



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Martha Eladi Obelai (Deceased) (Succession Cause
75 of 2010) [2023] KEHC 3717 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 75 OF 2010**

WM MUSYOKA, J

MAY 4, 2023

IN THE MATTER OF THE ESTATE OF MARTHA ELADI OBELAI (DECEASED)

RULING

1. The application the subject of this ruling is a Motion dated October 18, 2021. It seeks that the court directs the Deputy Registrar of the court to execute forms, that the other party has declined to sign, to facilitate transmission of the estate to the beneficiaries.
2. The deponent of the affidavit in support is Leah Madesha Kaburu, one of the administratrices, who I shall refer to as the applicant. It is averred that the grant herein was confirmed, and the estate, South Teso/Amukura/1692, was to devolve equally, as per the confirmation orders to 2 individuals, herself and Asare Vincent Eladi, who is the other administratrix, and I shall refer her, hereafter, as the respondent. She avers that she has signed the papers necessary to effect transmission, but the respondent has not executed the said papers, which failure has had the effect of stalling the transmission process.
3. The application is not opposed. I have seen 2 affidavits sworn after the application was filed. They are by the respondent and Lazaro Inyaa Ojilo, both sworn on March 9, 2022. They are headed witness affidavits, and address issues unrelated to the application dated October 18, 2018, for they do not offer any explanation for the failure or omission to execute the documents to have the land transmitted.
4. I have perused the record. A ruling was delivered herein on April 8, 2020, in which the applicant and the respondent were appointed joint administratrices of the estate. They were given 60 days, to file for confirmation of their joint grant. That application was filed by the applicant herein, dated May 19, 2020. It was allocated a date at the registry, on July 7, 2020, for hearing on October 15, 2020. It came up several times before the Judge, and the grant was confirmed on September 23, 2021, in the presence of the Advocates for both sides. A certificate of confirmation of grant was duly issued, dated October 21, 2021. The estate was shared equally between the applicant and the respondent.
5. After a grant is confirmed, what follows should be distribution of the estate in terms of the confirmation orders, as encapsulated in the certificate of confirmation of grant. The duty to distribute falls on the shoulders of the administrators, who ought to complete the exercise of distribution, within



6 months from the date of confirmation, according to section 83(g) of the Law of Succession Act, Cap 160, Laws of Kenya, and thereafter report to the court. Time would, therefore, be of the essence.

6. For avoidance of doubt, section 83(g) provides as follows:

“83. Duties of personal representatives

Personal representatives shall have the following duties-

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.
- (h)
- (i)

7. Where the property to be distributed is land, the distribution would happen at the lands registry, through a process known as transmission, which is regulated by sections 60 to 63, inclusive, of the Land Registration Act, No.3 of 2012, and sections 49 to 54, inclusive, of the Land Act, No. 6 of 2012. These provisions require that the certificate of confirmation of grant should be placed in the hands of the land registrar, so that he or she can facilitate the distribution of the landed assets as per the terms of the certificate of confirmation of grant. There are certain forms, that are prescribed under the Land Registration Act, which administrators have to execute, to enable the land registrar implement the certificate of confirmation of grant. These are the forms that the respondent is accused of failing to sign.

8. As should be clear from the above, transmission of landed assets as per the certificate of confirmation of grant is a process which happens outside of the Law of Succession Act. Indeed, the Law of Succession Act does not even mention transmission. Since the transmission process is regulated by the Land Registration Act and the Land Act, the court that should superintend over the transmission is not the High Court, but the Environment and Land Court and the enabled subordinate courts, according to sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act. These provisions ought to be read together with Articles 162(2) and 165(5) of the Constitution. What the applicant is inviting me to do, under the instant application, is to superintend over the transmission process, by making orders to have the respondent execute forms prescribed under the Land Registration Act. Going by the provisions in sections 2 and 101 of the said Act, I would have no jurisdiction to do that. As a court I should only exercise such jurisdiction as is conferred upon the court, where I sit, by the Constitution and the statutes. I shall not purport to exercise jurisdiction, where the Constitution and the statutes have expressly stated that the High Court has no jurisdiction, or where jurisdiction has been expressly conferred on another court. See In re Estate of Reuben Mugesani Bulimu (Deceased) [2020] eKLR (Musyoka, J).



