



In re Estate of the Late Mary Tamurei Kanaptany (Succession Cause 17 of 2023) [2024] KEHC 4528 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 17 OF 2023
JRA WANANDA, J
APRIL 12, 2024**

BETWEEN

KIPTONUI KANAPTANY A BUIGUTT PETITIONER

AND

KIPTOO TANUI 1ST RESPONDENT

MARGARET TANUI 2ND RESPONDENT

JACKLINE KIPTANUI 3RD RESPONDENT

KIPRUTO KISASSAN 4TH RESPONDENT

SAADAH LATOYA (CHEPKOECH 5TH RESPONDENT

TIROP KIMARU 6TH RESPONDENT

KIBIWOTT KANDIE KIPTANUI 7TH RESPONDENT

RULING

1. On 2/02/2023, the Petitioner/Applicant filed the Petition dated 1/02/2023 seeking a Special Limited Grant over the estate of the late Mary Tamurei Kanaptany (deceased).
2. Together with the Petition, the Petitioner also filed the Summons dated 1/02/2023 and filed through Messrs Nyairo & Co. Advocates. It is this Summons that is the subject of this Ruling. It seeks the following orders:
 - i. [Spent]
 - ii. That the Petitioner/Applicant be granted Special Limited Grant ad Litem for purposes of handling litigation concerning the deceased’s estate with regard to land parcel number Uasin Gishu/Timboroa/50.



- iii. That costs be in the Cause.
3. The Application is expressed to be brought pursuant to Section 47 and 54 and Paragraph 18 of the 5th Schedule of the Law of Succession Act, Rules 2, 12, 49 and 71 and 1st Schedule Form P&A 85 of the Probate and Administration Rules and “any other enabling provisions of the law”. It is then premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the Petitioner.
 4. In the Affidavit, the Petitioner described himself as the widower of the deceased whom he stated, died on 19/11/2013. He then deponed that the deceased died intestate and left 8 survivors (including the Petitioner) that he also left behind the land parcel number Uasin Gishu/Timboroa/50 measuring 15.5 acres (hereinafter referred to as “the property”), that Letters of Administration over the state is yet to be obtained, that the estate is under threat of being trespassed onto, wasted and/or interfered with hence the instant Petition. He deponed further that it is on this basis that he seeks the Special Grant to enable him institute a suit in Court and seek injunctive orders and/or protect the estate pending the succession process in order to preserve the estate.
 5. When the Application was placed before me on 17/02/2023 having been filed under Certificate of Urgency, I directed that the persons listed as beneficiaries do file consents to signify their approval of the Application before the Court could give any orders.

Replying Affidavit

6. I presume that it is pursuant to the orders referred to above that the beneficiaries (Respondents) were contacted and in response, on 29/06/2023, they filed a Replying Affidavit through the 3rd Respondent, Jackline Kiptanui. The Affidavit was filed through Messrs Isiaho Sawe & Co. Advocates.
7. In the Affidavit, the 3rd Respondent admitted that the Petitioner is indeed the Respondents’ father and deponed that she was swearing the Affidavit on behalf of all the Respondents. She deponed further that there has been conflict between their father (Petitioner) and the Respondents during the lifetime of the deceased over the property, that the Petitioner owned various parcels of land which he sold and applied proceeds therefrom for his own benefit at the expense of the family hence causing a lot of conflict with the deceased, that the Petitioner tried to forcefully take control and use of the land after the demise of the deceased, that they referred the dispute to the local administration but the same was not adequately resolved, that the Petitioner remarried in 2017 and currently resides in Kericho with his wife, that the Respondents filed Eldoret High Court P&A No. 54 of 2023 which is pending gazettement, and that the Petitioner wanted to secretly take control of the property hence the reason he did not serve the Respondents with the present Application.
8. She deponed further that the Petitioner has not disclosed that the Respondents are currently in use of the property, that he has not substantiated the alleged “eminent waste and/or intermeddling” that the estate is facing to warrant the orders he seeks, he has not disclosed against whom he intends to file the suit, and that the Petitioner is therefore guilty of material non-disclosure. She added that the Petitioner was not a dependent to the deceased as provided under Section 29(c) of the Law of Succession Act, that Eldoret High Court P&A No. 54 of 2023 which is awaiting gazettement supersedes the Petition herein, that there is no urgency warranting the issuance of a limited Grant, that the Petitioner has also failed to disclose the fact that he is the one wasting the estate by cutting down trees that given bad blood between the parties, that the assertion that the Petitioner will faithfully administer the estate is a far cry, that the Petitioner will have the liberty during confirmation of the grant to prove his dependency, and that nothing bars the Respondents from moving the Court as they are covered under Section 66(b) of the Law of Succession Act.



