



In re Estate of Dominic Aloise George Omenye (Deceased) (Succession Cause E070 of 2023) [2025] KEHC 1879 (KLR) (4 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E070 OF 2023**

G MUTAI, J

FEBRUARY 4, 2025

IN THE MATTER OF THE ESTATE OF DOMINIC ALOISE GEORGE OMENYE (DECEASED)

BETWEEN

MARY ANYANGO OMENYE 1ST APPLICANT

JACQUELINE MASIKA OMENYE 2ND APPLICANT

AND

PRIME BANK LIMITED PROTESTOR

RULING

1. The deceased died on 2nd April 2022 at the Mombasa Hospital. At the time of his death, he was 74 years old. He was survived by his one wife, Mary Anyango Omenye, and their five children, Ann Perez Omenye, Christine Radol Omenye, Tony Isaac Omenye, Jacqueline Masika Omenye and George Were Omenye.
2. With a view to administering the estate, the two administrators, Mary Onyango Omenye and Jacqueline Masika Omenye, filed this cause. In the affidavit in support of the petition, they listed various assets of the deceased. The estimated value of these was given as Kes.15,000,000. The administrators stated that the deceased had nil liabilities.
3. After the petition was gazetted on 29th December 2023, and there being no objection, this court issued the grant of letters of administration intestate of the estate of the deceased to the two administrators on the 1st day of February 2024. In the said grant, it was indicated that the grant would be due for confirmation on 2nd July 2024, that is to say, upon expiry of 6 months from the date of issuance.
4. Before the summons for confirmation of the grant was filed, Prime Bank Ltd, through its counsel, Theuri Wanjohi Advocates, filed what it called an “affidavit of protest” to confirmation of the grant. The same was said to have been filed under Rule 40 (6) of the Probate and Administration Rules, 1980.



In the affidavit sworn by George Wachira Muthui on 19th June 2024, it was deposed that the deceased owed the bank a significant amount of money amounting in aggregate to Kes 51,869,732, as of 21st January 2022, which sum continued to attract interest at the rate of 12% per annum from 9th October 2021 until payment in full.

5. Mr Muthui deposed that the said indebtedness wasn't disclosed in the petition for the grant of representation despite the fact that the petitioners knew about it and that the debt had been the subject of extensive litigation between the protestor and the deceased. It was thus urged that the court orders that the bank's claim be included as a liability to the estate and that the same be settled prior to the distribution of the estate of the deceased.
6. The administrators opposed the protest. In her replying affidavit sworn on 20th September 2024, Mary Anyango Omenye admitted that her husband was involved in litigation with the protestor, which wasn't concluded due to the untimely death of the deceased. She stated that the estate was desirous of finalizing the proceedings in the Milimani High Court "for purposes of having the security therein released to the estate." She contended that they were not averse to the claim before the court at Milimani, being noted in these proceedings on the grounds that the estate of the deceased would then be under obligation to settle whatever was deemed as due and payable in those proceedings.
7. She, therefore, prayed that this court dismisses the protest to the confirmation of the grant with costs and proceed to confirm the grant as issued with a rider on the settlement of the outcome of the proceedings before the honourable trial court in Milimani High Court Civil Suit No 1649 of 2019.
8. The protestor filed a supplementary affidavit sworn by Mr Muthui on 28th October 2024, in which the contents of the protest were reiterated. Mr Muthui deposed that the petitioners acted in bad faith by failing to disclose the estate's liability and stated that it would be in the interest of justice for an order of inclusion of the claim as a liability of the estate so that the same could be settled before distribution.
9. The protest proceeded by way of written submissions
10. The protestor filed written submissions dated 31st October 2024. Its counsel submitted that under Section 51 (2) of the [Law of Succession Act](#) and Rule 7 (d) of the Probate & Administration Rules, the petitioner/administrators ought to have disclosed the liabilities of the deceased. Counsel relied on the decision of A K Ndungu, J, re estate of Barrack Deya Okul (deceased) [2018] eKLR and that of L A Achode J (as she then was) in re estate of Kanyoike Kiboo ((deceased) [2020]eKLR in support of its contention that the liability should have been disclosed.
11. Counsel urged that the liability be stated in the list of liabilities of the estate and that the debt should be settled before the estate is distributed.
12. The submissions of the petitioners is dated 28th November 2024. The petitioners contended protestor's claim against the estate was bad in law and could not stand. It was contended that the Milimani proceedings would not affect the distribution of the estate in these proceedings
13. Reliance was placed on the case of re estate of Julius Ndubi Javan (deceased) [2018]eKLR and re estate of Stephen Taraiya Kapande (deceased) [2021] eKLR. They, therefore, prayed that the objection be dismissed and that the court do proceed to confirm the grant to enable the deceased's estate to be distributed without being held in abeyance.
14. I have considered the affidavit of protest, the supplementary affidavit, the replying affidavit and the rival submissions.



