



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Coram: D. K. Kemei - J**

**SUCCESSION APPEAL NO. E1 OF 2020**

**IN THE MATTER OF THE ESTATE OF DAVID KIAMBA MULI (DECEASED)**

**WINROSE EMMAH NDINDA KIAMBA.....APPELLANT/APPLICANT**

**VERSUS**

**AGNES NTHAMBI KASYOKA.....RESPONDENT**

**(Being an appeal arising from a Ruling delivered by Hon. Anne Nyoike**

**(Principal Magistrate) in Machakos Chief Magistrate's Court Succession**

**Cause No. 37 of 2020 (Ad litem) delivered on 1<sup>st</sup> October, 2020)**

**BETWEEN**

**AGNES NTHAMBI KASYOKA.....APPLICANT**

**VERSUS**

**WINROSE EMMAH NDINDA KIAMBA.....RESPONDENT**

**RULING**

1. The Applicant has filed an application dated 19<sup>th</sup> October, 2020 seeking the following Orders;

*i. Spent;*

*ii. The Court to set aside the Ruling delivered by the Magistrate's Court on 1<sup>st</sup> October 2020 and all subsequent Orders issued pending hearing and determination of this Appeal.*

*iii. The Court be pleased to reinstate the Limited Grant of Letters of Administration ad litem issued to the Applicant pending hearing and determination of this Appeal.*

*iv. The 30 days' leave granted to the Appellant/Applicant to register an Appeal to the Ruling be extended to the time the Applicant will register the Record of Appeal in Court; and*

*v. The costs of this Application be provided for.*

2. The Application is supported by an affidavit sworn by the Appellant/Applicant sworn on even date.

3. The Respondent filed its grounds of opposition opposing the Appellant's application as follows: -

*i. The application is misconceived, incompetent and is an abuse of this Honourable Court's process.*

***ii. The application is made in bad faith as it is the Applicant who has made it impossible to preserve the estate.***

***iii. No sufficient reason and/or grounds have been provided in support of the said application.***

***iv. The application offends the, provisions of law it is purportedly brought under.***

***v. There must be an end to litigation.***

***vi. The Applicant's application lacks merit and the same should be dismissed with costs.***

4. The gist of the application is that the Appellant/Applicant obtained a Limited Grant of Letters of Administration ad litem with the aim of registering a suit against the Respondent for intermeddling with the Estate of the Deceased and for preservation of the Estate pending distribution by the Succession Court. Due to the severely broken down relationship between the Respondent and the Appellant/Applicant, being co-wives of the Deceased, it was impossible for the Appellant/Applicant to obtain the consent of the Respondent and her children to obtain the Grant ad litem.

It was the Appellant/Applicant's case that the Respondent has been carrying out acts of waste on the Kangonde Property and has totally restricted the Appellant/Applicant's access and use of the same property since she changed the locks. She further averred that the Respondent has started to build a permanent house on the Kangonde Property and is extensively ploughing the land to the Appellant/Applicant's disadvantage because it was the only farm the Deceased and the Appellant/Applicant used to cultivate to get their food.

It was further her case that the Grant ad litem having been revoked, she has no locus standi to bring any suit against the Respondent for intermeddling until the Ruling delivered on 1<sup>st</sup> October, 2020 is set aside and the Grant ad litem is reinstated by this Court.

Upon revoking the Grant ad litem, the Learned Magistrate granted the Appellant/Applicant's Counsel leave of 30 days to register the Appeal and that the Memorandum of Appeal dated 6<sup>th</sup> October, 2020 was served upon the Respondent. The Appellant/Applicant's Counsel has requested for copies of typed and certified proceedings and the Ruling for purposes of registering the Record of Appeal. The Appellant/Applicant's Counsel is apprehensive that the period of stay of 30 days allowed may lapse before the Court supplies the typed and certified proceedings and ruling.

5. The Respondent in response filed her replying affidavit in which she averred that the Appellant/Applicant took out limited grant letters of administration ad litem for purposes of filing suit without the consent of the other beneficiaries of the Estate. It was contended that the Grant ad litem was based on misrepresentation to the extent that the Court was misled to conclude that the acts of preservation of the subject Estate amounted to intermeddling. She further claimed that the application for limited grant of letters of administration ad litem was characterized by non-disclosure of all the material facts by the Appellant/Applicant.

