Oyugi (Suing as the Legal Administrator of the Estate of the Late Erick Omondi Otieno - Deceased) v Opondo (Civil Appeal E044 of 2024) [2025] KEHC 12784 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12784 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E044 OF 2024

DK KEMEI, J

SEPTEMBER 19, 2025

BETWEEN

VICTOR ONYANGO OYUGI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE ERICK OMONDI OTIENO - DECEASED) ..... APPELLANT

AND

RUTH ADHIAMBO OPONDO ..... RESPONDENT

(Being an appeal from the ruling and Order of Hon. Christabel M. Chepseba (RM) delivered on 4th September 2024 in Siaya in CMCC Civil Case No. E029 of 2014)

JUDGMENT

1. Vide a Plaint dated 27th February 2024, the Appellant, suing as the administrator of the estate of Erick Omondi Otieno (Deceased), claimed general damages for pain, suffering, and loss of amenities under the Law Reform and Fatal Accident Acts. It was pleaded that the deceased was riding his motorcycle registration number KMFF 446U on or about 20th May 2023 when he was knocked down and run over by a motor vehicle registration number KCW 271J.

2. The Appellant further pleaded that he had solely obtained a Limited Grant of Letters of Administration Ad Litem issued on 7th December 2023. The Appellant went ahead to list the number of dependents as Melyne Atieno, Agnes Atieno, Magret Wanjiko,Isabel Adiambo (minors), and the Appellant as the brother of the deceased.

3. In opposition to the Plaint, the Respondent filed a Notice of Preliminary Objection dated 29th July 2024, seeking that the entire suit be struck out on the grounds that the Appellant had no capacity to initiate the suit as the grant made to him was invalid for violation of Section 58 of the *Law of Succession Act*.

4. In the ruling subject of this appeal, the learned trial Magistrate upheld the Preliminary Objection on the ground that the Appellant has no capacity to initiate the suit as the grant made to him was invalid, for violation of Section 58 of the *Law of Succession Act*. According to the learned trial Magistrate, the issue was whether the Appellant could be appointed as sole administrator, where some of the survivors of the deceased were minors, in view of Section 58. The learned trial Magistrate held that Section 58 was couched in mandatory terms that no grant of letters of administration intestate or with will annexed should be made to one person save for a trust corporation or Public Trustee, thus non-compliance would mean that the grant made is void, and is for revocation, under Section 76 having been made through a defective process. It was held that a continuing trust cannot vest in one administrator. On the argument by the Appellant that Section 58 did not apply as the Grant he obtained was limited for filing suit, the learned trial Magistrate held that Section 58 applied to all forms of grant. Reference was made to Veronica Mwikali Mwangangi vs Daniel Kyalo Musyoka [2005] eKLR that Article 159 of *the Constitution* could not save such a grant as it was a matter of the capacity of the person suing, thus the suit cannot be valid. The learned trial Magistrate struck out the suit with an order that each party bears their own costs.

5. Aggrieved, the Appellant has filed the present appeal vide the Memorandum of Appeal dated 13th September 2024, contending that:

    1. The learned trial Magistrate erred in fact and law in striking out the Plaintiff's suit based on a preliminary objection that was not substantiated both in fact and in law

    2. The learned trial Magistrate erred in law and fact in applying wrong principles when upholding the Respondent's preliminary objection, whereas on the court record, there were letters of grant ad litem issued by the same court on 7th December 2023.

    3. The learned trial Magistrate erred in fact in misdirecting herself in the assessment of fact and analysis of law, thereby arriving at an erroneous decision when clearly authority had been issued to the Appellant limited to presenting suit, and that grant issued was never revoked

    4. The learned trial Magistrate erred in law and fact in shifting the burden of proof to the Appellant to prove the non-existence of constructive trust when there was no evidence either in the form of an affidavit being tendered to make a finding of constructive trust, thereby relying on extraneous factors in making its determination.

6. The Appellant therefore prayed that the Ruling and Order be set aside with costs and substituted with an order that the suit be reinstated for hearing and determination before another court of competent jurisdiction. The Appellant seeks the costs of this appeal.

7. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied.

