



In re Estate of Anthony Timothy Mariano (Deceased) (Succession Cause 500 of 2017) [2023] KEHC 23364 (KLR) (Family) (6 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 500 OF 2017
MA ODERO, J
OCTOBER 6, 2023
IN THE MATTER OF THE ESTATE OF ANTHONY
TIMOTHY MARIANO (DECEASED)**

BETWEEN

MORSEL HIJRAT EXECUTOR

AND

MARIA SZABANOWICZ MARIANO OBJECTOR

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated 26th November 2021 filed by the Objector Maria Szabanowicz Mariano.
2. The Executor Morsel Hijrat opposed the Preliminary Objection. The matter was canvassed by way of written submissions. The Objector filed the written submissions dated 9th March 2023 whilst the Executor relied on her written submissions dated 8th March 2023.

Background

3. This Succession Cause relates to the estate of Anthony Timothy Mariano (hereinafter ‘the Deceased’) who died in the Netherlands on 3rd December 2015.
4. The Deceased died testate having left behind a written Will dated 19th March 2015. In his written Will the Deceased appointed Morsel Hijrat as the Executor to the Will and beneficiary of his Estate.



5. Following the demise of the Deceased a Grant of Probate was issued by the District Court of Midden-Nederland in the Netherlands on 15th June 2016. That Grant of Probate was resealed by this court on 25th July 2017.
6. Thereafter the Objector herein Maria Szabanowicz Mariano who claimed to be a wife to the Deceased filed a Summons dated 5th October 2018 seeking the following orders:-
 - “ 1. The resealed grant of Probate of the last Will of Anthony Timothy Mariano dated 19th March 2015 issued to Morsel Hijrat by the District Court of Midden-Nederland in the Netherlands on 15th June 2016 and resealed by the High court of Kenya at Nairobi by order of the court dated 25th July 2017 be revoked.
 2. Maria Szabanowicz Mariano be appointed administrator of the estate of Anthony Timothy Mariano.
 3. The cost of this Application be borne by the Respondent.
7. In response to the summons for revocation of Grant, the Executor filed a Notice of Preliminary Objection dated 26th November 2023 which was premised upon the Grounds:-
 - “ 1. That this Honourable Court lacks jurisdiction to revoke a Grant that was issued by a foreign court.”
8. As stated earlier the Preliminary Objection was opposed by the Objector.

Analysis and Determination

9. I have carefully considered this Notice of Preliminary Objection as well as the submissions filed by both parties.
10. It is not in dispute that the Deceased herein passed away on 3rd December 2015 in the Netherlands. A copy of the Death certificate is annexed to the Replying Affidavit dated 18th November 2016 sworn by the Executor.
11. Further it is not in doubt that a Grant of Probate was on 15th June 2016 issued to the Executor by the District Court of Midden-Nederland in the Netherlands.
12. Following a Petition for resealing of the Grant issued to the Executor the said Grant was duly resealed by the High Court in Kenya on 25th July 2017. The Objector now seeks to have that resealed Grant revoked.
13. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd – Vs West End Distributors LTD* [1969] EA 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 the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.“.....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts



pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”

14. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“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. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

15. Therefore, in order for a preliminary objection to succeed the following tests must be satisfied.

- (i) The Preliminary Objection should raise a pure point of law.
- (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
- (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
- (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.

16. Therefore, a genuine and proper Preliminary Objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.

17. By this Preliminary Objection the Executor contends that the High court of Kenya has no jurisdiction to revoke a Grant which was issued by a foreign court.

18. Jurisdiction is the authority by which a court is mandated to decide on matters presented before it for adjudication. Jurisdiction it is said is key and without requisite jurisdiction a court must immediately down its tools.

19. In case of *MV 'Lillian S -vs- Caltex Oil (kenya) Limited* [1989] eKLR the court stated as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there should be no basis for continuation of proceedings pending other evidence. A court of law should down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.” [own emphasis]

20. Resealing of a Grant issued by a foreign court is provided for by Section 77 of the *Law of Succession Act* which provides:-

“Where a Court or other Authority, having jurisdiction in matters of Probate or Administration in any Commonwealth country or in any other foreign country designated by the Minister by Notice or Gazette, has, either before or after commencement of this Act, granted Probate or Letters of Administration, or an equivalent thereof, in respect of the estate of a deceased person, that grant may, on being produced to, and a copy thereof deposited with the High Court, be sealed with the seal of the Court, and thereupon shall



be of the same effect and have the same operation in Kenya, as if granted and confirmed by the Court.”

21. Rule 42 (1) of the *Probate and Administration Rules* provides for the resealing of foreign Grants to allow for the distribution of property in Kenya forming part of the estate of the Deceased.
22. I have not been able to find in the Laws of Succession any provision allowing for the revocation of a foreign Grant. The only thing that is provided for is the ‘resealing’ of the foreign grant.
23. The Grant in this matter was issued in the Netherlands. The High Court in Kenya does not have the powers to review and/or set aside that Grant. This court cannot assume jurisdiction merely because the Grant was resealed in Kenya.
24. My view therefore is that any party seeking to ‘revoke’ a grant issued in a foreign country must file the application in the country or jurisdiction where the Grant was issued. Accordingly, I find that this court has no jurisdiction to revoke a foreign grant.
25. Finally, I find merit in this Notice of Preliminary Objection dated 26th November 2021. The summons dated 5th October 2018 filed by the Objector is hereby struck out. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

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MAUREEN A. ODERO

JUDGE

