



**In re Estate of Joel Onwonga Nyagenchanga alias Joel Onwonga Nyage (Deceased)  
(Succession Cause 74 of 2015) [2024] KEHC 1338 (KLR) (22 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1338 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
SUCCESSION CAUSE 74 OF 2015**

**TA ODERA, J  
JANUARY 22, 2024**

**IN THE ESTATE OF JOEL ONWONGA NYAGENCHANGA  
ALIAS JOEL ONWONGA NYAGE (DECEASED)**

**BETWEEN**

**WALTER KEROSI JOEL (DECEASED) ..... PETITIONER**

**AND**

**BENJAMIN ONSONGO MATONDA ..... RESPONDENT**

**AND**

**TABITHA MONGINA JOEL ..... OBJECTOR**

**RACHAEL MOKE JOEL ..... OBJECTOR**

**JOSPHINE MASESE JOEL ..... OBJECTOR**

**GEORGE MORARA ONWONGA ..... OBJECTOR**

**AND**

**HELLEN V. GICHANA ..... APPLICANT**

**RULING**

1. The Late Joel Onwong'a Nyagenchanga died on 8.2.2000. Walter Kerosi Joel was appointed as the Personal Representative vide Letters of Administration Intestate issued on 8.2.2017. The grant was confirmed on 21.5.2019 where the entire estate of the deceased, that is LR No. Masaba North/Boguche/1466 devolved to Benjamin Onsongo Matonda absolutely. The Objectors/Applicants filed a Summons for Revocation of Grant dated 26.4.2021 which application is still pending. The Administrator, Walter Kerosi Joel, subsequently died on 7.6.2019. Vide a Notice of Motion dated



25.8.2022 and filed by the firm of T.N. Okemwa & Co. Advocates, the Applicant, who describes herself as the Late Walter Kerosi Joel's wife, seeks the following prayers: -

1. That this Honourable Court be pleased to grant an order of substitution allowing the applicant herein, Hellen V. Gichana, to become the plaintiff and suing as the legal representative in the estate of Walter Kerosi Joel (deceased.)
2. That the applicant be allowed to proceed with the suit herein as the plaintiff.
3. That the costs of this Application be in the cause.
2. The grounds on the face of the application are that the applicant obtained letters of administration as litem with respect to the Estate of Walter Kerosi Joel (Deceased) for purposes of proceeding with the instant suit.
3. The Application was supported by an affidavit sworn by the applicant on 25.8.2022. She reiterated the facts captured herein.
4. The Respondent swore a Replying Affidavit on 9.1.2023 in opposition to the application. He deponed that the Applicant had previously filed an application dated 23.5.2022 which was struck out on 2.8.2022. He deponed that the instant application was therefore an abuse of court process. He deponed that the signature appearing on the application was a forgery. He deponed that the grant of letters of administration ad litem allegedly issued to the applicant could not assist her as there was no suit with regard to the Estate of Walter Kerosi Joel. He further argued that the said special limited grant can only be used in civil suits and not in succession proceedings. He deponed that the succession cause had been concluded and that he had been issued with a title deed and therefore any dispute relating to the land ought to be filed with the ELC.
5. On 19.10.2023, the Applicant was granted 7 days to file a Further Affidavit and annex the Letters of Administration. The Applicant filed a Supplementary Affidavit sworn on 13.12.2022. She deponed that she got married to Walter Kerosi Joel (Deceased) in 1983 under the Kisii Customary Law and they begot 7 issues from the said marriage. She deponed that her late husband did not involve any member or beneficiary of the estate in the succession cause and therefore urged the Court to cancel the grant.
6. Notably, despite the Court's orders, the Applicant did not attach the Letters of Administration Ad Litem over the Estate of Walter Kerosi Joel (Deceased).

### **Submissions**

7. The Respondent filed his submissions while the Applicant did not.

### **Respondent's submissions**

8. The Respondent filed his submissions dated 29.5.2023. He submitted that the Applicant had filed a similar application dated 23.5.2022 which application was struck out for having been filed by counsel without proper instructions as the firm had not filed a Notice of Appointment. The instant application was thus argued to be *res judicata* and cited the case of [Pangarea Holdings LLC & Another v Hachenda Development Ltd. & Others](#) Msa ELC No. 160 of 2019
9. He further submitted that the current firm had also not filed a Notice of Appointment and therefore the application is not properly on record. He cited the case of HC Nrb. Misc. Civil Application No. 685 of 2017 [Satya Bhama Gandhi v Director of Public Prosecutions & Others](#) where the Court described instances of what would amount to abuse of court process. He also cited the case of HC Nrb. Civil Suit No. 118 of 2018 [Techno Service Limited v Nokia International OY-Kenya & Others](#) where the



Court held that Order 9 Rule 1 of the [Civil Procedure Rules](#) requires an advocate acting for a party shall evidence such authority and this authority is evidenced by a Notice of Appointment.

10. On substitution, he submitted that the said prayer does not lie as the instant Estate is that of Joel Onwonga Nyagenchanga and not the Estate of Walter Kerosi Joel.