8. The Appellant submits that the Respondent's concerns as to the validity of the grant should have been raised before the Probate court in Ad litem Cause No. E129 of 2023 and seek its revocation; thus, the trial Court's move in its civil jurisdiction was erroneous. According to the Appellant, the issue of continuing trust should have been explained through an affidavit, but none was filed; thus, the learned trial Magistrate relied on extraneous factors to arrive at the impugned decision. The Appellant asserts that the grant is still valid to date as it has not been revoked or annulled by the Probate Court; thus, the trial Court made an erroneous and unjust decision. Reliance is placed on the case of Clemence Mkangoma & Another vs S. Transporters Co. Ltd [2021] eKLR, where the court held that the orders remained valid and could not in any manner be revisited by the trial Court, which in any event had no jurisdiction. According to the Appellant, the Grant was limited for purposes

of filing or presenting and of defending a suit and not empowering the Appellant to hold any share or allocate any share. The Appellant submits that once the filing of the suit is done, the grant ad litem purpose is dispensed with, and if any award is to be made, the estate would be called upon to avail proper letters of grant of administration to empower it for its distribution. The Appellant asserts that Section 58 is inapplicable to the limited grant as the Ad Litem limits the powers of the appointed administrator suing, presenting and/or defending suit since no share is either being allocated or distributed. According to the Appellant, no prejudice will be suffered by the estate since the distribution of the assets will only be authorized if the letters of grant of administration are issued in accordance with Section 53 of the *Law of Succession Act*, which appears not to limit the powers of the Administrator. It is submitted that Section 54 limits the powers of the administrator and allows the court to limit such power. The Appellant asserts that Section 54 cannot be subjected to the provisions of Section 58. The Appellant urges this court to find that Section 58 is inapplicable to the grant issued herein and reinstate the suit before another court of competent jurisdiction for hearing and determination.

9. I have considered the appeal in light of the evidence on record and written submissions filed herein. The issue for determination is whether the appeal has merit.

10. The duty of this court as a first appellate court is to re-evaluate the evidence and arrive at its own conclusions. In so doing, the court must take into account the fact that it had no opportunity to hear and see witnesses, and therefore must make an allowance for that. (See: Selle & Another v Associated Motor Boat Co. Ltd & Another (1968 (E.A. 123).

11. The impugned ruling and Order arose from the Respondent's Notice of Preliminary Objection. The Respondent's Preliminary Objection was based on the contention that the Appellant lacked the capacity to institute the suit as the grant made to him was invalid for violation of Section 58 of the *Law of Succession Act*.

12. The Kenya Supreme Court in the case of Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others SCK Petition No 10 of 2013 [2014] eKLR held that:-

''A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit.''

13. Sir Charles Newbold P. in Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696 stated:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.''

14. From the pleadings, it was the Appellant, as the administrator of the estate, who lodged a suit against the Respondent vide the Plaint dated 27th February 2024, seeking general damages under the *Law Reform Act* and Fatal Accident Act.

15. In Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, the court held that:

> " A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

16. It follows, therefore, that the preliminary objection must be raised on a pure point of law, and there should be no contestation of facts. If the preliminary point is argued, it may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration. See Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (supra).

17. It is noted that the Respondent, in particular, used the word "capacity" in the Preliminary Objection. Capacity has been defined in Black's Law Dictionary, 7th ed., as:

> " Capacity" generally refers to the legal ability of a person to perform certain actions, such as entering into contracts, making a will, or being held criminally responsible. It signifies having the necessary legal qualifications, like age and mental state, to engage in specific legal acts."

18. The Grant issued by the Court on 7th December 2023 to the Appellant is a limited one. It was limited only to prosecuting and/or defending suits or representing a suit. In legal parlance, that is what is referred to as the locus standi.

19. According to Black's Law Dictionary (8th ed), Locus standi is defined as:

> " The right to bring an action or to be heard in a given forum; standing."

20. It was defined in the case of Alfred Njau & 5 Others vs. City Council of Nairobi [1983] eKLR to mean-

QUOTE{startQuote "}

The right to Appear in Court."

21. The Court in Trouistik Union International & Another v Jane Mbeyu & Another Civil Appeal No. 145 of 1990, stated that Locus standi is a primary point of law, almost similar to that of jurisdiction, since the lack of capacity to sue or be sued renders the suit incompetent. See Julias Adoyo Ongunga vs Francis Kiberenge Abano Migori HC Civil Appeal No. 119 of 2015.

22. It follows that the Preliminary Objection raised a pure point of law; thus, the question for determination is whether the Preliminary Objection was merited in light of the provisions of Section 58 of the *Law of Succession Act*.

