



**In re Estate of Manfred Walter Schmitt (Deceased) (Succession Cause E069 of 2022) [2023] KEHC 18508 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18508 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE E069 OF 2022**

**G MUTAI, J**

**JUNE 15, 2023**

**IN THE MATTER OF THE ESTATE OF MANFRED WALTER SCHMITT  
(DECEASED)**

**AND**

**IN THE MATTER OF PETITION FOR LETTERS OF ADMINISTRATION  
AD LITEM**

**BETWEEN**

**JEANNE NGO YOCKBAG ..... APPLICANT**

**AND**

**URS WETTSTEIN ..... RESPONDENT**

**RULING**

**Introduction**

1. What is before this court is a Petition for Letters of Administration *ad litem* dated January 23, 2023 and filed in this Court on February 27, 2023 under a certificate of urgency. The Petition is supported by the affidavit of Jeanne Ngo Yockbag, the Applicant. It is based on the grounds that the deceased herein died testate on December 27, 2017 leaving a will dated August 28, 2017 in which he named Urs Wettstein, the Respondent herein, as the executor. She deposed that the deceased issued the Respondent, as the executor of his will, with his express instructions on the disposition of his estate. She stated that she is an interested party in the estate of the deceased under the said will by virtue of being a beneficiary named therein.
2. The Applicant averred that the Respondent is involved in conversion, fraud and intermeddling with the assets of the estate and has not managed the deceased's assets under his care with diligence and prudence. She accused the Respondent and the other beneficiaries of the estate of deliberately



mismanaging, neglecting and wasting the estate's substantial beneficial interest in assets of Black Hornbill Limited which acts and omissions led to the freezing of its bank accounts by the Kenya Revenue Authority and appointment of Equity Bank as the tax agent on account of unpaid taxes owed by the deceased and the company. She further accused the Respondent and other beneficiaries of having intermeddled with the USD Bank Account Number 04xxxx of the Black Hornbill Limited.

3. The Applicant's case is that she intends to file and prosecute a suit, in defense of the estate, in her capacity as a life partner of the deceased, beneficiary of the estate and his personal representatives for orders that the Respondent and the other beneficiaries or their agents or advocates, company secretary, employees or proxies be restrained from leasing, mortgaging, selling or in any manner handling any shares, affairs or properties belonging directly or indirectly to the estate of the deceased and registered in the name of the company.
4. In response the Respondent filed a Replying Affidavit sworn on March 28, 2023. In the affidavit the Respondent termed the Petition before me as an abuse of court process and fatally and incurably defective on account of the way it was drafted. It was deposed that advocate who commissioned the petition is a senior associate in the firm of the Applicant's advocate, which action it was urged, offends the mandatory provisions of the [Oaths and Statutory Declarations Act](#). For that reason it was submitted the instant petition ought to be struck out.
5. The Respondent further stated that the Applicant is not a spouse nor a beneficiary to the estate of the deceased neither was she a dependant of the deceased at the time of his death. That for the said reasons the Applicant is incapable of taking out letters of administration ad litem in respect to the estate of the deceased. That the deceased was survived by one child namely Sophie Schmitt a German national residing in London.
6. He averred that the deceased did not have a valid Kenyan will naming the Applicant as a beneficiary. He deposed that the succession proceedings before this court seek grant of letters of administration in respect of the estate of the deceased who died intestate. That even if this court was to issue the grant ad litem the same would be in vain as the properties the petitioner claims to be subject of her intended suit were not owned by the deceased neither do they form part of the estate of the deceased. They are owned and registered in the name of Black Hornbill Limited which was not owned by the deceased. Further the deceased was not a shareholder of the said company. It was also urged that this court has no jurisdiction to hear and determine commercial disputes relating to ownership of properties by Black Hornbill Limited.
7. In conclusion Respondent urged the court to dismiss the petition.
8. This court on March 13, 2023 directed the parties to file their written submissions. It was directed that the submissions once filed would be highlighted on May 2, 2023. The Applicant through her advocates Messrs Murgor & Murgor Advocates filed her written submissions dated April 20, 2023. The Respondent on the other hand through his advocates Daly & Inamdar Advocates LLP filed written submissions dated May 1, 2023.