She finally stated that she has on several occasions approached the Appellant/Applicant herein through the Local Administration for peaceful discussions on the preservation of the Estate of the Deceased to no avail.

6. In response to the Replying Affidavit filed on 19<sup>th</sup> November, 2020, the Appellant/Applicant filed her supplementary affidavit reiterating that, the consent of the Respondent and her children could not be obtained because they have been very hostile since the death of the Deceased to the point of instigating a burial dispute. She also contended that it is also not mandatory to seek the consent of the Respondent and her children. She further reiterated that, the Respondent lacked the requisite and mandatory locus standi to bring summons leading to the revocation of the Grant ad litem because she had not obtained a limited grant ad litem to bring the proceedings on behalf of the Estate of the Deceased. She finally reiterated that, she wrote letters to various institutions that were meant to preserve the Estate of the Deceased pending distribution by the Court, considering the fact that the Respondent has already, illegally and unlawfully, received part payment of those benefits before the Court appoints an Administrator as alleged.

7. In response to the Supplementary affidavit filed on 4<sup>th</sup> December, 2020, the Respondent filed a further affidavit, filed on 10<sup>th</sup> December, 2020 reiterating that vide Machakos Chief Magistrate's Court Citation Cause no. 55 of 2020, the Appellant/Applicant cited both the Respondent and her children with the Deceased and called upon them to appear in Court and accept or refuse to take out the Letters of Administration Intestate of the Deceased's Estate. The Respondent filed an affidavit in reply to the said citation, and inter-alia, accepted to take out letters of Administration intestate of the Deceased's Estate.

Pursuant to the aforesaid, the said Magistrate's Court (Honourable Ondieki-SPM) made the following Orders: -

***i. That the Citees do file a petition for letters of administration intestate within a period of 21 days of the said Order (28<sup>th</sup> August, 2020)***

***ii. That the Citees may wish to join the Citor (Winrose Emmah Ndinda Kiamba) in the petition, failing which the necessary actions and procedure will follow in the said Petition.***

***iii. That concerning intermeddling, the Citor may wish to move the Court as appropriate.***

Pursuant to the aforesaid Orders, the Respondent and children of the deceased filed a Petition for Grant of Letters of Administration Intestate of the deceased's estate vide Machakos High Court Succession Cause no. 21 of 2020. The Appellant/Applicant and her children are named among the beneficiaries of the deceased's estate, being the deceased's 2<sup>nd</sup> house.

The Respondent further reiterated that anything and everything regarding the deceased's estate and administration should be raised before the Honourable Court in the aforesaid Succession Cause No. 21 of 2020.

8. The Summons were canvassed by way of written submissions. It is only the Appellant/Applicant's submissions that are on record.

9. The Appellant/Applicant filed submissions that are a reiteration of the contents of the supporting affidavit. Counsel for the Appellant/Applicant submitted and stated that they were seeking that the Ruling delivered on 1<sup>st</sup> October, 2020 be set aside; the Grant issued on 10<sup>th</sup> July 2020 be reinstated; and the time for registering the Appeal be extended beyond the 30 days granted by the lower court.

Counsel reiterated that the Magistrate's Court revoking the Grant was largely informed by the errors that the consent of the Respondent and her children was compulsory before the court could issue the Grant and that the Respondent had the locus standi to register the application that led to the grant being revoked without obtaining the limited grant ad litem.

The Counsel submitted that it is a mandatory requirement of law that the Respondent should have obtained a limited grant ad litem or Grant of letters of Administration Intestate before registering the application in court and which the Appellant/Applicant did not have either. Reliance was placed on the following case laws:

*i. Alfred Njau & 5 Others v City Council of Nairobi (1983) eKLR.*

*ii. Elizabeth Ndulu Mathuva & 2 Others v Joseph Mbiu Muthiani & Another (2008) eKLR.*

*iii. Troustik Union International & Another v Jane Mbeyu & Another (1993) eKLR.*

It was submitted that locus standi does not simply arise by the mere fact that the Respondent is a wife of the Deceased as it was required by law to apply to court for a limited grant ad litem to be issued in her favour before she can address the court on any issue concerning the estate of the deceased.