23. Section 58 of the *Law of Succession Act* provides:

Number of administrators where there is a continuing trust

(1) Where a continuing trust arises—

(a) No grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation;

(b) No grant of letters of administration with the will annexed shall be made to one person alone except where— (i) that person is the Public Trustee or a Trust Corporation, or (ii) in the will, the testator has appointed one or more trustees for the continuing trust who are willing and able to act.

(2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion

24. In Obado v Omoro (Civil Case E017 of 2021) [2023] KEHC 22848 (KLR) (27 September 2023) (Ruling) R.E. Aburili J. held as follows:

> " 64. A grant in respect of an estate of property left behind by the deceased is the only key for any person claiming to be beneficially or legally entitled to the said properties, to access the court and ventilate their grievance. Without the grant, whether a limited or full grant, allowing the filing of the suit, the initiator of the suit, like in the instant case, is tantamount to entering a closed room without opening the door. As was correctly stated by Chitembwe J. in Hawo Shanko vs Mohamed Uta Shanko (supra) that:-
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> > "All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that, despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose and then to allow him to continue with the suit. The suit as initiated becomes void ab initio, and cannot be resurrected by the issuance of a subsequent limited grant."

25. It follows, therefore, that obtaining a Grant is mandatory, lest the suit initiated become void ab initio and cannot be resurrected with a subsequent grant. A grant must be obtained from the inception of the suit and not afterwards. The initiator is under obligation to ensure that he/she has the requisite capacity at the time of filing the suit.

26. According to the Appellant, the issue of continuing trust should have been explained through an affidavit, but none was filed; thus, the learned trial Magistrate relied on extraneous factors to arrive at the decision. The Appellant asserts that the affidavit would enable the court to determine the existence of a trust. According to the Appellant, the Grant was limited for purposes of filing or presenting and or defending a suit and not empowering the Appellant to hold any share or allocate any share, thus the inapplicability of Section 58. According to the Appellant, a proper letter of grant of administration will empower the Appellant to go on with the distribution of the estate. The Appellant asserts no share is either being allocated or distributed for Section 58 to be invoked.

27. The learned trial Magistrate opined that a continuing trust was established vide the Plaint dated 27th February 2024, where particulars of the minors had been given and their birth certificates attached thereto. According to the learned trial Magistrate, the continuing trust arose in respect of the deceased's estate. The argument by the Appellant that an affidavit was necessary to establish the continuing trust does not hold water since in the Plaint dated 27th February 2024, particulars of the minors had been

pleaded. The suit was lodged under the *Law Reform Act* and the Fatal Accident Act where particulars of the dependants must be pleaded. I find the learned trial Magistrate's findings as the correct position that, whether a full or limited grant, compliance with Section 58 is mandatory.

28. A Continuing trust has not been defined under the *Law of Succession Act*. The Black's Law Dictionary (11th ed.2019) defines Continuing Trust as:

> " 1. A trust that does not end upon the grantor's death. 2. A trust that does not end on a particular date or upon the occurrence of a particular event. • Such a trust must be planned so as not to violate the rule against perpetuities. 3. A trust whose proceeds have not yet been distributed."

29. In Onjoro & Another vs Ekaka (Suing as the Administrators of the Estate of Edisa Nasirumbi, (Deceased) (Civil Appeal E004 of 2021) [2023] KEHC 20051 (KLR) (17 July 2023) (Judgment)it was held:

> " 8. A continuing trust arises where a deceased person is survived by minors, and, to a limited extent, surviving spouses. At the distribution of the estate, the shares due to a minor are not devolved to the minor during his minority, but are held by the administrators or personal representatives, during the minority of the minor, in trust. The effect of it is that the share of a minor falls into a trust, taken care of by the administrator or personal representative, or trustees, from the date their offices become operational, until the minor attains majority age. The trust exists during the minority, regardless of whether the grant has been confirmed or not. For the surviving spouse, there is entitlement to a life interest in the net intestate estate. The life interest terminates only upon the demise of the surviving spouse, or upon the surviving spouse exercising the power of appointment of all the property under life interest. What section 58 provides is that where the deceased is survived by a minor or a spouse, there would be continuing trusts, and in such cases, no grant of representation should be made to one personal representative. That applies whether the deceased died testate or intestate, subject to certain qualifications where there is a testacy, and the testator has appointed trustees for the continuing trust. The only exception is where the personal representative is a trust corporation or the Public Trustee.
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> 9. So, is there any consequence to non-compliance with section 58 of the *Law of Succession Act*? Section 58 is in mandatory terms. It says that no grant of letters of administration intestate or with will annexed should be made to one person, save for a trust corporation and the Public Trustee. Non-compliance would mean that the grant made is void, and is for revocation, under section 76, for having been made through a defective process. It means that a continuing trust cannot vest in one administrator. Section 58 should be read together with sections 71(2A), 75(A), 81, and 95(2) of the *Law of Succession Act*, all of which touch on continuing trusts and appointment of more than one personal representative.
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> 10. It has been submitted that the grant that the respondent obtained was limited to filing suit, and, therefore, section 58 did not apply to it. There is nothing in section 58 which states that the provision is limited to full grants or does not apply to limited grants. The qualifications or criteria for appointment