### **Applicant's Submissions**

9. When the matter came for highlighting of submissions on May 2, 2023 Mr Murgor SC reiterated the Applicant's averments in her affidavits and submitted that his client was kicked out of Black Hornbill Limited. He argued that the Respondent had intermeddled with the estate and that when he realized he couldn't run away from his actions he came up with the allegation that the deceased was bankrupt whereas the value of estate was at least 1,000,000.00 Euros. Counsel relied on Section 16 of the [Law](#)



of Succession Act and submitted that if a will is made and complies with the laws of the country it was made it is valid in Kenya. Counsel urged the court to allow the Petition Limited Grant ad litem.

### **Submissions of the Respondent**

10. Mr Mito, counsel for the Respondent reiterated his client's position in his affidavit and written submissions and submitted that the relationship of the petitioner and the deceased is crucial in determining this petition as neither in this Petition nor in the main Petition is it stated that she is the wife of the deceased. Counsel referred the Court to sections 29 and 66 of the Law of Succession Act for the definition of the term "dependant" and identification of people who may take out grants of representation and submitted that the Petitioner was a girlfriend and a business partner of the deceased and was therefore not qualified to take out a grant.
11. Counsel further submitted that the deceased will is a foreign will. He submitted that the assets it referred to were not Kenyan assets. He urged that there is a procedure for adoption of foreign wills which hadn't been used in the instant case. Counsel relied on Section 11 and 16 of the Law of Succession Act on validity of written wills and foreign wills.
12. Counsel submitted that there was no basis for granting Applicant the grant ad litem when she is neither an executor of a will nor a dependant of the deceased.
13. On Black Hornbill Limited counsel relied on the case of Salomon versus A Salomon & Co Ltd [1896] UKHL 1 and submitted that a corporate entity is separate from its owner. He argued that the deceased was not a shareholder, neither did he have any interest in the company. He further submitted that there was no proof that the properties mentioned in the petition were owned by the deceased. That the right court to handle the issues on the ownership of the company is Commercial Court and not this court. It was submitted that the company in question had no interest in these proceedings.

### **Response by the Applicant**

14. Mr Murgor, in a rejoinder submitted that the Respondent has not denied the will and or its existence. He submitted that the Black Hornbill Limited is a landholding company and not a trading company. He stated that the allegation that the company is not part of the estate is a recent invention. In closing he submitted that the properties of the estate need to be preserved.

### **Analysis and Findings**

15. I have considered the Petition, the response thereto and rival written and oral submissions for both counsel and the issue that emerges for determination is whether grant ad litem should issue to the petitioner.
16. I must state at there is a main Petition for Grant of Letters of Administration Intestate which has been taken out by the Respondent. The Applicant has filed objection proceedings against the said application. In writing this ruling I have to be cautious not to prejudge those matters as a wrong impression may be thereby given that the Court has prejudged them. In light of that my ruling will necessarily be limited in its scope.



17. Grant ad litem is one of the limited grants under the *Law of Succession Act*. Section 54 of the said Act provides;

“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.”

18. The Fifth Schedule paragraph 14 provides;

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

19. Further the court in the case of *In Re The Matter of the Estate of Morarji Bhanji Dhanak (Deceased)* [2000] eKLR stated that:-

“The grant limited ad litem (see 4 above) is one normally used for prosecuting or defending proceedings began in a court of justice. This type of grant is covered within our succession act in the 5th schedule para 11-16. It has been described as Grant for Special purposes.”

20. In this case the Applicant’s argument is that she intends to file a suit to preserve the estate which has been wasted by the Respondent. On the other hand, the Respondent argues that the deceased died intestate as he did not have a valid Kenyan will and the petitioner not being a spouse or beneficiary is not entitled to limited grant ad litem.

