



In re Estate of Wolfgang Walter Wirth (Deceased) (Succession Cause E034 of 2023) [2025] KEHC 1523 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E034 OF 2023
G MUTAI, J
FEBRUARY 14, 2025**

IN THE MATTER OF THE ESTATE OF WOLFGANG WALTER WIRTH (DECEASED)

BETWEEN

TORSTEN LECHNER APPLICANT

AND

EVERLINE TABU WANJALA 1ST ADMINISTRATOR

PURITY EUPHEMIA 2ND ADMINISTRATOR

RULING

1. Vide a petition dated 19th May 2023, the 1st administrator/respondent sought a grant of representation in respect of the estate of Wolfgang Walter Wirth (deceased). I shall hereafter refer to Mr Wirth as “Wolfgang” or “the deceased”. The 1st petitioner stated that she was a widow of the deceased and listed herself, Ms Purity Euphemia, her daughter, aged 19 at the time of the filing of the petition, and a son, Peterson Wanjohi, aged 15 years at the time, as his dependants and beneficiaries of his estate.
2. The petitioner averred in her affidavit in support of the petition that Wolfgang died on 14th August 2022 in Dubai, United Arab Emirates. She gave his last known place of residence as Galu Palm II Villa in Kinondoni, within Kwale County.
3. Ms Wanjala averred in her petition that the deceased died intestate while domiciled in Kenya. The deceased owned three properties to wit, Title Nos. Kwale/Galu Kinondoni/998, 1205 & 1206.
4. The petition was gazette on 3rd June 2023, vide Gazette Notice No 8660. There being no objection, the grant was issued to Ms Everline Tabu Wanjala, the 1st administrator/respondent herein on 2nd August 2023.
5. The 1st administrator/respondent filed the summons for review and confirmation of the grant of letters of administration intestate dated 13th February 2024. The said Summons was heard on 12th March



2024. The Court, in view of the provision of section 71(2A) of the *Law of Succession Act*, as there was a minor beneficiary, appointed Ms Purity Euphemia as the 2nd administrator and concomitantly confirmed the grant.
6. The assets of the estate, as listed in the certificate of confirmation of grant dated 15th April 2024, are Title No Kwale/Kalu Kinondoni/1206, Title No Kwale/Kalu Kinondoni/998 and funds in the bank account number 0205280001 in the Diamond Trust Bank of Kenya Ltd.
 7. Vide chamber summons dated 23rd July 2024. Torsten Lechner, who I shall hereafter refer to as the applicant, ought two orders to wit:-
 1. The Court be pleased to certify this application as urgent and be heard *ex parte* in the first instance;
 2. That pending the hearing of this application *inter partes* the honourable court be pleased to issue a temporary injunction against Everline Tabu Wanjala & Purity Euphemia, their agents and or servants or any person acting on their instruction from entering, accessing or otherwise dealing or interfering with the assets of the deceased including the property Title No Kwale/Galu Kinondoni/1206 & 998 and bank account number 0205280001, Diamond Trust Bank Ltd.
 8. The application sought no other orders save for those 2.
 9. The basis upon which the application was brought was that the grant was obtained fraudulently by concealment from this Court of material facts, to wit that the deceased left behind a valid will and had appointed Mr Torsten Lechner as the executor, that he was domiciled in Germany and that at the time the 1st administrator filed this petition a grant had already been issued in Germany by the Alzey Local Court. It was also urged that the proceedings to obtain the grant were defective in so far as they are for intestate succession, whereas the deceased had a Will executed on 4th August 1994. Lastly, it was stated that the petitioners herein are not beneficiaries under the will of the deceased and are, therefore, intermeddlers.
 10. The application was supported by the affidavit of Mr Torsten Lechner sworn on 23rd May 2024 before a Notary Public in Worms, Germany. Mr. Lechner deposed that he was the executor of the will of the deceased. According to him, the deceased had in his will bequeath all his property to Wolstein Local Authority as the sole heir and beneficiary of his estate. He averred that he was duly appointed as an executor of the estate of the deceased by the Alzey Local Court.
 11. Mr Lechner deposed that he applied for a resealing of the grant on 30th October 2023, vide Mombasa High Court P&A Cause No E068 of 2023. On 2nd February 2024, this Court issued a certificate of resealing a foreign grant. He became aware of the competing grant on 25th April 2024 upon being served with a letter by the firm of Mwaka Karisa & Company Advocates. He denied knowledge of the administrators and beneficiaries in this Succession Cause, stating that they were neither dependants nor beneficiaries of the estate of the deceased. He further denied that the 1st administrator was married to the deceased during his lifetime, stating that he was married to Ms Ulrike Wirth until her demise.
 12. The deponent stated that since the deceased had a will, the estate could not be administered as an intestate estate. For that reason, he prayed that the grant of letters of administration intestate dated 1st August 2023 and certificate of Confirmation of Grant dated 15th April 2024 be revoked forthwith.