On the issue of Consent, Counsel for the Appellant/Applicant submitted that the Respondent and her children would not give the consent as the intended suit was to be registered against them; the long standing hostile relationship between the Respondent and the Applicant due to the burial dispute; and that the consent of the Respondent and her children does not need to be obtained owing to the peculiar circumstance of this case.

On the aspect of who bears the costs, Counsel relied on the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another (2016) eKLR**. He further noted that **Justice Kuloba in Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition (Nairobi) Law Africa 2011, page 94** said that "*costs are awarded at the unfettered discretion of the Court, subject to conditions and limitations as may be prescribed and to the provisions of any law for the time being in force...*"

It was finally submitted that the Appellant/Applicant has discharged the legal and evidential burden of proof that the summons is merited and hence should be allowed. Reliance was placed on the case of **Petition No. 1 of 2017, Raila Amolo Odinga & Another v IEBC & 2 Others (2017) eKLR**. Counsel added that the revocation of the Grant was in error and urged the court to reinstate it and allow the Summons as prayed.

10. Upon careful consideration of the application, the rival affidavits and submissions, I find the singular issue for determination is whether the summons have merit.

11. The grant intended to be reinstated is a Limited Grant of Letters of Administration *ad litem* which was limited for the purpose of filing suit until further representation was granted by this court. I am aware that a limited grant could also be revoked if any or more of factors in section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya are present. I should think also that, it is potent ground in an application for reinstatement of Limited Grant to show that the grant has been used for a purpose other than the one for which it was granted, or that the purposes for which the limited grant was issued has not ceased to exist or has not been spent, and/or the time for which the limited grant was to subsist has lapsed. But, from the arguments presented in this case, I should determine whether: -

*a) The grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case; or*

*b) The grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*

12. **Section 54 and 55** of the Law of Succession Act (to be referred to as the "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."**

**Fifth Schedule (14)**

*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.*

**Section 55 (1)** Law of Succession Act states:

*“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.”*

13. The above provisions are clear and that such a grant is normally issued due to the exigencies arising in relation to the estate and which could not wait for issuance of full grant through the normal way. It is also issued without prejudice to the right of any other person to apply for full grant of representation to the deceased. As such, limited grant may not be subjected to full and strict compliance with the requirements meant for, as if it is full grant of representation. Again, the person to whom the grant is so made undertakes to administer the estate according to the law but limited for the purpose for which the grant is issued until a further grant of representation is made by the court. I have perused the pleadings filed in the lower court and that the court was satisfied that the urgency warranted issuance of a limited grant which it issued on 10<sup>th</sup> July, 2020.

14. On the aspect of consent of the other beneficiaries, the Law of Succession Act that explicitly provides that, 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. The aforementioned, clearly depicts that the aspect of consent with regard to special limited grants of representation need not be mandatory and judging from the strained relationship between the Appellant/Applicant and the Respondent, the aspect of consent could not be attained as the same was for purposes of acquiring the locus standi for instituting a suit against the Respondent. Therefore, this Honourable Court notes that the action of the Lower Court in granting the Appellant/Applicant the Grant ad litem was at the discretion of that court and considering the circumstances of this particular case, I find that the grant was NOT obtained fraudulently. As such, I am NOT satisfied that the Respondent did not show any sufficient cause as to compel the lower court to revoke the limited Grant issued. The grant is still necessary for purposes of proceeding with the intended Appeal dated 6<sup>th</sup> October, 2020 filed in court.

15. On the aspect of the grant been obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, having gone through the record, I note that the deceased at the time of his demise was not cohabiting with the Respondent as is expected of a husband and wife. The attached pleadings of Divorce and the destruction of the matrimonial property by the deceased indicated that he no longer termed her as his wife. However, the same was not officially declared by a court of law. At the time of his death the deceased was still married to the Respondent.

Under **Section 55 (1)** Law of Succession Act states:

*“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.”*

**Section 79** of the Act provides:

*“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”*

From the aforementioned, it is clear that the Appellant/Applicant Special Limited Grant ad litem was strictly for purpose of instituting a suit against the Respondent and preservation of the Estate of the deceased from the intermeddling by the Respondent pending distribution by the Succession Court. The building of a permanent house on the Kangonde property and ploughing the piece of land that sustained the deceased and the Appellant/Applicant was intermeddling with the Estate of the deceased. Both the Respondent and the Appellant/Applicant require the authority from the grant of letters of Administration to have the Locus standi to address any institution on the aspect of the deceased's Estate.

