In re Estate of Daniel Njagi Gathenge (Deceased) (Succession Cause 552 of 2013) [2023] KEHC 22345 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22345 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

SUCCESSION CAUSE 552 OF 2013

RM MWONGO, J

SEPTEMBER 19, 2023

BETWEEN

NICHOLUS WANJOHI MURIUKI ..... APPLICANT

AND

WANGUI NJAGI ..... 1ST RESPONDENT

JUSTUS MURIUKI NJAGI ..... 2ND RESPONDENT

JOYCE MUTHONI NJAGI ..... 3RD RESPONDENT

JANE WAMBERE ..... 4TH RESPONDENT

RULING

Background and Application

1. The deceased died on March 16, 1978. His wife, Wangui Njagi (1st Respondent) filed a petition and took out letters of administration in Kerugoya PMCC Succession No. 28 of 1991. A grant was issued to her and confirmed on April 10, 2002. The only property belonging to the estate of the deceased was listed as Mutithi/Strip/12, which was distributed to her and the deceased's children as set out in the confirmed grant.

2. The applicant, Nicholus Wanjohi Muriuki, filed a Summons dated November 8, 2010, for revocation of the grant on the grounds that he – the applicant – was the nephew of the deceased; that prior to his death, the deceased had held the said property on trust for himself and his brother Muriuki Kathenge, the applicant's father (who had since died); and that the fact of the existence of the trust, and hence the entitlement of the applicant and his siblings, had not been disclosed to the court as required. The applicant annexed a copy of a grant of letters of administration ad litem for the estate of Muriuki Kathenge.

3. Whilst the summons for revocation was pending, the court on February 18, 2015 issued orders that the status quo of the land parcel as at February 2, 2015be maintained.

4. On March 21, 2018, the petitioner/1st respondent died whilst the summons for revocation was pending.

5. On June 11, 2019 the respondents filed a Preliminary objection, amended on August 20, 2020– premised on the grounds that the summons for annulment of the grant was incompetent and improperly before the court as the court had no jurisdiction to deal with a claim of a trust in land; that the applicant had no locus standi to bring the application; that the grant had been executed and, upon the death of the administrator, it could not be revoked; and that the applicant's claim cannot be advanced nor can the respondents be forced to substitute the deceased administrator.

6. On March 21, 2022, Mary Wanjira, a sister in law to the applicant, filed a summons dated March 15, 2022, seeking to be a substitute for Wangui Njagi, the deceased's wife, as administrator of the deceased's estate. She exhibited a grant of letters of administration de bonis non issued to Ephantus Karimi Muriuki in respect of the estate of Wangui Njagi. She also attached the death certificate of Ephantus Karimi Muriuki who died on 25/1/2020.

7. Finally, Mary Wanjira attached a Limited Grant ad Litem issued by the Chief Magistrate's Court in Kerugoya, which indicates that it is limited to "the purpose of substitution of the deceased in Kerugoya High Court Succession Cause No 552 of 2013". The said grant ad litem in essence appoints her to substitute the deceased administrator, Wangui Njagi.

8. Following the court's directions, written submissions on the aforesaid applications were filed by the parties, as the matter had been pending for a long time since 2013.

Issues for Determination

9. The court has carefully considered the parties' submissions together with the supporting pleadings and documents in support thereof. The issues which emerge for determination are as follows:

    a). Whether the respondents' preliminary objection against the hearing and determination of the Summons for Revocation dated 8/11/2010 meets the threshold for such objections

    b). Whether the Summons for substitution datedMarch 15, 2022is merited

Whether the Respondents' Preliminary Objection against the hearing and determination of the Summons for Revocation dated 8/11/2010 meets the threshold for such objections

10. The centrepiece of the argument of the respondents in the amended preliminary objection is that the court lacks the jurisdiction to hear a claim of an interest in Land parcel No Mutithi/Strip/12 being that the land is allegedly held in trust by the deceased for himself and for his brother. Such an issue, it is argued, should be handled by the Environment and Land Court under articles 162(2)(b) and 165(3)(a) of the *Constitution*. Further, that the applicant has no locus standi under section 76 *LSA* to bring the application for revocation.

11. The applicant submitted that the preliminary objection should fail as it was not a proper preliminary objection on a point of law, but depended on an argument on evidence. The applicant cited the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* (2022) eKLR where the court considered the locus

classicus on the issue of preliminary objections referencing the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where the court stated as follows:

> " 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."

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...."

12. In this case, it is clear that the preliminary objection is premised on the issue of the alleged existence of a trust allegedly held by the deceased in favour of his brother. No evidence was provided of a trust, nor is it mutually agreed that there was a trust. There is no agreement that the facts on trust pleaded by the applicant are correct. In fact, it is disputed that there is a trust. The respondents' submissions at page 3 indicates that "the applicant has however not presented any evidence of declaration of a trust", and that a declaration concerning the existence of a trust is not a role of the probate court.

13. Thus this is a point – on the existence or non-existence of trust – which would have to be subjected to trial for ascertainment. It is thus not a pure point of law. It offends the clear rules under the *Mukhisa Biscuit cas*e. In my view, therefore the preliminary objection cannot stand, and it fails.

