



**Owiti v Audi (Family Miscellaneous Civil Case E007 of 2022)
[2024] KEHC 130 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY MISCELLANEOUS CIVIL CASE E007 OF 2022
DO OGEMBO, J
JANUARY 17, 2024**

BETWEEN

THEDEUS ONDIJO OWITI APPLICANT

AND

NELSON OWITI AUDI RESPONDENT

RULING

1. The applicant Thedeus Ondijo Owiti, has applied to this court under Sections 47 and 74 of the [Law of Succession Act](#), Cap 160 and Rules 43, 49 and 73 of the [Probate and Administration Rules](#), and Order 45 Rule 1 of the [Civil Procedure Rules](#). The application, dated 14-11-2022, seeks the following orders: -
2. That this court be pleased to grant an order of temporary injunction against Standard Chartered Bank restraining it from imposing any restrictions on the account No. xxxx pending the hearing and determination of this application.
3. That the certificate of confirmation of grant of representation to the estate of the Late Nelson Owiti Audi issued to the applicant on 2/3/2018 in this cause be rectified/reviewed in the following respects as provided for under Rule 43(1) of the [Probate and Administration Rules](#).
4. That the court be pleased to rectify/review the grant to include the following shares and beneficiary thereto i.e. 100 shares in Owens Maternity and Nursing Home Limited to Thedeus Ondijo Owiti.
5. In the Affidavit in support of the application, sworn by the applicant on 14-11-2022, the applicant has deponed that the letters of administration to the deceased's estate was issued to him and confirmed on 9-3-2021. That the business entity known as Owens Maternity and Nursing Home Limited was bequeathed to the applicant by the deceased in 2013 before his demise, and that South Sakwa/Barkowino/3116 on which the business is situated was transferred to him by the deceased before his demise and was not subject of the Succession Cause. That the same was co-owned by the deceased and his mother Phelistus Wengi Ondijo at 100 and 20 shares respectively. That the applicant is one of the



beneficial owners of the entity, a holder of an account with the Bank, which has put a restriction on the said account for failing to provide updated information regarding the account. He pleads that the grant be rectified and or reviewed to include the aforementioned asset and the mode of distribution to be done as deemed expedient by the court.

6. In the filed submissions, the applicant has submitted that the substantive prayer for determination is Prayer 3 for review/rectification of the grant to include shares owned by the deceased. He relied on the case of *In re Estate of Mugira Ngaruni (Deceased)* [2021]eKLR, where Gitari J. allowed a similar application by a widow where property was discovered after confirmation of the grant.
7. The applicant also cited the case of *In re estate of Charles Kibe Karanja* [2015]eKLR, where Musyoka J. observed;

“In view of what I have stated in the proceeding paragraphs, the said application was misconceived. The changes sought to be effected on the certificate of confirmation of grant cannot be made without reviewing the orders made on 7-11-2006 confirming the grant and distributing the Estate as per the terms of the Will of the deceased. New assets cannot be introduced and distributed by merely rectifying the Certificate of confirmation of grant. That calls for going back to the distribution orders so as to have them revised or altered. The applicant ought to have sought a review of the orders of 7-11-2006 so as to include the discovered assets and to distribute them. It is only after the review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

8. Whereas the Standard Chartered Bank, did not make any submissions, it relied on the Affidavit it had filed in response to the application. I have perused the said affidavit, sworn by Irene Wakasa, Relationship Manager of the bank. That due to failure of the entity to respond to the emails of the bank to send required information, the bank declared a restriction on the account which took effect on 30-11-2021. That to date, the bank is yet to send the required information and the restriction remains in place.
9. I have considered this application and the Affidavit in support of the same and the annexures attached. I have also considered the submissions of the applicant and the Affidavit filed by the interested party.
10. Ideally, this application seeks rectification of a confirmed grant. A grant had been issued and confirmed in respect of the estate of the Late Nelson Owiti Audi. The administrators in the succession cause were Thomas Odhiambo Owiti, Bertha Anyango Owiti, Phelistus Wengi Ondijo and Thedeus Ondijo Owiti. And the grant was confirmed on 9-3-2021. In the certificate of confirmation of grant, the beneficiaries and their shares as apportioned are clearly declared.
11. This application now seeks rectification of the confirmed grant so as to include a property known as Owens Maternity and Nursing Home Limited as property of the deceased. Indeed the applicant has exhibited documents of incorporation of the company showing that the same has 2 shareholders, the deceased with 100 shares, and Phelistus Wengi Ondijo with 20 shares.
12. It has been deposed by the applicant that the said business entity is situated on land parcel number South Sakwa/Bar Kowino/3116 and that the same had been bequeathed to him by the deceased prior to the deceased's death.
13. It is further the position of the applicant that following the bequeath of the property to him inter vivos, the same is not subject of distribution of the deceased's estate.
14. I find a contradiction in the position taken by the applicant regarding this matter. Whereas the applicant maintains that the property in question was a bequeath to him by the deceased while he was



alive and therefore not subject of distribution of the deceased's estate, it is the same applicant who has moved this court with the present application for rectification of the confirmed grant as to reflect the property in question as part of the property of the deceased; in that case the applicant by seeking to have this property included in the schedule and list of property of the deceased, is acknowledging that the property is subject of distribution.

15. And if the said property is part of deceased's estate subject of distribution (as implied by the applicant) then the Applicant is bound to follow the procedure of Rule 40 of the *Probate and Administration Rules*. He must list all the beneficiaries of the deceased's estate and mode of distribution of shares to each. In case the said property sought to be included is a bequeath *inter vivos*, and acknowledged as such by the other beneficiaries with equal or prior right over the deceased estate would be expected to confirm their acceptance or consent to the property to be wholly apportioned to the applicant.
16. Otherwise, the applicant cannot claim a bequeath and that the property is not subject of distribution of the deceased's estate, while at the same time he seeks for the same property to be listed in the list of property of the deceased and have the respective confirmed grant rectified and the same apportioned to him without exhibiting any concurrence or consent by the other beneficiaries.
17. It is for this reason that I find the application of the applicant dated 14-11-2022 devoid of any merit. I dismiss the same.
18. Costs of the application shall be in the cause. It is so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF JANUARY, 2024

D.O. OGEMBO

JUDGE

Court:

Ruling read out in court (virtually) in the presence of Ms. Otieno holding brief for Ms. Anuro for the Interested Party. Okello Adipo Advocates absent.

D.O. OGEMBO

JUDGE

17.1.2024