9. In *Beatrice Wangui Kamau alias Beatrice Wangui Kagunda vs. John Kariuki Kamau & another* [2016] eKLR (Ombwayo, J), it was said that the High Court, after confirmation of grant, under Section 71 of the *Law of Succession Act*, becomes functus officio, and can only entertain an application for revocation of grant thereafter, and that when it comes to transmission of the rights of the legal representative, heirs and beneficiaries under the *Land Act*, 2012, it is the Environment and Land Court that has jurisdiction to entertain disputes arising from the confirmation of grant. See *David Ngugi Kamau & 8 others vs. Waithira Moboyo & 4 others* [2021] eKLR (Mutungi, J), *In re Estate of Musiru Khatela Shanguya (Deceased)* [2021] eKLR (Musyoka, J), *In re Estate of Ephantus Kariuki M'Mbui (Deceased)* [2022] eKLR (Njuguna, J), *In re Estate of Daniel Khasievera Anusu (Deceased)* [2022] eKLR (Musyoka, J) and *In re Estate of Hellen Nyokabi Marine -Deceased* [2022] eKLR (J. Njagi, J).
10. In any event, I belong to the school of thought that holds the position that ordering the Deputy Registrar to sign forms, to facilitate transmission of an estate, would amount to the Deputy Registrar stepping into the role and function of an administrator. Why should Deputy Registrars be compelled to perform the duties of personal representatives of estates when such estates have such personal representatives in office. It is their duty, under section 83 of the *Law of Succession Act*, to distribute the estate as per the certificate of confirmation of grant. It is not the duty of the Deputy Registrar. If personal representatives fail to transmit an estate or an asset, or to complete administration, they would be failing in their duties as personal representatives. That would amount to failure of administration. Where administration fails, the remedy is not to bring in the Deputy Registrar of the High Court to administer the estate, but removal of the personal representatives from their office, and to replace them with administrators who are competent to complete administration. Bringing in the Deputy Registrar, to augment the administrators, is to condone failure by administrators. The court is not short of options, where the administrators fail, and there is no pool in the family, of competent persons to be appointed, to take their place, the court can appoint the Public Trustee, the administrator of last resort. Failure to complete administration would be a fertile ground for removing an administrator, under section 76(d)(ii) of the *Law of Succession Act*. I shall, accordingly, not direct the Deputy Registrar to do what the applicant proposes, I shall give alternative orders instead.
11. It was said, in *In re Estate of Laban Mogire Magogo (Deceased)* [2020] eKLR (Ougo, J), that the Deputy Registrar of a probate court has no role in facilitating transmission of assets upon confirmation, by signing documents on behalf of recalcitrant administrators, for the probate court has no jurisdiction over transmission of assets after confirmation of grant. In *In Estate of Mbaabu M'Abutu (Deceased)* [2020] eKLR (Gikonyo, J), the court lamented about court administrators being turned into administrators of estates of deceased persons, where the duly appointed administrators of the estates of the deceased refuse to sign transmission documents as required of them by the law. It was asserted that where an administrator wilfully fails or refuses to diligently carry out his statutory duties, the grant made to him should be revoked, rather than authorize the Deputy Registrar or court administrator to sign transmission papers, leaving the indolent administrator in situ. In that case, the court did not direct the court administrators to sign the transmission papers, it instead revoked the grant of the recalcitrant administrator, appointed another administrator in his place, and directed the new administrator to sign all the relevant transmission papers, and to complete the administration within given timelines. In *In re Estate of Kiruthu Kimiti (Deceased)* [2021] eKLR (Mutuku, J), it was stated that failure or refusal to sign transmission papers frustrates the process of completing administration, and that amounts to a failure of administration, for which a grant is liable to revocation. The court gave the administrators time to do what is required of them in law, and in default the Deputy Registrar would be authorised to step in. See also *In re William Akuma Ombogi (Deceased)* [2020] eKLR (Ougo, J) and *In re Estate of the Late Njonjo Kihiga (Deceased)* [2022] eKLR (Chemitei, J).



12. The final orders that I make in the circumstances are:

- a. That I hereby give the respondent, Asare Vincent Eladi, 60 days to sign the relevant forms, to facilitate transmission of South Teso/Amukura/1692, in terms of the certificate of confirmation of grant, dated October 21, 2021;
- b. That in default of (a), above, the grant made to her shall stand revoked, by this order, leaving the applicant the sole administratrix, who shall have all the powers to transmit the estate herein, as per the certificate of confirmation of grant, dated October 21, 2021; and
- c. That the matter shall be mentioned after 60 days, for the purpose of monitoring compliance, and for further directions.

13. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 4TH DAY OF MAY 2023

W.M. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Maloba, instructed by Maloba & Company, Advocates for the applicant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.