as administrator are uniform, whether one seeks a full or limited grant, and the provisions in sections 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 of the *Law of Succession Act*, on forms of grants, and the persons entitled to a grant, apply to both full and limited grants. In Veronicah Mwikali Mwangangi v Daniel Kyalo Musyoka [2005] KLR (Ang'awa, J), a suit was struck out because the limited grant, giving the administrator authority to sue, contravened section 58, which requires appointment of more than one administrator where a continuing trust arises."

30. Musyoka J. in the In The Matter of the Estate of Raphael Chessa Oyeyo (deceased)[2013]eKLR held as follows:

"I find that there was no error in this matter. What has happened is that the administrator failed to comply with section 58 of the *Law of Succession Act* when she applied for letters of administration. She sought letters as a sole administrator. This was not an error by the court; consequently, it cannot be corrected through section 74 of the *Law of Succession Act* and Rule 43 of the Probate and Administration Rules. The grant of letters of administration intestate cannot be rectified in this manner.

Koome J. held in In the Matter of the Estate of Muniu Karugo (Deceased) Nairobi High Court succession cause number 2668 of 1997 that rectification only deals with obvious errors and it cannot be used to fundamentally change the character of the grant. I agree entirely with that position. The proposed changes will fundamentally change the grant as it will cease to be a grant to a sole administrator and become a joint grant. Where such fundamental changes are contemplated, then the grant ought to be cancelled.

It should also be stated that the grant made in this matter is a nullity as long as it is issued in circumstances that were not in keeping with section 58 of the *Law of Succession Act*. Section 58(1) (a) of the *Law of Succession Act* provides that:

> 'Where a continuing trust arises – no grant of letters of administration in respect of an intestate estate shall be made to one person alone ...'
>
> The law is clear. No grant is to be issued in such circumstances. No grant should have been made in this case. The grant made herein was a nullity. It is useless and inoperative. Section 76 of the *Law of Succession Act* provides that the same is liable to revocation. The same provision grants me the power to revoke such a grant on my own motion." See Kenya Power & Lighting Company Limited v Mwangi (Suing as the Legal Representative of the Estate of Geoffrey Muthii Muthike - Deceased) (Civil Appeal 13 of 2019) [2023] KEHC 24211 (KLR) (25 October 2023) (Judgment),"

31. In re Estate of Mariko Nyamu M'ibiri (Deceased) [2017] eKLR F.Gikonyo J stated as follows:

"(3) This point does not require copious arguments before a court could settle it. Section 58 of the *Law of Succession Act* is clear that where there is a continuing Trust, no grant of letters of administration in respect of the estate shall be made to one person alone except where the administrator is the Public Trustee or a Trust corporation. The administratrix herein is not the Public or a Trust Corporation. But, such a situation is remediable by removing the festered

waters; wherein, subject to S. 66 of the *Law of Succession Act*, the court appoints one or more persons to be joint administrators."

32. Musinga J. (as he then was) stated In Re The Estate of Lameck Omwoyo (Deceased) [2008] eKLR that the underlying objective of this provision is to safeguard the interests of minor beneficiaries of the estate.

33. A.K. Ndung'u J. in Elizabeth Wanjiku Njoka v Joseph Njuguna & 3 others [2016] eKLR had this to say regarding non-compliance with Section 58 :

> " The requirement is so vital that even where two administrators are appointed and one dies, the surviving administrator is required under Section 75 of the Act to appoint not less than one or more than three, and in so failing, the court may appoint on its own motion. Indeed, failure of an administrator to appoint gives rise to a cognizable offence, and such an administrator shall be guilty of an offence and shall be liable to a fine not exceeding Kshs. 5,000/= as per Section 95 (1) (2) of the Act. Failure to comply with this mandatory provision rendered the grant defective."

