



In re Estate of Alexander Augustine Agutu (Deceased) (Succession Cause 101 of 1994) [2024] KEHC 4826 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 101 OF 1994
RN NYAKUNDI, J
MAY 9, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE ALEXANDER
AUGUSTINE AGUTU (DECEASED)**

IN THE MATTER OF

ROSE ENNABEL KOKONYA 1ST APPLICANT

PAUL CHIMUNGUNI 2ND APPLICANT

RULING

1. Before me are two applications for determination. The first one is dated 1st December, 2023 expressed to be brought under Sections 1A, and 3A of the *Civil Procedure Act* and Orders 2 Rule 15, and 51 rules 1 and 3 *Civil Procedure Rule*, 2010, Articles 31,45,50,159, 165(3), (b) & 259 of the *Constitution* of Kenya and Rule 4&24 of the *Constitution of Kenya (Protection of Rights and fundamental freedoms) Practice and Procedure Rules*, 2013.

The applicant, Jacqueline Onyango seeks the following orders:

- a. That the 2nd application filed by the Respondent dated 24th November, 2023 be struck out and removed from the court's records for being outrageously scandalous, frivolous, vexatious or otherwise abuse of the court process.
2. I have considered both applications as canvassed by the applicants taking different positions as to who is best placed to administer the intestate estate of the deceased. The question to be answered by this court is whether there is any valid reason why this estate remains unadministered since the initial gazettelement on 9th September, 1994. The historical factual matrix reveals the following:

That the deceased died on 6th January, 1993 as per the death certificate filed in court on 29th June, 1994. The applicant Rose Annabel Kokonya and Paul Chimungeni petitioned for



letters of administration in succession cause No. 101 of 1994. The affidavit in support for the petition for letters of administration intestate in paragraph 3 deposes as follows:

“ That the deceased was at the date of his death domiciled in Eshikulusi Kakamega and his last known place of residence was at Kakamega. Further the deponent averred as follows: That the deceased died intestate and left the following surviving him. Rose Kokonya, Lilian Wamusehenga, Charlottee Serrem, Jane Mbendo, Jaqueline Onyango, Paul Chimungeni and Olive Chimungeni.”

3. Following the Kenya Gazette acknowledgment of the petition, the court issued grant of letter of administration intestate to Rose Annabel Kokonya and Paul Chemungeni on 25th April, 1996. Soon thereafter the following affidavits of the beneficiaries were filed in support of distribution of the estate within the framework of the Law of Succession Act. For purposes of this matter, I refresh the parties’ memory on what they stated on oath on the 8th of January, 1999.

4. First, Jane Mbendo who deponed that she is a daughter to the deceased admitted the following facts:

That I have read the affidavit of the Applicants/Petitioners sworn on 10th March, 1998 and I have fully understood its contents;

That it is true that the family has agreed that the assets of the deceased should be apportioned as set out in the Petitioner’s affidavit.

That I participated in the decision and fully agree with the resolution reached by the family.

That I make this affidavit in support of the application herein.

5. Second was the affidavit of Olive Chimungeni, also a daughter of the deceased, who deponed as follows:

That I have read the affidavit of the Applicants/Petitioners sworn on 10th March, 1998 and I have fully understood its contents.

That it is true that the family has agreed that the assets of the deceased should be apportioned as set out in the petitioner’s affidavit;

That I participated in the decision and fully agree with the resolution reached by the family.

That I make this affidavit in support of the application herein.”

6. Third was Sheila Chimungeni also a daughter to the deceased whose affidavit is sequenced in the following language

That I have read the affidavit of the Applicants/Petitioners sworn on 10th March, 1998 and I have fully understood its contents.

That it is true that the family has agreed that the assets of the deceased should be apportioned as set out in the petitioner’s affidavit;

That I participated in the decision and fully agree with the resolution reached by the family.

That I make this affidavit in support of the application herein.”



7. Fourth is the affidavit of Lilian Wamusehenga, a sibling to the other deponents. She also admitted in her affidavit as follows:

That I have read the affidavit of the Applicants/Petitioners sworn on 10th March, 1998 and I have fully understood its contents.

That it is true that the family has agreed that the assets of the deceased should be apportioned as set out in the petitioner's affidavit;

That I participated in the decision and fully agree with the resolution reached by the family.

That I make this affidavit in support of the application herein."