Petitioner's Further Affidavit

9. On 20/09/2024, the Petitioner filed a Further Affidavit in which he denied that he has any conflict with the Respondents (his children) over the property. He deponed that he has always utilized the property since he acquired it and he is not aware of the alleged forceful acquisition as claimed by the Respondents, that he bought the property in the deceased's name through a loan which he serviced, that he is not aware of the alleged dispute that was referred to the Chief, that the exhibited alleged letter from the Chief is undated, does not disclose the nature of the dispute, it is not addressed to anyone, it does not disclose who procured it or the author, that the letter is a fabrication and is meant to tarnish his image and that of his family, that he even approached the Respondents to sign a consent in support of the Petition but they refused to so sign, that they cannot therefore allege that they were not aware of the Petitioner's intention to move the Court for the Special Limited Grant, that after retirement in 1992, he started depending on the deceased for provision of basic needs having secured the property in the name of the deceased and that she used to cultivate the property in order to put food on the table, that after the demise of the deceased and out of loneliness and the desire to be cared for, he was forced to remarry, that this does not take away his interest over the property as the widower, that in order of preference, a Grant of Letters of Administration ought to be given to the surviving spouse, and that the Respondents are all adults and have since settled in various parts of the country with some having married and are not on the suit land.

Dissenting Affidavit filed by the 2nd Respondent

10. In respect to the Respondents, a "spanner was thrown into the works" when the 2nd Respondent on 20/09/2023 filed her separate Affidavit "breaking ranks" with the rest of the Respondents. The Affidavit is filed through Messrs Nyairo & Co. Advocates, the Advocates on record for the Respondents which itself may raise procedural questions.
11. Be that as it may, in the Affidavit, the 2nd Respondent deponed that she associates herself with the contents of the Further Affidavit filed by the Petitioner, that the rest of the Respondents did not involve her in the preparation of the Replying Affidavit which she first saw on 13/09/2023 and whose contents she had not approved, that she does not therefore associate herself with the Replying Affidavit which seeks to deny the Petitioner her status as a dependent, and that the deceased took care of the Petitioner when she was alive and especially when the Petitioner retired from employment.

Hearing of the Application

12. On 5/10/2023, Counsel for the Respondents informed the Court that they had already filed the substantive Succession Cause, namely, Eldoret High Court P&A No. 54 of 2023 and the samee was pending gazettelement. With this information, I asked the Petitioner's Counsel, Mr. Wahome, who was then holding brief for Ms. Odwa whether the Petitioner still wished to continue with the instant Petition. I then gave him time to brainstorm and make a decision thereon. On 22/11/2023, Ms. Odwa appeared and insisted on proceeding with the Petition.
13. In the circumstances, it was agreed and I directed, that the Application be canvassed by way of written Submissions. The Petitioner then filed his Submissions on 4/12/2023 and the Respondents filed theirs on 27/02/2024.