### **Determination**

11. I have considered the Application, the supporting affidavit, the replying affidavit, the supplementary affidavit and the Respondent's submissions and also the law.
12. Looking at the Application, the Respondent raised the plea of *res judicata* and it is therefore imperative that I determine that issue first as it has the propensity of determining this matter in limine.
13. The doctrine of *res judicata* is now well-settled and courts have over time substantively addressed themselves on the matter.
14. Recently, the Supreme Court also had occasion to weigh in on the matter. In [John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 Others](#) (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) the Court restated in paragraph 86 that the elements to be demonstrated are:
  - a. There is a former judgment or order which was final;
  - b. The judgment or order was on merit;
  - c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
  - d. There must be between the first and the second action identical parties, subject matter and cause of action.
15. Looking at the application dated 23.5.2022, the parties are similar as to the ones herein and suing and/or being sued in the same capacity. The following prayers were sought:
  - a. That this Honourable Court be pleased to grant an order of substitution allowing the applicant herein, Hellen V. Gichana to become the plaintiff and suing as the legal representative in the estate of Walter Kerosi Joel- (deceased).
  - b. That the applicant be allowed to proceed with the suit herein as the plaintiff.
  - c. That the costs of this Application be in the cause.
16. Obviously, the prayers are the same. However, the said application was struck out by this Court on 2.8.2022 for having been filed by a Counsel who was not properly on record. Can the plea of *res judicata* apply in the circumstances herein? The answer is in the negative. [Black's Law Dictionary](#), 9<sup>th</sup> Edition, defines merits as "1. The elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure.
17. In the circumstances, the order dismissing the application dated 23.5.2022 was not on merit but on a technicality. The plea of *res judicata* therefore does not apply.
18. In addition, the application dated 23.5.2022 was struck out and not dismissed. A suit that has been struck out may be filed afresh. See [Enock Kirai Mubanyi v Hamid Abdalla Mbarak](#) [2013] eKLR That is the position in this matter, that the applicant could file the application afresh.



19. That said, I am, however, inclined to dismiss the application on the ground that the Estate of Walter Kerosi Joel (Deceased) has no business in this suit, and certainly not in the manner postulated by the applicant. If I understand the applicant correctly, she proposes to substitute the Late Walter Kerosi Joel and then wear his shoes as the personal administrator of the estate of Joel Onwonga Nyagenchanga.
20. The law is settled on this matter. A grant is issued in personam. It cannot be transferred. In the case of *Re Estate of Muroko Kimitu (Dcd)* [2019] eKLR, the Court cited the Court of Appeal decision *Florence Okutu Nandwa and Another v John Atemba Kojwa* Civil Appeal No. 306 of 1998 where the Court held as follows: -

“A grant of representation is made in personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another.

The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the *Law of Succession Act*. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the *Law of Succession Act* and the *Probate and Administration (Rules)*. I agree with the respondent that there cannot be a substitution of the dead administrator by his wife in the manner proposed by the applicant.”

21. It follows therefore that the applicant herein cannot substitute the Late Walter Kerosi Joel in this matter in the capacity so claimed. Given that the administrator of the Deceased’s estate is deceased, it follows that the grant has become useless and inoperative and is ripe for revocation under Section 76 of the *Law of Succession Act*. It certainly cannot be brought to life by transferring it to another party.
22. Having held as above, it follows that the issue of locus standi is immaterial.
23. However, I would like to state that the applicant stated that she had successfully applied and obtained Special Limited Grant of Letters of Administration Ad Litem with respect to the Estate of Walter Kerosi Joel (Deceased). Looking at the application and the supplementary affidavit, the said special grant has not been attached. Therefore, the Court cannot assume matters and, for whatever it is worth, she is a stranger to these proceedings.
24. I am guided by the Court of Appeal decision in *Trouistik Union International & Another v Jane Mbeyu & Another* [1993] eKLR, where the Court rendered itself thus:

“The common law rule on this matter is expressed in the Latin maxim “*action personalis moritor cum persona*” that is, a personal action dies with the person. This rule was, to a large extent, supplanted by the *Law Reform Act*. That Act keeps alive, with few exceptions, causes of action which vest in a person since deceased. Accordingly, to determine who is empowered to enforce that chose in action, for what purposes, and when in point of time, one must look at that Act and allied relevant legislation. One such enactment, is the *Law of Succession Act* (Cap. 160). Section 2 of that *Act* provides in mandatory terms, that unless any other written law provides otherwise, the provisions of the *Act* “shall constitute the law in Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this *Act*.”



.... To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82(a) of the *Law of Succession Act*. That section confers that power on personal representatives and on them alone. As to who are personal representatives, section 3, the interpretative section, provides an all-inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the *Act*? Section 3 says “administrator means a person to whom a grant of letters of administration has been made under this *Act*.”

It is not in dispute that the two respondents who invoked the aid of the Court to agitate the cause of action which survived the deceased, were not persons to “whom a grant of letters of administration have been made under the *Act*” ie the *Law of Succession Act*. They did not even pretend to be such...”

25. However, even assuming that the applicant had obtained the special grant ad litem, the application would still be hopelessly irredeemable.
26. I further note that the firm of T.N. Okemwa & Co. Advocates has not filed a Notice of Appointment of Advocates. While there is a Notice of Appointment of Advocates by the said firm and dated 25.8.2022, the same is unstamped. Further, there is no receipt in the Court file indicating that an invoice was raised and subsequently a payment was made. It may have been an error at the registry level or otherwise. I am unable to make any conclusion on the same. Be it as it may, whether the same had been filed or otherwise, the application would have suffered the same fate for the reasons stated hereinabove.
27. It is for those reasons that I dismiss the application dated 25.8.2022.
28. There shall be no order as to costs.

**DATED, DELIVERED AND SIGNED AT KISII THIS 22<sup>ND</sup> DAY OF JANUARY 2024.**

**TERESA ODERA**

**JUDGE**

In the presence of:

N/A for the Applicant

N/A for Respondent

Oigo - Court Assistant