13. Mr Lechner exhibited the two grants issued by this court in Succession Cause No E034 of 2023 to Everline Tabu Wanjala on 2nd August 2023 (and confirmed on 16th April 2024) and another dated 2nd February 2024 issued to Torsten Lechner.
14. The application was opposed. Ms Everline Tabu Wanjala swore an affidavit dated 18th October 2024 in which she averred that the deceased died “in her arms in Dubai where we had gone for a holiday as husband and wife.” According to her, she lived with the deceased as husband and wife at Kinondo in the properties known as Title No Kwale/Galu Kinondoni/988 and 1206 in Kinondo Location within Kwale County, having had a marital relationship for over 2 years.
15. She deposed that she was married to the deceased under the customary law. Ms Wanjala stated their marriage was known to his relatives as well as members of his community in Worm. She claimed that she had no knowledge of the alleged will. In her opinion, the will did not apply to the Kenyan properties as the said document made no mention of these despite having been executed after their purchase. Ms Wanjala termed the application as frivolous and vexatious and prayed that it be dismissed with costs.
16. The applicant filed a supplementary affidavit sworn by Mr Johannes Bruchert on 24th November 2024, in Wolstein, Germany. Mr Bruchert, who is the mayor of Wolstein, Germany, denied that there had been a marriage between the deceased and the applicant under Luhya Customary law and averred that no evidence that the marriage had been recognized as required under sections 44 and 45 of the Marriage Act, 2014 was provided.
17. Mr Bruchert deposed that prior to filling the petition, the 1st administrator was made aware of the existence of the will vide a letter dated 24th January 2023, which specifically made reference to the written will of the deceased person. He denied that the 1st administrator and her children were the dependants of the deceased. He also denied that the deceased had ever written any document in English. By dint of the foregoing, he cast doubt on the authenticity of the commitment he is alleged to have given to the applicant regarding her maintenance and that of her children. Further he stated the signature in the said document did not belong to the deceased. Lastly he deposed that the will was applicable to the Kenyan property of the deceased. The deponent pointed out that the 1st administrator/respondent didn't challenge the validity of the will and the capacity of the testator to execute it.
18. The application was canvassed by way of written submissions. Both parties filed Written Submissions, which I shall refer to below.
19. The submissions of the applicant are dated 13th November 2024. In the said submissions, the applicant identifies two issues as coming up for determination, to wit:-
 - i. Whether the grant issued on 1st August 2023 should be revoked; and
 - ii. Whether the respondent and her children are dependants of the deceased.
20. Counsel for the applicant submitted that the application was premised on section 76(b) of the Law of Succession Acts to the extent that it was obtained fraudulently by the making of a false statement or by concealment from the Court of something material to the case and by mean of untrue allegation of fact essential in point of law to justify the grant.
21. It was submitted that the 1st administrator was aware of the existence of the will having been notified on 23rd January 2023 by the Municipal Council of Wollstein. Despite being aware of the will, she did not dispute it, nor contested its validity. Counsel urged relying on the decisions of the Court in Patrick Mwangemi Wanjala & 3 others vs Jackson Ngoda Juma [2016]eKLR, re Estate of Agwang Wasiro