Petitioner's Submissions

14. Counsel for the Petitioner submitted that by virtue of Section 66 of the *Law of Succession Act*, the Petitioner is best suited to be issued with the Letters of Administration ad Litem as he ranks top in



- order of priority. Regarding the argument that the Respondents have already applied for a full grant hence there is no need to issue any grant in this matter, Counsel termed it as a misinterpretation of the purpose of a Limited Grant ad Litem as distinguished from a full Grant, that whereas a Grant ad Litem is for purposes of instituting or defending a claim and is determined upon determination of the claim, a full Grant is aimed at distributing the estate, that this is borne from the fact that one cannot pursue a claim on behalf of the estate in a succession cause but in a civil suit. He cited the case of *In re estate of Helena Wangechi Njoroge (Deceased)* [2015] eKLR.
15. Counsel contended further that the argument that the Application stood spent once a Petition for full Grant was filed cannot stand given that the aim of the Special Limited Grant is to pursue a claim against a third party on behalf of the estate, that as at present, no Grant has been issued in Eldoret High Court P&A No. 54 of 2023 and the said Cause is contested, that it would therefore be in the interest of justice that the Court grants the Special Limited Grant so as to protect the estate as the beneficiaries pursue a full Grant, and that the Petitioner has lodged an Objection and also a cross-Petition in the said Eldoret High Court P&A No. 54 of 2023. It is Counsel's further argument that Section 54 of the *Law of Succession Act* was aimed at providing an avenue to ensure that a deceased's estate is protected and/or preserved especially in scenarios where there are objections with regard to who is to administer the estate, who is to benefit from the estate and how the estate is to be distributed or where obtaining a confirmation of Grant was likely to take long such as in the instant case. She cited the case of *In re Estate of Henry Kithia Mwitari (Deceased)* [2021] eKLR.
16. In regard to the allegation that there was non-disclosure, Counsel submitted that such has not been established as the Petitioner has laid out who the beneficiaries are and the assets that the deceased left behind, that the Petitioner went out of his way to obtain a consent for purposes of obtaining the Special Grant but the Respondents refused to execute and instead, rushed to Court to petition for a full Grant so as to scuttle the Application herein, and that the resistance by the Respondents is malicious as no prejudice has been cited. She cited the case of *Winrose Emmah Ndinda Kiamba v Agnes Nthambi Kasyoka* [2021] eKLR.

Respondents' Submissions

17. On her part, Counsel for the Respondent submitted that from a casual perusal of the Affidavit and the annexures furnished, it cannot escape the mind that the Petitioner is only seeking the orders because he alleges to have contributed towards acquisition of the property, that therefore the Petitioner is simply trying to pursue his right of ownership through the back door, that being a land ownership issue as pointed out, this Court lacks the jurisdiction to ventilate on the issue as formulated by the Petitioner. She added that the sole objective for which the Summons was filed has been overtaken by the institution of the substantive Succession proceedings since the Petitioner can ventilate his issues within the filed Succession proceedings and/or any other appropriate forum.
18. According to Counsel therefore, the sole issue for determination is whether this Court has jurisdiction to hear and determine land ownership. On this issue of jurisdiction, he cited the locus classicus case of *Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd* [1989] KLR. She submitted further that if this Court lacks jurisdiction, then there is no point of going to the merit of the proceedings. She cited the Supreme Court case of *Samuel Kamau Macharia vs KCB & 2 Others*, Civil Application No. 2 of 2011.
19. Counsel also cited Article 165(3) and (5) of *the Constitution* regarding the jurisdiction of the High Court and Article 162(2) and Section 13 of the Environment & Land Court Act, 2011 on the jurisdiction of the Environment & Land Court. She also cited Rule 41(3) of the Probate and Administration Rules and also the case of *Priscilla Ndubi and Zipporah Mutiga vs Gerishon Gatobu*



Mbui, Succession Cause No. 720 of 2013. Counsel contended that disputes on land can only be determined by the Environment & Land Court and once the ownership of the property is ascertained by that Court, the Probate Court may proceed to distribute the property to the rightful dependents.