16. **Rule 73 Probate and Administration Rules** gives Court inherent powers to make orders in the interest of justice or to prevent abuse. The rule imposes a duty on the Court to make orders to protect from waste or to preserve the estate of a deceased. The court is not toothless in the event of abuse.

In the case of **In re the estate of Helena Wangechi Njoroge (Deceased) (2015) eKLR** the Court held the following concerning letters of administration 'ad litem':

*“Section 79 vests the property of the deceased in the personal representative, so that the latter can then exercise the powers set out in Section 82 and discharge the duties set out in Section 83 of the Act. It should be pointed out that that the provisions in Section 82 can only be fully exercised by a substantive administrator that is the person holding, not a limited grant, but a full grant. Likewise, the duties imposed by Section 83 are to be discharged to their fullest by the holder of a substantive grant of representation.....”*

*It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad litem. The suit envisaged to be filed on the strength of a grant ad litem is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defend the estate against third parties.”*

17. From the foregone, it is clear that a Limited Grant of Letters of Administration Ad Litem is usually used when the estate of a deceased person is required to be represented in court proceedings. The grant issued to Winrose Emmah Ndinda Kiamba granted on 10<sup>th</sup> July, 2020 was also limited for purposes of filing suit. The correspondences by the Respondent to Kwetu Sacco, TSC, AON/MINET, KNUT and KLB was not within her authority as she lacked authority to speak nor address any institution on behalf of the Estate of the deceased. The construction of a permanent house and ploughing on the Kangonde Property is unlawful and/or illegal as the Respondent lacks the authority to do so. Section 45 of the Act provides for protection of the estate. It is provided under Section 45 (1):

***“Except so far as expressly authorized by this Act or by any other written law, or by a grant of representation under this Act no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with any free property of a deceased person.”***

The provision makes it an offence to intermeddle and the person who intermeddles is answerable to the rightful administrator etc. **Rule 49** of the Probate and Administration rules provides:

***“A person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”***

18. Under Rule 73 of the Probate and Administration Rules the court is not precluded from making orders in the interest of justice and to prevent abuse of court process. None of the parties has obtained a grant of letters of administration. The Appellant/Applicant had a limited grant that was revoked thus this application. The prayers in the summons are calling upon this court to preserve the estate of the deceased by reinstating the grant *ad litem*. It is noted that upon the appellant citing the respondent vide Machakos Chief Magistrate’s court No. 55 of 2020, the Respondent subsequently filed a **succession cause No. 21 of 2020 at Machakos High court** which should actually be the arena where the parties herein should be litigating over matters relating to the estate of the deceased. The grant is yet to be issued to the Respondent and that the Appellant is at liberty to participate therein either as an administrator or a beneficiary. However, that notwithstanding, the appellant is entitled to pursue an appeal if she so desires as it is within her rights to do so. It is also noted that the appellant lodged her memorandum of appeal within a day upon delivery of the impugned ruling dated 6.10.2020 and hence the appeal was lodged within time and there is no reason why the appellant should seek for extension of time to file an appeal when there is an appeal already lodged. The appellant should proceed to pursue the record of lower court and file the requisite record of appeal. It is noted that the prayers 2 and 3 sought by the Appellant/Applicant in her application dated 19.10.2020 are substantive and must await the determination of the appeal while prayer 4 is superfluous in view of the fact that there is already a memorandum of appeal on record. The sum total of the Appellant’s application is that if the same is considered at this stage, then there will be no need for the appeal as the same will have been determined at the interlocutory stage. If that is allowed, then the Applicant will have made a coup as it were against the Respondent without according the Respondent an opportunity to challenge the appeal. I find the same to be improper and hence the prayers sought must be declined.

19. In the result, it is my finding that the Appellant’s application dated 19.10.2020 lacks merit. The same is dismissed with no orders as to costs. In order to fast track the appeal, the following directions are hereby issued:

- a) The Deputy Registrar is directed to call for the record of the lower court and commence the admission of the appeal.***
- b) The appellant is directed to file and serve the record of appeal within thirty (30) days from the date hereof.***
- c) Mention on the 20.05.2021 for further directions.***

It is so ordered.

**Dated and delivered at Machakos this 11<sup>th</sup> day of March, 2021.**

**D. K. Kemei**

**Judge**