Whether the Summons for substitution dated 15th March 2022 is merited

14. The applicant's summons seeks that the honourable court be pleased to substitute the applicant, Mary Wanjira Ngatia in place of the 1st respondent Wangui Njagi who is now deceased.

15. It indicates that the deceased died on 21st day of March, 2018 and she was domiciled in Kenya. That the applicant has obtained Limited Grant ad Litem for purposes of substitution of the deceased administrator.

16. The 2nd, 3rd and 4th respondents in their notice of preliminary objection to the Notice of Motion dated October 2, 2022 argue that: The Applicant has improperly invoked the jurisdiction of this honourable court by seeking substitution of the deceased single administrator by way of Grant of Letters of Administration Ad Litem; Further, the summons as filed offend section 66 of the *law of Succession Act* as read with section 38 as the applicant lacks standing to apply for and obtain letters of administration Ad litem.

17. In addition, it was submitted by the respondents that the proceedings by the Applicant are fatally and incurably defective, for failure to properly invoke the Court's jurisdiction; that the application offends the mandatory provisions of Section 76(e) of the *Law of Succession Act* as well as Rule 44 of the Probate and Administration rules for purportedly seeking substitution of a deceased single administrator by way of summons taken out under Rule 73 of the *Probate and Administration Rules*.

18. Further, that the Applicant has improperly invoked the jurisdiction of this honourable court by seeking substitution of the deceased single administrator by way of Grant of Letters of Administration Ad

Litem, and that the said letters are defective for being obtained from a different court rather than the court in conduct of the succession matter.

19. The respondents also submit that the summons as filed offend section 66 of the *law of Succession Act* as read with section 38 as the applicant lacks standing to apply for and obtain letters of administration Ad litem.

20. Finally, the respondents also submit that a single administrator cannot be replaced by way of summons taken out under Rule 73 of the *Probate and Administration Rules* as the applicant has purported to do; and that the Courts have affirmed this repeatedly.

21. Section 81 of the Act envisages that, in the event of the death of one or more of joint administrators, where there are several administrators, the surviving administrator or administrators would then have the mandate to continue with their duties to completion without the need to replace the deceased ones. That Section states thus:

> " Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them..." (Emphasis added)

22. Here there was a sole administrator who died, and section 81 is inapplicable. In the case of *Florence Okutu Nandwa & another v John Atemba Kojwa*, Kisumu Civil Appeal No. 306 of 1998, the Court of Appeal made it clear that:

> " A grant of representation is made in personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the *Law of Succession Act*. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the *Law of Succession Act* and the Probate and Administration (Rules)..." (Emphasis added).

23. Instructively with regard to "substitution", Khamoni J in the case of *Re Estate of Mwangi Mugwe alias Elieza Ngware (deceased)* [2003] eKLR stated:

> " ...the operative word is "substitution". The *Law of Succession Act* has no provisions talking about substitution of a deceased single administrator. The Applicant is using section 71 and Rules 40 and 41, the provisions used in normal proceedings during the hearing of summons for confirmation of grant where the administrator has not died. That is not the position in this summons mainly for substitution... In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76(e) of the *Law of Succession Act* and Rule 44 of the Probate and Administration Rules whereby the Applicant would apply for revocation or annulment of a grant on the ground "that the grant has become useless and inoperative through subsequent circumstances"

24. The applicant submits that the grant herein has to be revoked to pave the way for appointment of a new administrator or administrators. Section 76 of the LSA gives the court discretion to revoke grant of representation on its own motion under section 76(e) for the reason that it has become useless and inoperative through death of administrator.

25. *In Re Estate of George Ragui Karanja (Deceased)* [2016] eKLR Musyoka J. held as follows:

> "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." (Emphasis added).

26. Similarly, Gitari, J held in the case of *In re Estate of Muroko Kimitu - (Deceased*) [2019] eKLR as follows:

> "There can be no substitution of an Administration by way of filing an application for substitution. For one to be appointed an administrator, he must follow the process under the *Law of Succession Act* and the Probate and Administration Rules. Short of that an administrator coming on record through an application for substitution will not be properly on record and grant issued would easily be revoked as the proceedings to obtain it were defective in substance." (Emphasis added).

27. It is therefore clear that the only way by which to "substitute" a sole deceased administrator is to apply for revocation of the grant under the provisions of Section 76 (e) which provides:

> "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) .....
>
> .....
>
> (e) that the grant has become useless and inoperative through subsequent circumstances."

28. I think enough has been said to demonstrate that the the summons dated March 15, 2022 have no merit, and therefore cannot stand.

Disposition

29. Given all that I have stated above, the result is that the preliminary objection fails and is dismissed.

30. Similarly, having found that the applicant's summons dated March 15, 2022 has no legal basis as being fatally and incurably defective, the same is hereby dismissed.

31. This being a family matter, no orders are made as to costs.

32. Orders accordingly.

DATED AT KERUGOYA THIS 19TH DAY OF SEPTEMBER 2023

R MWONGO

JUDGE

In the presence of:

Ngigi - for Applicant

Kendi - for 2nd - 4th Respondents