Determination

20. Before I delve into determining the issues arising herein, I may mention that the parties have expended considerable space and time arguing over matters which are not ordinarily intended to be determined in an Application for a Special Limited Grant. For instance, the parties have needlessly haggled over who between them qualifies as a “dependent” under Section 26(c) of the *Law of Succession Act*, who between them ranks higher in the order of priority in respect to applying for Letters of Administration under Section 66, and who purchased the said property. With due respect to both Counsel, the above are matters reserved for the Probate Court that shall hear and determine the substantive Succession Cause and which is the Court that shall deal with identification of the estate properties, identification of the beneficiaries and eventual distribution of the estate among such identified assets.
21. Further, Counsel for the Respondents has submitted that the Summons herein raises issues of land ownership and that for that reason, this Court lacks jurisdiction to hear and determine the matter and that the same should be left for determination by the Environment & Land Court (ELC). I find this submission to be a misconceived notion and premature since it wrongly assumes that the proceedings herein have reached the stage of distribution of the estate. To the contrary, the Application herein only seeks Special Limited Grant ad litem for the purposes of instituting or defending a suit or suits. The issue of jurisdiction over issues of land ownership cannot therefore arise at this stage. In any case, it is absurd to argue that such an Application for Special Grant should be filed before the Environment & Land Court (ELC). The question of whether this Court possesses the jurisdiction to hear and determine the Summons or Petition herein cannot therefore amount to an issue for determination herein.
22. In view of the foregoing, upon examination of the Application, and the other pleadings filed, including the Affidavits and respective Submissions, I find the one broad issue that arises for determination to be “whether this Court should grant the Special Limited Grant of Letters of Administration to the Petitioner despite the Respondents having already filed the substantive Succession Cause over the same estate”.
23. In this matter, the Petitioner is the father to the Respondents. It is not denied that subsequent to the filing of the Petition and Summons herein on 2/02/2023 by the Petitioner in which he seeks the Special Limited Grant, the Respondents, on 29/06/2023, proceeded to file the substantive Succession Cause, namely, Eldoret High Court P&A No. 54 of 2023 in which the Respondents seek to be given full Letters of Administration over the same estate. It is therefore not denied that at present, there are two parallel Succession proceedings relating to the same estate and proceeding side by side. Of course, the two matters seek different orders but it cannot also be denied that the two matters are very closely related and basically address the same estate.
24. In appropriate cases, there would be nothing wrong with a Court issuing a Special Limited Grant in respect of an estate for the carrying out of a specific purpose such as instituting or defending a suit in Court, even where the substantive Cause has already been filed. To this extent, I am in agreement with the Petitioner’s Counsel that a Petition for Special Limited Grant cannot be presumed to become automatically spent the moment the substantive Succession Cause is filed. That cannot be the law. Each case must be dealt with and determined on the basis of its own unique facts and circumstances.