34. The Appellant has argued that the Grant was limited for purposes of filing or presenting and or defending a suit, and not empowering the Appellant to hold any share or allocate any share, and so Section 58 is inapplicable in this case. I find this proposition by the Appellant misconceived.

35. The Appellant has placed reliance on the case of Clemence Mkangoma and Peter Onyango (Suing as administrator S Of And legal representatives of the estate of Francis Oyugi Obadha (deceased) vs T.S.S Transporters Co. Ltd,[2021]eKLR where Chepkwony J. stated that:

> " Of concern and material to the facts of this particular case are the Limited Grant of Letters of Administration Ad Litem and the Limited Grant of Letters of Administration Ad Colligenda Bona. The former is provided for under Form 14 of the Fifth Schedule of the *Law of Succession Act* and is only invoked when the estate of a deceased person is required to be represented in court proceedings while the latter is usually used in an emergency for purposes of dealing with the property of a deceased person which is subject to waste or danger and where there is no sufficient time to obtain a full grant. Nonetheless, I agree with the finding of the court in the case of Julian Adoyo Ongunga & Another "vs- Francis Kiberenge Bondeva(supra), that there are instances where such a Limited Grant of Letters of Administration Ad Colligenda Bonais tailored in a manner as to allow for the institution of an action or where the record expressly provides for such. In such cases, the focus will be on the contents and wording of the grant."

36. According to the Appellant, the grant is valid as it has not been revoked or annulled by the Probate Court. In Clemene Mkangoma case (supra) is distinguishable to this case in that the orders issued by Muriithi J. therein indicated to be for Letters of Administration Ad Colligenda Bona when the Appellants therein had petitioned the court for an order that a Grant of Administration Ad Litem do issue limited for the purpose (of filing suit/defending a suit or representing suit). The orders therein were still in force as granted by the learned Judge until they were set aside. The contestation was about the form of grant, the Letters of Administration Ad Colligenda Bona was indicated to be for purposes of filing suit/defending a suit or representing suit.

37. In Clemene Mkangoma case (supra) the court placed reliance on the case Morjaria vs Abdalla[1984]KLR 490 which buttresses this Court's findings, where the court stated as follows:-

> "Notwithstanding that the grant of letters of administration ad Colligenda bona was not a form of grant appropriate for this case and that it did not follow Form 47 in the First Schedule to the *Law of Succession Act* as provided by rule 36 (2) of the Probate and Administration Rules, the grant was specifically limited to "the purpose only' of representing the appellant in this appeal and those words in themselves constituted a valid grant under rule 14 enabling the appellant's son and his step-mother to represent the appellant in this appeal."

38. I find Section 58 of the *Law of Succession Act* is clear that where there is a continuing Trust, no grant of letters of administration in respect of the estate shall be made to one person alone except where the administrator is the Public Trustee or a Trust corporation. The Appellant is not a Public Trustee or a Trust Corporation. The learned trial Magistrate correctly found the Appellant had no capacity to initiate the suit as pleaded since the grant was invalid for violating the provisions of Section 58 of the Law of Succession. The Appellant cannot argue that there will be no prejudice suffered by the estate when Section 58 is couched in mandatory terms. I find that it matters not the matter was still before the succession court which had granted the limited grant as long as the issue of minors have been pleaded in the Plaint. The Appellant's excuse that he did not intend to participate in the distribution of the estate of the deceased is not convincing since the issue of capacity at the inception of the matter is crucial.

39. In view of the foregoing observations, it is my finding that the appeal lacks merit. The ruling of the learned trial Magistrate delivered on 4th September 2024 upholding the Notice of Preliminary Objection dated 29th July 2024 is upheld. The suit namely Siaya CMCC Civil Case No. E029 of 2014 stands struck out with costs to the Respondent. The Respondent is awarded costs of this appeal.

DATED, SIGNED, AND DELIVERED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2025.

D. K. KEMEI

JUDGE

In the presence of:

Mukabane.....for Appellant

M/s Tesot for M/s Ongonga...for Respondent

Okumu.....Court Assistant