



In re Estate of Josephine Wangui Thiongo (Deceased) (Succession Cause 1532 of 2011) [2023] KEHC 21806 (KLR) (Family) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21806 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1532 OF 2011
PM NYAUNDI, J
JULY 21, 2023
IN THE MATTER OF THE ESTATE OF JOSEPHINE
WANGUI THIONGO DECEASED

BETWEEN

JOSEPH KANYI THIONG'O PETITIONER

AND

FRANCIS KAMWARO THIONG'O 1ST RESPONDENT

PATRICIA KAMAU THIONG'O 2ND RESPONDENT

RULING

1. By Notice of Preliminary Objection dated June 19, 2023, the Respondents seek to strike out the Summons for Revocation dated December 15, 2022 on the following grounds-
 1. That the Summons for revocation is defective and an abuse of the court process as it is against the provisions of Section 76 (a), (b) and (c) of the [Law of Succession Act](#) that does not provide for revocation of a certificate of confirmation of grant.
 2. That the summons for revocation is against the provisions of section 71(2) of the [Law of Succession Act](#) and Rule 40 (4) of the [Probate and Administration Rule](#) and Section 76 (a), (b) and (c) of the [Law of Succession Act](#). The affidavit sworn in support of the application seeks for prayers for revocation and the appointment of new administrators in the estate.
 3. The summons application for revocation is fatally defective in form and substance it cannot be cured by article 159 of [the Constitution](#) and Section 76 of the [Law of Succession Act](#).
2. The Preliminary Objection was canvassed by oral arguments on July 4, 2023 via the virtual platform.



3. In summary the Respondents contend the Preliminary Objection is on a pure point of law. That Section 76 of the [Law of Succession Act](#) provides for revocation of grant of representation and not certificate of confirmation of grant.
4. Further it is submitted that the Summons is contradictory as the Applicants seeks revocation of grant and at the same time is seeking appointment of new administrators. That the Application is erroneously presented under Section 71 of the [Law of Succession Act](#) and Rule 40 of the [Probate and Administration Rules](#) which provide for Confirmation of grant and not revocation.
5. It is argued that the defects cannot be cured by the Application of Article 159.
6. The Applicant in response urged the Court to find that indeed the Respondents had failed in their obligation and that therefore the Court should be guided by the need to deliver substantive justice and not be constrained by the technical procedures.
7. The Applicant urges that unless his application is allowed the estate is in peril. The Applicant urges that the Grant as it exists now has excluded beneficiaries or seeks to disinherit rightful the beneficiaries of the estate.

Analysis and Determination

8. Upon considering the rival submissions and the pleadings filed herein I discern the following as the issues for determination.
 - a. Whether the Preliminary objection meets the legal threshold
 - b. Whether the Summons for revocation dated December 15, 2022 should be dismissed
 - c. Who should pay costs
 1. Whether the Preliminary objection meets the legal threshold- The principles to guide Courts when considering whether or not a preliminary objection meets the legal threshold were set out in *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696 where at page 700 paragraphs D-F Law JA (as he then was) had this to say:

...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
 2. And at page701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....
9. In the instance case the Respondents contend that the Summons offend the express provisions of Section 76 of the [Law of Succession Act](#). On this point I find that the Preliminary Objection raises a pure point of law.



10. On the merits of the Preliminary Objection, I concur with the decision of Kemei J *In re Estate of Kiberenge Mukwa (Deceased)* [2021] eKLR where the Court stated

"[7]. A certificate of confirmation of a grant is not a grant of representation, but a certificate to the effect that the grant had been confirmed by the court. The discretion given to the court by the provisions in section 76 of the Law of Succession Act is for revocation of grants of representation, not certificates that confirm those grants. There is therefore no power in those provisions for the court to revoke a certificate of confirmation of grant. As can be seen from the outset, the said appeal stands on shaky ground.

[8]. The grounds given for the appeal are that the Appellant was never served with summons for confirmation of grant and neither did she consent to the confirmation, distribution and apportionment of the deceased's estate, hence there was no attendance on her part, and that the hearing proceeded to her detriment. She seeks that the certificate be revoked

[9]. I am being invited to revoke a certificate of confirmation of grant. The certificate is not an order of the court. A certificate is not a judicial order. It is an extract from a court order made in the confirmation proceedings. The certificate is generated from the court order. It is important for the parties to differentiate between the character of a grant of representation and a certificate of confirmation of grant. A grant is a court order; it is a judicial pronouncement to the effect that some person has been appointed as administrator and granted the power to act as such. The certificate of confirmation of grant on the other side merely certifies that orders have been made to confirm the grant. The certificate of confirmation of grant is not the order itself but a confirmation that the grant has been confirmed and the shares of the beneficiaries ascertained."

11. On this ground the Summons for revocation must fail. The Applicant submits that the Court is duty bound to dispense substantive justice and not be fettered by procedural technicalities. In effect the Applicant is invoking Article 159 of the *Constitution*. The primacy of procedure is well settled, the Court of Appeal in the case of *Fcs Ltd v Odhiambo & 9 Others* [1987] KLR 182 – 188 held *inter alia*:

"The rules of procedure carry into effect two objectives; first to translate into practice the rules of natural justice so that there are fair trials and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the court would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of Section 3A of the Civil Procedure Act on inherent jurisdiction of the court to do justice."

12. Rules of procedure cannot therefore be regarded as procedural technicalities provided for under Article 159(2)(d) of the *Constitution*. In the case of *Speaker Of The National Assembly v Karume* [2008] KLR 425, the Court of Appeal held:

"Where there was a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament; that procedure should have been strictly followed."



13. Further in the case of *Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others* [2013] eKLR;
“...the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation”.
14. For the foregoing reasons I proceed to strike out the Summons for revocation dated December 15, 2022.
15. I am however cognizant of the responsibility bestowed on this Court by virtue of Section 47 as read with Sections 76 and 73 of the *Law of Succession Act*. The issue at hand is that despite the Grant of letters of administration having been issued on December 2, 2011 and confirmed on July 31, 2012, the administration of the estate is yet to be finalised.
16. Both Sections 76 and Section 83 mandate the Court to act suo moto in appropriate cases to revoke grants under section 76 or ensure that the Administrators fulfil their duties as provided for under Section 83.
17. In the interest of justice, I find that on the face of it, there has been a delay in finalising the administration of the estate.
18. I therefore direct that;
- a. The Administrators/ Respondents herein proceed to finalise the administration of the estate within 120 days.
 - b. The matter be mentioned on November 15, 2023 to confirm compliance.
 - c. This being a family matter each party will bear their own costs.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JULY, 2023.

P M NYAUNDI

JUDGE

In the presence of:

Mugun for the Petitioner

Joseph Thiongo in person.

Sylvia Court Assistant