21. The parties do not agree on the validity of the will. In the High Court Probate and Administration Cause No E042 of 2022 between the same parties this honourable court in its ruling delivered on July 29, 2022 by Onyiego J held as follows:-

“At this stage, citation proceedings is not a proper avenue to entertain objection proceedings and the element of lack of jurisdiction. In my view, it is not for the court to determine or direct in a citation application the nature of a grant to petition. To do so will tantamount to premature determination over the existence or validity of a will.

In the circumstances, I cannot direct the citee to specifically petition for such and such a grant will leave it open for the citee to make his decision in accordance with the law to petition for a grant of representation within 30 days in default, the 3<sup>rd</sup> respondent Sophie Schmitt a daughter to the deceased to appropriately move the court by petitioning for a grant of representation within 30 days and in default ,the citor being one of the alleged beneficiaries in the disputed will shall be at liberty to petition for a grant of representation in accordance with the law.”

22. Similarly, in this case it is my view that it would be premature for this court to determine whether the petitioner is a dependant or not, at this point. Such a decision may only be made after the Court makes a determination, after hearing the parties, on the Objection. I find hold that it is only after a ruling is made that she is a dependant that a grant of any sort may be made to her, if need be.



23. I note that the Respondent petitioned this court for Letters of Administration Intestate vide a Petition filed on August 26, 2022. There is also a pending objection application.
24. Accordingly, it is my view that the issues raised in this petition can be dealt with in the petition for grant of representation and or the objection proceedings. In the interests of justice, the hearing of the objection proceedings will be fast tracked.
25. There was severe contestation as to the title deeds belonging to a Black Hornbill Limited which were said to be in the possession of a third party. It was submitted that the deceased and the Applicant had shares in Black Hornbill Limited. The Respondent, while admitting that the Applicant has some shares denied that the deceased did. It is my view that disputes on shareholding and or management of companies are not a proper province of a Probate Court. A Probate Court may only deal with devolution of shares of a deceased person but may not interfere with the running of a company or decide which party is entitled to what property. The proper court for that is the Commercial Division of the High Court.
26. The High Court has pronounced itself on numerous occasions on this issue. I will quote two decisions. *In re Estate of Boniface Mutinda Kabaka (Deceased)* (Succession Cause E185 of 2021) [2022] KEHC 12031 (KLR) (Family) Maureen Odera J held that:-
- “It is manifest therefore that the shares held by the Deceased are assets which are available for distribution to the beneficiaries of his estate. The shares do not entitle the widow to involve herself in the running of the company. I find that the Probate Court has no jurisdiction in a Succession Cause to grant orders as against a Limited Liability Company. Any claims the Applicant may have to company property can only be properly ventilated in the Commercial Division.”
27. In *Victor Mabachi & Another vs Nurtun Bates Limited* [2013] eKLR the court held that -“This being the case Mediacom as a body corporate is a person jurisca’ with separate independent identity in law; distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”.
28. The House of Lords in *Salmon vs Salmon & Co Limited* [1897] ACC held that:-
- “a limited company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued, and it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders”.
29. If, as is claimed by the Applicant, the Respondent is engaged in oppressive action and is disposing of the assets of Black Hornbill Limited the *Companies Act* would appear to this Court to give her sufficient safeguards in form of derivative action under Part XI of the *Companies Act*. As a minority shareholder she is not without a remedy, in the event that her rights as a shareholder is breached.

### Disposition

30. I therefore order as follows: -
1. The Petition for Letters of Administration ad litem is hereby dismissed with no orders as to costs;
  2. The status quo orders currently subsisting directing Aboo & Co not to release the titles deeds in its possession are hereby discharged; and



3. The Objection Application filed by the Applicant is listed for directions on June 21, 2023.

**DELIVERED, DATED AND SIGNED IN MOMBASA THIS 15<sup>TH</sup> DAY OF JUNE, 2023 VIA MICROSOFT TEAMS**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr. Philip Murgor and Mr. George Ouma for the Applicant

Mr. Zeus Ombeva and Ms. Grace Kinyanjui for the Respondent

Ms. Winnie Migot – Court Assistant

