



REPUBLIC OF KENYA



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**In re Estate of the Late Toto Ngonyo Hinzano (Deceased) (Ad Litem
31 of 2021) [2024] KEHC 5639 (KLR) (13 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

AD LITEM 31 OF 2021

SM GITHINJI, J

MAY 13, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE TOTO NGONYO
HINZANO (DECEASED)**

BETWEEN

NELSON NGONYO HINZANO PETITIONER

AND

PUBLIC TRUSTEE, MOMBASA RESPONDENT

RULING

1. Before this Court is the Petition for a Special Limited Grant dated 10th September 2021 filed by the Petitioner, Nelson Ngonyo Hinzano. The Petitioner sought the Limited Grant for the purpose of filing before the Mombasa High Court, summons for the revocation of grant of letters of administration issued to the Respondent in MSA Admin. Cause No. 438 of 2000.
2. The Petition was opposed by the Respondent. The Respondent filed a Replying Affidavit sworn by Jafred Erima Maliro, assistant public trustee, on 14th October 2021.

Background

3. This matter relates to the estate of Changawa Ngonyo Hinzano (hereinafter referred to as ‘the Deceased’) who died intestate on 29th April 2007 at Malindi within Kilifi County. The deceased was survived by his son, the Petitioner herein, and other twelve mentioned in the affidavit in support of the Petition. The Petitioner seeks a special limited grant ad litem to substitute or represent the deceased in Msa Admin. Cause No. 438 of 2000.
4. Briefly, the genesis of this litigation is the estate of the late Monje Ngonyo and her late husband Ngonyo Hinzano who customarily took in four wives for purposes of bearing children. The deceased herein was therefore a son of the 1st co-wife, the late Dama Ngonyo Hinzano. That the entire family resided on



land parcel Gede/Majimboni/17 measuring approximately 5.0 Ha, initially registered in the name of Monje Ngonyo. Upon the demise of the said Monje Ngonyo, the 4th co-wife, Jumwa Ngonyo Hinzano, together with her household proposed that the said land be subdivided.

5. This proposal was vehemently opposed by the rest of the family, leading to several complaints being filed to different offices, including the Land Control Board which directed that the title remains in the name of Monje Ngonyo. Sometime, in the year 2009, the Petitioner noticed that the said title was missing causing him to file a police report. Thereafter, the children of the 4th co-wife, allegedly sired with one Kiponda Mutune, made an application to the Respondent's office, purportedly to the exclusion of the rest of the family.
6. The Respondent then filed Msa Admin Cause No. 438 of 2000 where it is claimed that the legal heirs of Monje Ngonyo were listed as Hinzano Ngonyo, Salim Kiponda Hinzano, John Kiponda Hinzano and Tsongalem Khamisi Kiponda, all children of the 4th co-wife. Resultantly, Gede/Majimboni/17 was transferred to the four children of the 4th co-wife as proprietors in common.
7. It is this subdivision that is considered the genesis of the protracted litigation. According to the Petitioner, the consent of the rest of the family was not sought.
8. As stated earlier the Respondent opposed the Petition for a Special Limited Grant stating that the Petitioner lacks locus standi to file the present petition and has failed to disclose that he already filed summons for revocation of grant in MSA ADMIN CAUSE No. 438 of 2000. That the land was transferred to the rightful heirs and the title in its possession in trust of the estate of the deceased and his brother Changawa Ngonyo Hinzano is LR. No. Gede/Majimboni/1295. That despite informing the Petitioner about the said property, he has refused to obtain a full grant in respect of the deceased's estate. To the Respondent, the petition is a non-starter, unmerited and the intended revocation would be of no benefit to the Petitioner.
9. The matter was canvassed by way of written submissions. The Petitioner filed his written submissions on 19th July 2023; the Respondent did not.

Analysis and Determination

10. I have carefully considered the Petition for Special Limited Grant, the response filed thereto as well as the written submissions filed by the Petitioner.
11. Section 54, of the [Law of Succession Act](#) Cap 160, Laws of Kenya (the Act) provides for the circumstances under which a Special Limited Grant may be issued by the court as follows:
 54. Limited grants

“A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.”
12. The grant limited ad litem is one normally used for prosecuting or defending proceedings began in a court of justice. This type of grant is covered by the [Succession Act](#) in the 5th schedule para 11-16. It has been described as Grant for Special purposes. I agree with the Petitioner's submissions that such a grant falls under paragraph 14 of the 5th Schedule of the Act, and that such a petition is initiated through form 90B provided in the rules. Although it is clear that the petition is not in the prescribed form, I am



guided by Article 159 (2) (d) of *the Constitution* of Kenya, Section 72 of the *Interpretation and General Provisions Act*, and rule 70 of the *Probate & Administration Rules* which provide as follows: -

“ Article 159. Judicial authority

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—...

(d) justice shall be administered without undue regard to procedural technicalities; ...

Section 72. Deviation from forms

Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.

Rule 70. Forms

The forms set out in the First Schedule, with such adaptations, additions and amendments as may be necessary, shall, when appropriate, be used in all proceedings under these Rules:

Provided that the Chief Justice may by notice in the Gazette vary the forms and prescribe such other or additional forms as he thinks fit.”

13. Having said that, I am inclined to consider the merits of the petition. The Petitioner seeks a limited grant for purposes of filing summons for revocation of grant issued to the Respondent in another suit filed in Mombasa. The Respondent annexed a copy of summons for revocation of grant filed in the Mombasa suit on 16th October 2018. The present application was filed on 28th September 2021, approximately 3 years after the summons for revocation were filed in Mombasa. The Petitioner did not contest the existence of the summons. Evidently so, the Petitioner did not disclose the status or outcome of the said summons for revocation.
14. In the given circumstances, and considering the nature of the prayers framed in the Petition, I am of the opinion that this petition has long been overtaken by events.
15. The outcome is that the petition is dismissed. Each party to bear its own costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 13TH DAY OF MAY, 2024.

.....
S.M. GITHINJI

JUDGE

In the absence of: -

Mr Ireri for the Petitioners.

Mr Mamilo for the Public Trustee

Parties be notified.

.....
S.M. GITHINJI



JUDGE

13.5.2024