15. It is evident that the administrators and the protestor are labouring under a misapprehension of fact. Having carefully perused the physical court file and the records in the CTS, I note that no summons for confirmation of the grant has been filed by the administrators in respect of the grant issued on 1st February 2024.
16. Can a creditor file a protest before the summons for confirmation of the grant is filed? I do not think so. Rule 40 (6) of the Probate and Administration Rules, 1980 provides that:-
- “any person wishing to object to the proposed confirmation of a grant shall file in the cause, in duplicate, at the principal registry, an affidavit of protest in Form 10 against such confirmation, stating the ground of his objection.”
17. As I understand it, the “proposed confirmation of grant “can only mean a summons for confirmation of grant, which has already been filed. It seems to me that a protestor would not be able to state ground(s) of his objection unless there was in existence a file summons.
18. In my view, the words used in the grant, that the grant of representation was due for confirmation on 2nd July 2024, does not take away the statutory duty of the administrators to file the summons for confirmation of the grant as soon as practicably possible, after the expiry of 6 months. The said words were for the guidance of the administrators.
19. Since the protest was filed before the summons for confirmation of grant was filed, the protest in this cause is misguided and is, therefore, for dismissal.
20. The foregoing notwithstanding, I agree with what F Gikonyo, J, stated in the case of re estate of Julius Ndubi Javan (deceased) [2018] eKLR:-
- “(14) The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation...”
21. A similar decision was made by W. Musyoka, J in re Estate of Mukhobi Namonya (Deceased) [2020] eKLR. In this case the learned Judge expressed himself as follows:-
- “24. The omission of persons who claim to be claimants from or creditors of the estate is not a ground for revoking a grant. After all, creditors of an estate are entitled to have their debts settled. It is for this reason that debts and liabilities are given priority over distribution of the estate. Debts and liabilities ought to be settled first. Distribution is of the net estate, after the debts and liabilities have been met. The administrators have a duty to identify the creditors of the estate and to pay them off before proposing distribution, or to make provision for them at confirmation of grant. Such claimants and creditors have an obligation to place their claims before the administrators, and should the administrators fail to settle the same or acknowledge them, move the Environment and Land Court to prove their claims, since the High Court no longer has jurisdiction to determine questions around ownership of immovable property in view of Articles 162(2) and 165(5) of the Constitution.



28. One of the duties of administrators, set out in section 83(d) of the Law of Succession Act, is to ascertain and pay out of the estate all the debts of the deceased. Ascertainment of the debts of the estate is about identifying them, in terms of finding who the creditors were, how the debts were incurred, what documentation is available, before pay out can be done. If the debts arose during administration, and were necessitated by the exigencies of administration, such as where funds were needed to pay for the administration process, in terms of money for court fees, advocates costs, land rents and rates, taxes, and attendant expenses, then section 83(c) of the Law of Succession Act would be relevant. That provision requires administrators to pay out of the estate all the expenses of obtaining the grant and all other reasonable expenses of the administration. Where estate assets have been dissipated to address the expenses envisaged in section 83(c) then it must be stated what these expenses were, how they arose and how they were settled. The same would apply where certain debts and liabilities of the estate needed to be settled and estate assets had to be sold to facilitate the settlement of such debts. Section 83(d) of the Law of Succession Act requires administrators to ascertain and pay, out of the estate, all the debts of the deceased. In addition, section 83, at paragraph (e), requires the administrators to render accounts of their administration within six months of their appointment.
22. What I understand the foregoing decisions as saying is that the debts of a deceased person ought to be identified and settled before the grant can be confirmed. Where it is not possible to settle the liabilities before the grant can be confirmed, the Summons ought to show how the debts will be paid once the grant is confirmed. As stated earlier, the beneficiaries only get the residue of the estate, net of liabilities.
23. In the circumstance and in the exercise of my discretion under section 47 of the Law of Succession Act and Rule 73 of the Probate & Administration Rules, 1980, I order that the deceased indebtedness to the protestor be ascertained first. Once that has been done, either by way of a decision of the court in the Milimani or by consent, the administrators should thereafter file a summons for confirmation of the grant. The summons shall list the liabilities of the deceased.
24. In the circumstances: -
- a. I dismiss the affidavit of protest;
 - b. Direct that parties to ascertain the deceased's indebtedness to the protestor as soon as practicable;
 - c. File the summons for confirmation of grant listing the debt due to the protestor as a liability once the quantum of the same is established.
25. The net estate of the deceased will only be distributed to his lawful beneficiaries once the liabilities are paid off.
26. Each party shall bear its own costs.
27. Orders accordingly.

DATED AND SIGNED IN MOMBASA THIS 4TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI



JUDGE

In the presence of:-

Mr Gathu, for the Administrators;

Mr Theuri Wanjohi, for the Protestor; and

Arthur – Court Assistant.

