.
20. The Manager, Co-operative Bank of Kenya, Kenyatta Avenue Branch shall be served with this order for compliance.
21. I note from the Replying Affidavit filed by the Interested Party that the same was drawn by B.M. Mungáta & Co. Advocates whom the Interested Party engaged and consulted on the application hence they must have incurred some costs. I will order that the Interested Party's costs of this application shall be in the Cause to be assessed at the final distribution of the Estate herein.
22. I so order.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST JANUARY 2025.

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 21ST JANUARY 2025.

