



In re Estate of Athman Bin Ali alias Athman Ali Mwaringa (Deceased) (Succession Cause 23 of 2005) [2023] KEHC 17678 (KLR) (17 April 2023) (Ruling)

Neutral citation: [2023] KEHC 17678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
SUCCESSION CAUSE 23 OF 2005**

SM GITHINJI, J

APRIL 17, 2023

**IN THE MATTER OF THE ESTATE OF ATHMAN BIN
ALI ALIAS ATHMAN ALI MWARINGA (DECEASED)**

BETWEEN

OMAR ATHMAN ALI APPLICANT

AND

NASSOR ALI MOHAMED RESPONDENT

RULING

1. The Respondent, Nassor Ali Mohamed raised a Preliminary Objection dated October 25, 2022 on the following grounds;
 1. That the applicant's application of summons of revocation as filed herein seeking substitution of a dead administrator is not provided for under the law of succession.
 2. That there is no grant in force and it is impossible to deal with the confirmation of a non-existent grant and hence the application by the applicant is incompetent and fatally defective.
 3. That the application is defective and meant to offend Section 76 (a), (b) and (c) of the [Law of Succession Act](#).
 4. That the procedure applied by the applicant for re-issuing the confirmation of grant is not tenable under section 76 of the Law of Succession.
 5. That under Section 29 of the [Law of Succession Act](#), the Applicant being a nephew to the deceased is not entitled to inherit.
2. This ruling pertains to the Preliminary Objection raised by the Objector Nassoro Mohamed Ali who is the son of the deceased administrator Ali Mohamed who was appointed as the executor and trustee



of the Estate of Athman Bin Ali Alias Athman Ali Mwaringa, deceased. The applicant has since filed summons for revocation and re issue of grant dated May 19, 2022 in which the applicant moves the court to have the grant re issued and replace the deceased administrator Ali Mohamed with Omar Athman Ali who is the biological son of the late Athman Bin Ali. The Executor, Ali Mohamed has since passed on before distributing the estate to the beneficiaries.

3. The respondent/protestor who is the son of the deceased administrator, Ali Mohamed, is opposed to the revocation and reissuing of the grant arguing that the application offends the provisions of Section 76 of the [Law of Succession Act](#) and has presented before this court a Certificate of Confirmation of Grant issued in the lower court to him in respect to the Estate of his deceased father, Ali Mohamed Ali, which in my view is in respect of a separate estate and not the one relating to Athman Bin Ali Alias Athman Ali Mwaringa. His objection has since been raised in the form of a Preliminary Objection.
4. In my view, there is no specific provision in succession law which provides for substitution of a single deceased administrator/executor or deceased administrators or executors. In case of such a scenario as in the present case, Section 76 (e) comes to play and a fresh grant of letters of administration de bonis non is issued. Hon. Musyoka J. held as follows in [Re Estate of George Ragui Karanja \(Deceased\)](#) (2016) eKLR:

“The [Law of Succession Act](#) does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative... It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the [Law of Succession Act](#), to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.”

5. In my opinion, such a grant as in the present circumstances is revocable under section 76 of the [Law of Succession Act](#) and upon its revocation, a fresh application for grant ought to be made in the usual way, following procedures laid down in the [Law of Succession Act](#) and the [Probate and Administration \(Rules\)](#). The applicant is advised to make appropriate application for revocation of the grant and then seek issuance of a fresh grant of letters of administration de bonis non and subsequent confirmation of the grant. In my view, the process under Section 76 if followed, will resolve the issue of who will become the administrator of the estate herein.
6. Be that as it may, as to what constitutes a preliminary objection has been the subject of several judicial pronouncements and is well settled. The Supreme Court addressed its mind on this issue in the case of [Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others](#) (2015) eKLR and stated:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”
7. The Preliminary Objection as has been brought by the Objector does not meet the threshold of a Preliminary objection and in the end, it ought to be dismissed of which I have done. Cost be in the cause.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF APRIL, 2023.



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S M GITHINJI

JUDGE

In the Presence of; -

Nassor Ali Mohammed – Respondent.

Mr Kimani Gicharu holding brief for Mr Musa for the Objector before court.