8. Fifth is Charlotte Serem, a daughter to the deceased also deposed as follows:

That I have read the affidavit of the Applicants/Petitioners sworn on 10th March, 1998 and I have fully understood its contents.

That it is true that the family has agreed that the assets of the deceased should be apportioned as set out in the petitioner's affidavit;

That I participated in the decision and fully agree with the resolution reached by the family.

That I make this affidavit in support of the application herein."

9. Sixth is Jacqueline Onyango, apparently recently appointed as a co-administrator with Rose Annabel Kokonya. As way back in March 1998, she deposed as follows:

That I have read the affidavit of the Applicants/Petitioners sworn on 10th March, 1998 and I have fully understood its contents.

That it is true that the family has agreed that the assets of the deceased should be apportioned as set out in the petitioner's affidavit;

That I participated in the decision and fully agree with the resolution reached by the family.

That I make this affidavit in support of the application herein."

10. Seventh is Loice Chemungeni, a widow of the deceased. She also deposed as follows:

That I have read the affidavit of the Applicants/Petitioners sworn on 10th March, 1998 and I have fully understood its contents.

That it is true that the family has agreed that the assets of the deceased should be apportioned as set out in the petitioner's affidavit;

That I participated in the decision and fully agree with the resolution reached by the family.

That I make this affidavit in support of the application herein."

11. From the court record, on 2nd May, 2000 summons for confirmation were heard and determined by the court and a certificate of confirmation of grant issued on said date with the following model of distribution

Name Description of property Shares of Heirs

Rose Annabel Chimungeni Marama/Shirotsa/955 All

Marama/Shirotsa/1067 All



Lillian Bertha Chimungeni Buruburu LR No.3478 All
Loice Lukhaba Chimungeni MARAMA/Buchenya701 All
Isukha/Shirere/83
National Housing Co-op Plot123 All
Marama/Shimamwenyuli/486 All
404 Station Wagon KTG 486 All
Jacqueline Onyango National Housing Co-op Plot71 All
Jane Chimungeni Rowena Marama/Shimamwenyuli/417 All
Paul Chimungeni Marama/Shimamwenyuli/427 All
Olive Mary Chimungeni Marama/Shimamwenyuli/629 All
Charlotte Atsango Serem Marama/Shimamwenyuli/626 All
Sheila Joyce Maloba Marama/Shimamwenyuli/1235 All

12. This estate has remained unadministered for all those years despite the fact that Rose Annabel Kokonya has been the administrator ever since the petition for administration was gazetted. This is evidenced by the application filed by Jacqueline Onyango dated 17th April, 2023, stating as follows:

That from the onset, I want to let the Honorable court know that I am a firm believer in the Rule of Law, and I make this application in utmost good faith; that all my siblings and beneficiaries of my father's estate get complete the administration of the estate and settle down in life in the peace that the sweat of our late father paid off and his spirit is forever appeased in the way his affairs are managed even in his death as to how he would have wished for his home and children.

That whereas the administrators are my siblings, and whereas the second administrator, Paul Chimungeni died on 24th April, 2007 the surviving administrator has not moved diligently to conclude the distribution of the estate in line with the mode of confirmation.

That by the order of the court dated 26th April, 1996, my two siblings, that is to say, Rose Annabel Kokonya and Paul Chimungeni, all of P.O. Box 30840, Nairobi, were granted by this court the Grant of Letter of Administration intestate to the estate of the deceased

13. In the same affidavit, Jacqueline Onyango identified additional assets belonging to deceased referenced LR Marama/Shimamwenyuli/625, but not part of the initial summons for confirmation filed by Rose Annabel Kokonyi and Paul Chimungeni. She therefore petitioned the court to have the certificate of confirmation of grant rectified to include the asset so that it can be administered within the provisions of the Law. The administrator Rose Annabel Kokonyi filed an affidavit opposing the averments by Jacqueline Onyango, disagreeing with every statement made on oath in that affidavit. The truth is that these two siblings seem not to agree on anything. The reasons why wrangles exist between them cannot even be deduced from the record. In so far as the administrator has filed an affidavit challenging the perspective by her sister, there is no actual probate account as stipulated in Section 83 of the *Law of Succession Act*.

The Question is whether these two administrators would ever deliver the final distribution of this estate to the beneficiaries as premised in the Law.