- (deceased) [2020]eKLR and re Estate of Ahmedali Abdulhussein Mamujee; Succession Cause No 234 of 2013 that fraud or the making of untrue allegations essential in point of law to the making of grant were grounds for revocation of grant. Further, the resealing application was gazetted, and despite being aware of it, she never informed the Court when making the application for confirmation of the grant.
22. On whether the 1st administrator and her children were dependants or dependants of the deceased, it was stated that they were not. Counsel submitted that there was no proof of celebration of a customary marriage counsel. Counsel relied on the case of Vincent Aliero Ayumba vs Livingstone Eshikuri Liakayi & 2 others [2017]eKLR and re Estate of DMM (deceased) [2018]eKLR.
 23. Based on the foregoing, it was urged that the application be allowed with costs being awarded to the applicant.
 24. For their part, the administrators/respondents submitted that the application was unmeritorious and ought to be dismissed with costs.
 25. They urged that the instant application was commenced by way of chamber Summons dated 23rd July 2024 for an order of injunction but that it did not seek to annul or revoke the grant issued on 2nd August 2023 and confirmed on 12th March 2024. Counsel for the Respondents urged that there was no application before the Court seeing for orders relating to the ground advanced.
 26. Counsel for the Administrator/respondents submitted that the Will of the deceased made no mention of the Kenyan assets. This, it was urged, meant that the Kenyan assets were to be excluded from the Will.
 27. Counsel for the administrators/respondents submitted that their deceased got married to the 1st administrator under customary law. In support of this, she relied on letters written by chiefs in Kwale and Busia and photographs taken during the lifetime of the deceased.
 28. Counsel urged that the deceased died intestate in respect of his Kenyan estate. For this reason, the 1st administrator/respondent was entitled to apply for a grant. In support of this contention, reliance was placed on section 34 of the [Law of Succession Act](#), which states that:-

“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”

Counsel urged that the will made no mention of the Kenyan asset and that by dint of that, the deceased died intestate in respect of his Kenyan estate.
 29. It was urged the 1st administrator/respondent was the wife of the deceased, entitled to apply for a grant under section 35 of the [Law of Succession Act](#).
 30. It was therefore prayed that the application be dismissed with costs.
 31. The application before the Court is a Chamber Summons. As I have already stated, it seeks only 2 prayers, which are, on the face of it, temporary in nature. I have looked at the documents filed in the CTS to see if the application dated 23rd July 2024 was ever amended. From the portal it is clear that I am required to render my decision regarding the said Chamber Summons only and nothing more.
 32. My reading of the prayers sought is that no permanent orders are sought. Prayer No. 2 states “that pending the hearing of this application interpartes...”. No request is made for permanent orders nor indeed for revocation or annulment of grant.



33. That being the case, there is nothing I can grant. The application is in vacuo. Once interim relief was granted, there was/is nothing more for this Court to do. The Court cannot give the Applicant what he has not asked for. To quote Matthew 7:9 -10

“⁹ Which of you, if your son asks for bread, will give him a stone? ¹⁰ Or if he asks for a fish, will give him a snake?”

34. Needless to say, parties are bound by the pleadings and the applications they make.

35. In any case, the applicant approached the Court by way of Chamber Summons rather than by Summons under Form 107, as provided for Rule 44(1) of the Probate & Administration Rules. The application is, therefore, defective.

36. Given the foregoing, I am not able to consider the merits of the application. Consequently, the Chamber Summons dated 23rd July 2024 is struck out.

37. As this is a family matter I make no orders as to costs.

38. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 14TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Chengo, for the Administrators/Respondents;

Mr Andiwo, for the Applicants; and

Arthur – Court Assistant.