25. In this matter, the two parties are in conflict and dispute insofar as the property herein is concerned. The property is in the name of the deceased (widow to the Petitioner and mother to the Respondents) although the Petitioner alleges that he is the one who, in reality, purchased it but registered it in the name of the deceased (his late wife). While the Petitioner states that he needs the Special Grant to protect the property from waste and for filing or defending Court cases, the Respondents (save for the 2nd Respondent) do not seem to trust the Petitioner with the property. The Respondents state, and the Petitioner does not deny, that he has since remarried. The Respondents seem to suspect that the Petitioner's intention is to hand over the possession and control of the property to his new family hence the resistance from the Respondents.
26. To some extent, the Respondents' fear is far-fetched since a Special Limited Grant ad Litem such as the one sought herein is issued only for a specific purpose and does not in any way empower the grantee to distribute the property or even administer it. To do these further actions, the Petitioner, even if the Court were to give him the Special Limited Grant, would still have to apply for the full Grant. The Respondents therefore really have nothing to fear.
27. There are however serious implications that are likely to arise if this Court were to issue the Special Grant during the existence of Eldoret High Court P&A No. 54 of 2023. For instance, I wonder what will happen if today the Court were to give the Limited Grant to the Petitioner upon which he then proceeds to institute or defend a suit in Court as he alleges to intend to do and then tomorrow, the Court in Eldoret High Court P&A No. 54 of 2023, issues to the Respondents a full Grant. Does the Special Limited Grant issued to the Petitioner then become inoperative? Does the Respondent then apply to take over the cases from the Petitioner? Given the serious differences existing between the parties, is it not clear that such an Application is likely to be hotly contested thus leading to further litigation within the existing suit? What would this Court achieve by knowingly creating room for such scenario to arise?
28. The Court's duty is to create order, not to set the stage for disorder. In my view, issuing the Special Grant in this matter will only cause uncertainty and chaos. In doing so, the Court will not be assisting the parties but will be further complicating and aggravating the dispute between them. The likelihood of two Courts issuing different and conflicting orders over the same estate is very high.
29. Counsel for the Petitioner has cited the decision of M. Odero J delivered in the case of *In re Estate of Henry Kithia Mwitari (Deceased)* [2021] eKLR. Upon perusal of that authority, I find it clear that Counsel has quoted it out of context and the same is distinguishable from the facts herein. In that case, an Objector applied for revocation of a full Grant on the ground that the Petitioner/Administrator therein never disclosed to the Court that she had earlier applied and obtained a Special Limited Grant in earlier proceedings over the same estate. According to the Objector therefore, the Petition for the full Grant was obtained by fraud or concealment of material facts and should not have been granted as it was sub-judice. It is in this context that, while dismissing the application, the Judge correctly found that there was no violation of the sub-judice rule. It is very clear therefore that the facts in the said authority are totally different from the facts herein and that the authority has no application whatsoever to the instant case.
30. There is a further reason why the instant Application cannot succeed. As submitted by the Respondents, although the Petitioner alleges that he requires the Special Grant for the purposes of filing or defending a suit or suits relating to the property, he has not presented evidence of any kind indicating any threat to or apprehension over the status of the property. It is not disclosed who he intends to sue or which suit he wishes to defend. If the suit or suits are existing, the Petitioner has not disclosed the parties involved or even exhibited copies of the pleadings for this Court's scrutiny. Not



even a demand letter to any potential Defendant or one from potential Plaintiff has been produced. The Special Grant is therefore clearly sought in a vacuum.

31. Since the Petitioner has not mentioned any existing suit, I presume that there is none. The question therefore is why the hurry? What is the urgency in pursuing the Special Limited Grant even after the Petitioner has been made aware that the substantive Succession Cause has already been filed and in which he admits to have already filed an objection and a cross-Petition? Why would the Petitioner strenuously still insist on pursuing this matter in the circumstances? What is it that the Petitioner feels can only be addressed in this Petition which cannot be handled in Eldoret High Court P&A No. 54 of 2023?
32. For this reason, I find the stance taken by the Petitioner to be unreasonable and mischievous and an effort at misusing the Court to massage a personal ego. Fortunately, the Court is not in the business of dispensing aesthetic therapy for psychological satisfaction. A Court of law is a serious forum which must be respected and allowed to only handle and determine real, moot and justiciable controversies, not to waste precious judicial time on academic, imagined and non-existent disputes. In this case, all the prayers and matters raised by the Petitioner can be easily addressed and sought in the already filed substantive Cause. This Court shall not therefore countenance the unnecessary existence of two parallel suits addressing the same estate. The Petitioner should make his prayers in the said in Eldoret High Court P&A No. 54 of 2023. For this reason, I decline to issue the Special Limited Grant ad Litem sought herein.

Final Orders

33. In the premises, I order as follows:
 - i. The Summons dated 1/02/2023 and by extension, the Petition of the same date, and both filed herein by the Petitioner on 2/02/2023, are hereby dismissed.
 - ii. This being a matter between a father, on one part, and his children, on the other, I order that each party bears his or her own costs

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12TH DAY OF APRIL 2024.

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WANANDA J. R. ANURO

JUDGE