The Law

14. Rule 73 of the [Probate and Administration Rules](#) provided for the inherent power of the court as follows: -

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

In [re Estate of Elijah Mbondo Ntheketha \(deceased\)](#) (2017) eKLR it was held: -

“The removal of an administrator amounts to revoking his appointment. Revocation of grants is provided for under Section 76 of the Law of Succession Act. An Applicant seeking to obtain such revocation must build a case founded on Section 76”

Section 76 (d) of the [Law of Succession Act](#) gives the Court the powers to annul or revoke a grant on an application of a party or *suo moto* on the grounds stipulated therein. The section speaks in the following terms.

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

- (i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
- (ii) To proceed diligently with the administration of the estate; or
- (iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular.”

In [re Estate of William Nzioka Mutisya \(Deceased\)](#) [2018] eKLR Hon. Justice GV Odunga aptly observed: -

“It is however my view that the administrators may be removed from their duties where, due to wrangles and disagreements amongst themselves, it is impossible for them to proceed diligently with the administration of the estate... In my view if the Court finds that the administrators are unable to properly administer the estate due to their disagreements, nothing steps the Court from removing them from the administration and appointing new administrators notwithstanding the issue of priority or preference. This must be so because section 66 of the [Law of Succession Act](#) provides that:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made.”

15. The evidence is very clear that since 9th September, 1994 when Rose Annabel and Paul Chemungeni were empowered through the Kenya Gazette to administer the estate and subsequent instruments issued by the court, substantively nothing has happened in consonant with the law on the timelines set by the Act. I tend to agree with the affidavit evidence filed by Jacqueline Onyango. That there has been inordinate delay by the surviving administrator to deliver on a mandate as faithfully bestowed upon



her by the legal instruments of administration. The law on this issue is very specific as can be deduced in the case of *re estate of Njue Kamunde (Deceased)* [2018] eKLR it was held: -

“The applicant contends that the respondent has acted contrary to the law in carrying out her duties as the administratrix and feels that on account of that, she should be suspended and leave her as the sole administratrix of the estate of the deceased who is her late son... I agree with the applicant that Section 47 Law of Succession Act and Rule 73 Probate and Administration Rules can be invoked to remove or suspend him/her...I also agree that personal representatives are subject to supervision of this court and this court will not shy away from making any orders that may be expedient and necessary for the ends of justice and to prevent abuse of powers conferred to them under Sections 53 and 79 of the Law of Succession Act.”

16. The dispute in this estate is purely lack of leadership from the administrator and acting within the confines of Section 83 of the *Law of Succession Act*. The lengthy delay in distributing this estate by the administrator has occasioned prejudice and injustice to the other beneficiaries who have a legitimate expectation that the estate survived of the deceased should have been concluded long time ago as stipulated in the certificate of confirmation of grant. The actual prejudice in this estate is real and the court must invoke the inherent powers donated by the Succession Act to grant a remedy to the beneficiaries, including the administrators. Based upon that evidence on record, I am satisfied to make the following declarations:
- a. That the appointment of Jacqueline Onyango as a Co-administrator with Rose Annabel Kokonyo is in conformity with the provisions of Section 66 of the Law of Succession Act as read with Rule 73(1) of the Probate and Administration Rules.
 - b. That the two administrators by order of this court move swiftly and on a priority basis to complete transmission of the estate to the beneficiaries including any properties which may have come to their knowledge but not included in the initial certificate of confirmation of grant as the primary instrument of administration of the estate.
 - c. That the discovery of new assets shall cause the grant so issued by the court to be amended to facilitate distribution of the estate applying the model identified and agreed by the parties in the certificate of confirmation of grant dated 2nd May, 2000.
 - d. That the distribution of this estate be completed within the timeframe of 60 days from today's ruling and thereafter file a probate account under Section 83(g) of the Law of Succession Act be filed on or about 1st August, 2024 before the Deputy registrar of the High Court.
 - e. That the Deputy registrar of the High Court of Eldoret be and is hereby empowered to sign all the instruments of conveyance, transmission and distribution of the shares so identified for the benefit of the beneficiaries shall the two administrators abdicate their respective duties as defined in the Law of Succession Act.
 - f. That on completion of transmission of the estate the Deputy Registrar be at liberty to file the probate account and with leave of the court she be discharged from further duties as to the administration of this estate is concerned. This being a family matter, I make no orders as to costs

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF MAY, 2024

In the Presence of



Mr. Otieno Aluoka for Jackline Onyango

Mr. Mwetich Advocate

.....

R. NYAKUNDI

JUDGE

