



**In re Esxtate of Kimukonyi Tuwei - Deceased (Succession Cause
267 of 2009) [2024] KEHC 12311 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 267 OF 2009
RN NYAKUNDI, J
OCTOBER 11, 2024**

**IN THE MATTER OF THE ESTATE OF KIMUKONYI TUWEI – DECEASED
THROUGH**

BETWEEN

JOSPHINA KANDA PETITIONER

AND

ABRAHAM KIPRUTO ROTICH RESPONDENT

RULING

1. Before me for determination is a notice of motion dated 27th September, 2023 expressed to be brought under the provisions of Art. 159(2)(b)(d) and (e) of *the Constitution*, Rules 5(2)(a)(b) of the *appellate jurisdiction Act*, Section 47, 76 and 81 of the *Law of Succession Act* and Order 9 Rule 9 of the Civil Procedure Rules. The applicant seeks orders as follows:
 - a. Spent
 - b. The Honourable court be pleased to set aside and/ or review its exparte orders issued on 28th March, 2023 which substituted the respondent Samuel Kipkosgei Kanda now deceased with one Phylis Jepkemoi Kosgei.
 - c. Pursuant to grant of prayer b above, the honourable court be pleased to reinstate the applicant Josphina Kanda as the sole surviving administrator of the estate as confirmed on 22nd June, 2010.
 - d. Costs of this application be provided for.
2. The application is supported by an affidavit sworn by Josephina Kanda and 12 grounds summarised as hereunder:



3. The applicant stated that the application proceeded Ex parte without the knowledge of the applicant's counsel or the applicant herself. That the orders purport to have been issued on 28th March, 2022 long before the said application was filed.
4. The applicant averred that the application purports to have been filed and paid for by the applicant JOSPHINA KANDA who is unaware as at no time did she instruct any counsel to file it and thus the application dated 23rd March, 2023 was improperly before the court and subsequent orders issued therein are null and void.
5. That the grant issued on 25th May, 2023 purportedly relating to the estate of Kimukony Tuei does not in any way far or relate to the deceased the subject of this succession. She averred that had the application been served for Interparties hearing, the honourable court would have decided otherwise for the interest of justice to be met.
6. The applicant further averred that the Respondent is a stranger to the estate of the deceased and thus could not purport to substitute the estate. That there is no known procedure of substituting an administrator in succession matters since the grant is issued to the administrator in persona and not transferable. She equally pointed out that the application dated 23rd March, 2023 filed by M/s Emmanuel Kipkurui & Co. Advocates is incompetent for being brought by an advocate who is not properly on record by dint of Order 9 Rule 9 of the Civil Procedure Rules.
7. In response to the application, Phylis Jepkemoi Kanda the wife of Samuel Kipkosgei Kanda (deceased) deposed that the late Kimukonyi Tuwei married the late Maria Talaa sometime in 1968 but as they were unable to have a child of her own they adopted one Samuel Kipkosgei Kanda sometime in 1976 whom they provided for his basic needs and education
8. Subsequently, the said Kimukonyi Tuwei married Josephina Kanda the Petitioner herein sometime in 1979. That the said Samuel Kipkosgei Kanda married one Phylis Jepkemoi Kosgei and together they were blessed with the following issues:
 - a. Everline Chemusto Koech – Daughter
 - b. Gladys Jebet Kosgei – Daughter
 - c. Victor Kipsang – son
 - d. Fransica Jepkorir Kosgei – Daughter
 - e. Mercy Jemutai Kosgei – Daughter
 - f. Sharon Jelagat Kosgei – Daughter
 - g. Abel Kiptoo Kosgei – Son
 - h. Allan Kibiwot Kosgei – Son
9. Prior to his demise, Kimukonyi Tuwei had both of his wives live in the parcel of land known as Cherangany/Koitugum/525 that measured approximately 31 acres. Unfortunately, he had not allocated the said parcel to each house their respective portions and that forms the foundation of the instant suit.
10. That the Petitioner herein applied for and obtained a Grant of Letters of Administration intestate issued on 3.12.2009 over the estate of the late Kimukonyi Tuwei without informing and involving the late Samuel Kipkosgei Kanda who was a bona fide beneficiary and concealing material facts such as:



- a. The existence of another 1st house of the deceased, rather she misled the court that she was the sole wife of the late Kimukonyi Tuwei;
 - b. The existence of other beneficiaries to the said estate; and
 - c. The existence of another Succession matter namely ITEN SRMCC Succession Cause No. 29 of 2009.
11. That it is what prompted Samuel Kipkosgei Kanda to make an application of the aforementioned Grant in Eldoret High Court Succession Cause No. 267 of 2009; In the Matter of the Estate of Kimukonyi Tuwei Between Josephina Kanda versus Samuek Kipkosgei Kanda.
 12. That in the matter the Honourable court ruled that a grant be issued to both the said Josephina Kanda and the late Samuel Kipkosgei Kanda as Co. Administrators “for the purpose of administration and distribution of the Deceased’s Estate”.
 13. The Respondent deposed that unfortunately the said Samuel Kipkosgei Kanda died on 8.7.2022. After this demise, it became imperative for his surviving wife to make an urgent application to substitute him as a Co-administrator of the estate of the late Kimukonyi Tuwei for purposes of ensuring that the process of distribution of the estate proceeds without hitches to its ultimate conclusion.
 14. That the said application dated 27.9.2023 is frivolous, ill-intended and meant to prevent the ends of justice from being satisfied by frustrating the final distribution of the Estate of the said Kimukonyi Tuwei.
 15. That on numerous occasions the said Petitioner herein has intermeddled by selling significant portions of land from the Estate of the late Kimukonyi Tuwei without obtaining any court order to that effect to the County Government Elgeyo Marakwet and Several innocent purchasers.
 16. That the said Petitioner herein has even gone ahead and allowed complete strangers to the said estate such as one Philip Busiemoi to enter into the deceased’s property and cut trees for charcoal burning.
 17. That after the demise of Kimukonyi Tuwei the said Josephina Kanda unlawfully, unfairly and illegally apportioned herself a disproportionately larger amount of the said Estate of about 20 acres which dwarfs the size that the late Samuel Kanda as left with.
 18. According to the Respondent, since the Petitioner in this instance seeks equitable remedies, her actions disentitle her from the remedy of stay as she has come to court with unclean hands by:
 - a. Failing to obtain a court order before selling, leasing or in any way dealing with the Estate of the deceased, which actions amount to intermeddling with the Estate of the deceased.
 - b. Failing to render account of all her dealings with regard to the said Estate of the deceased.
 - c. On many occasions unleashing physical and verbal abuse on her.
 - d. Concealing and/or failing to disclose material facts with regard to this estate to the effect that there exist other beneficiaries to the Estate of the deceased.
 19. Given the aforementioned grounds, the Respondent concluded that the instant appeal is ill-conceived, misguided, made in bad faith and ought to be dismissed so as to allow the parties herein to proceed to finally distribute the Estate of the late Kimukonyi Tuwei.



Determination

20. To bring this matter into perspective, some little background is necessary. Following the death of the deceased on 20th December, 2007 at Tendin Sub-Location, the Petitioner petitioned for a Grant Letters of Administration wherein she highlighted the following as surviving the deceased person:
 - a. Josphina Kanda – Widow
 - b. Leah Jepkorir Tuei
 - c. Naomi Jepchirchir
 - d. Prisca Jerono Tuei
21. In the said petition, the only identified property belonging to the estate of the deceased was CHERANGANY/KOITUGUM/525 MEASURING APPROX 14.38 HA. On 22nd June, 2010 the grant was confirmed with the property being allocated solely to the Petitioner. Thereafter, the Objector/Applicant filed summons for revocation/annulment of grant dated 14th June, 2010 seeking annulment of the said grant on grounds that the petitioner misled the court and obtained the said grant without involving the Dependants and the real beneficiaries of the Estate who have the legal and beneficial interest in the estate.
22. The applicant further deposed that they had earlier on commenced succession proceedings through the court at Iten vide Iten SRMCC SUCC. CAUSE NO. 29 of 2009 wherein the Petitioner herein fully participated but did not inform them that she had filed the current suit.
23. According to her, the Petitioner failed to disclose the fact the deceased had two wives; the late Maria Kimukuny and herself. That there is another succession cause at Iten which has been concluded and distribution of the Estate done. That the petitioner intends to dispossess him of the use of his portion of the subject parcel of land known as CHERANGANY/KOITUGUM/525 and therefore it is necessary that a restriction be issued and that each one of them do utilize their various portions pending the hearing and determination of this cause. Following the summons, an order was issued on 12th July, 2010 restraining dealings in the subject property.
24. In the response to the summons, the Petitioner/Respondent argued that she had already petitioned the High Court at Eldoret for a grant of letters on 3rd December, 2009. That while she was awaiting confirmation the applicant proceeded and obtained another grant of letters from the Senior Resident Magistrate's Court at Iten and attempted to proceed and distribute the estate prior to confirmation of grant.
25. As the proceedings advanced, Samuel Kipkosgei Kanda passed on and his wife made an application for substitution, which application was allowed. Thereafter on 27th September, 2023 the Petitioner challenged the substitution.
26. I have also take note of this court's ruling dated 26th April, 2021, in which this court in its wisdom appointed both the Petitioner and the Objector as administrators of the estate of the deceased.
27. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules



- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

28. Let me point out that ideally, this court ought not substitute an administrator. I am of the view that once an administrator dies, the grant becomes inoperative save for circumstances when the court deems fit to have the estate properly distributed with substitution such as in this case. Revocation of grant is governed by section 76 of the *Law of Succession Act* which provides as follows;

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—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) 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; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”



29. In the case of *Goods of William versus Loveday* (1900) AC P 154, the object of the power to revoke a grant is to ensure the due and proper administration of an estate and protection of the interests of those beneficiaries entitled to the estate. Thus;

“The real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto, and I can see no good reason why the court should not take fresh action in regard to the estate where it is made clear that the previous grant has turned out abortive or inefficient. If the court has in certain circumstances made a grant in the belief and hope that the person appointed will properly and fully administer the estate, and it turns out that the person so appointed will not or cannot administer, I do not see why a court should not revoke an inoperative grant and make a fresh grant.”

30. The circumstances of this case are that the Grant issued on 25th May, 2023 was issued to two individuals being; Philis Jepkemoi Kosgei and Josephine Kanda who are beneficiaries of the estate of the deceased and properly so by the fact their degree of consanguinity puts them in a proper position to be administrators of the estate.

31. Having examined the facts and circumstances of the case, in the event this court had any doubt as to the just administration of the estate herein, the Grant issued on 25th May, 2023 would have been revoked to pave way for a fresh Grant to be issued. I have however not seen any compelling circumstances to warrant a revocation or setting aside of this court’s ex parte orders. I believe that with the two administrators as appointed, they are able to properly and fairly administer the estate of the deceased. Better yet, the matter has been in court for quite some time and there is need for the administrators to move with haste and bring it to a conclusion by administering the estate.

32. The court in exercising discretion under Section 66 of the *Law of Succession Act* and Rule 73(1) of the Probate and Administration Rules had also in mind the provisions of Section 76 of the same Act. What was required of the new administrators is to file and sign fresh petition accompanied with the necessary forms recognized and attached to the schedule of the *Law of Succession Act*. This is meant to regularize the order on appointment by this court or done for the interests of justice of this long protracted succession cause.

33. In this respect, the order on appointment of legal representatives to administer the estate of the deceased shall be regularized by the administrators working closely with their respective legal counsels to ensure that the estate does not remain non-administered which essentially is a breach of the Succession Act. As a consequence, an order be and is hereby made that the administrators initiate the process of petitioning for the making of Grant of Letters of Administration to the estate of Kimukonyi Tuwei.

34. The death of an administrator or an executor to any probate or intestate proceedings before transmission of the estate and presentation of a probate account under Section 83(g) of the Act with a subsequent order of discharge of the administrators or executor renders Certificate of Confirmation of Grant useless and inoperative. The guiding principle under Section 76 of the *Law of Succession Act* is for the court to exercise jurisdiction for a just cause to have the Grant revoked. The fundamental importance of it, is that the appointment of an executor or administrator is in personam. The administration of an intestate estate is manifestly and undoubtedly vested with the legal representatives, whereas for probate administration, it is vested with an executor or executors duly appointed by the testator.



35. Therefore, the process and procedure of rectification should not be applied literally to apply to such cases, for that is only the domain of correcting topographical errors on the face of the record.

36. Each party to bear their own costs.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 11TH DAY OF OCTOBER 2024

.....

R. NYAKUNDI

JUDGE

