



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

SUCCESSION CAUSE NO. 14 OF 2019

IN THE MATTER OF WILLIAM OCHOLA ONDERA ALSO KNOWN AS OCHOLA ONDERA (DECEASED)

BETWEEN

ALUOCHIER SUCCESSION LIMITED.....PETITIONER

-AND-

PESILA AJUANG OCHOLA

PAMELA ADHIAMBO OBURA

CAREN ADOYO

SYPROSE AKEYO

MARTIN OTIENO OCHOLA.....OBJECTORS

RULING

On 3/12/2020, I directed parties to address this court on the issue of the *locus standi* of the petitioner in this succession cause. The court directed that parties do file written submissions which they duly complied.

In its capacity, as Aluochier Succession Limited, the petitioner filed the instant succession proceedings for grant of letters of administration intestate for the **Estate of the Late William Ochola Ondera also known as Ochola Ondera (hereinafter Deceased)** on 28/11/2019.

In its submission, the petitioner submitted that it has the requisite *locus standi* to file succession proceedings for grant of representation by virtue of it being a trust co-corporation as envisaged under **Sections 3 (1), 56 (2), 57, 58 (1), 66 and 81 of the Law of Succession Act and Rules 2, 25 (6) and 29 of the Probate and Administration Rules, 1980**. The petitioner also invited the court to consider **Sections 31 and 83 of the Advocates Act**. The petitioner also filed a supplementary affidavit and annexed a Certificate of Incorporation dated 16/10/2019 to further support its claim.

The firm of **Omonde Kisera & Co. Advocates** filed submissions dated 5/11/2021 on behalf of the objectors. The objectors submitted that **Section 66 of the Law of Succession Act** gives the order of preference of persons who should be the first to administer the estate of deceased persons; that they are the lawful beneficiaries falling under **Section 29 of the Law of Succession Act**.

The objectors further submitted that they have not been cited by the petitioner on their refusal to take up letters of administration as provided for under **Rule 22 (1) of the Probate and Administration Rules** and neither have they renounced their right to petition for grant of letters of administration in the estate of the deceased. The objectors concluded that the application be disallowed for the petitioner lacks the *locus standi* and the objector be allowed to exercise their priority right.

Let me turn to the crux of the matter. **Section 56 and 57** of the Law of Succession Act bars the issuance of grant of letters of representation to inter alia body corporates except to the Public Trustee and a Trust Corporation. The sections are reproduced as follows: -

56. No grant to certain persons

(1) No grant of representation shall be made—

(a) to any person who is a minor, or of unsound mind, or bankrupt; or

(b) to more than four persons in respect of the same property.

(2) No grant of letters of administration, with or without the will annexed, shall be made to a body corporate other than the Public Trustee or a Trust Corporation.

57. Grant to body corporate

No grant of representation shall be made to a syndic or nominee on behalf of a body corporate:

Provided that, where a body corporate applies for a grant of probate or (in the case of a trust corporation) letters of administration, the application may be signed, and any necessary affidavits may be sworn, by an officer authorized in that behalf by the body corporate or the directors or governing body thereof.

A trust corporation is defined under Section 3 (1) of the Law of Succession Act as follows: -

“trust corporation” means an incorporated banking or insurance or guarantee or trust company having a subscribed capital of not less than five hundred thousand shillings, or any body corporate which has a subscribed capital of not less than five hundred thousand shillings and which is for the time being empowered (by or under any written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers), to undertake trusts, but for so long a time only as that body corporate shall not, by any prospectus, circular, advertisement or other document issued by it or on its behalf, state or hold out that any liability attaches to the Public Trustee or to the Consolidated Fund in respect of any act or omission of that body corporate when acting as an executor or administrator:

Provided that a body corporate which would be a trust corporation but for the fact that its subscribed capital is less than five hundred thousand shillings may act as executor or administrator in any case with the leave of the court on giving such security as the court may determine, and thereupon for the purpose of so acting as executor or administrator that corporation shall have all the rights and privileges conferred on a trust corporation by this Act;”

From the above definition, a trust corporation can take the form of a banking, insurance, guarantee or trust company. A trust corporation can also be a body corporate which is permitted to undertake **trust by the written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers. The trust corporation is expected to also act as an executor or an administrator.**

The petitioner, Aluochier Succession Limited is a company incorporated under the **Companies Act** while incorporation of Trust Corporations is governed by the **Trustees (Perpetual Succession) Act Cap 164.**

There is no definition of what constitutes a Trust Corporation under the Companies Act. It is only under the **Trustees Act Cap 167** where we find the definition of a Trust Corporation as follows:-

“trust corporation” means the Public Trustee or a corporation appointed by the court in any particular case to be a trustee or a corporation which is for the time being a trust corporation within the meaning of the Law of Succession Act (Cap. 160)

As observed above, the trust corporation is also expected to act as an executor or administrator. The duties of the executor or administrator are stated under **Part III of the Trustees Act, Cap 167.** The same provisions cannot be found in the Companies Act. Besides, the legal title which persons who form companies assume is the position of a Director or a Director - Shareholder. They cannot be expected to carry out the functions of administration of estate of deceased persons as those who are appointed under the **Section 6 of the Trustees (Perpetual Succession) Act Cap 164,** the governing statute for incorporation of Trust Corporations.

Even if **Section 3 (1) of the Law of Succession Act** can be given a wide interpretation to include those body corporates incorporated under the Companies Act, the petitioner has not demonstrated to this court that in its memorandum of association or under the Companies Act it is allowed to carry on the duties as those of personal representatives.

Should I also point out that **Section 71 (2) of the Law of Succession Act** provides that in intestacy, before the confirmation of grant, the identities and the respective shares of all persons beneficially entitled to the estate of the deceased must be ascertained. The said proviso is as follows: -

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

Faced with the same question, **Gikonyo J,** made the following observation in **Re Estate of Stanley Mwiti Itheria (Deceased) [2017] eKLR**

“These matters make me sceptical whether a stranger like a limited liability company unless it is a trust corporation should be a direct beneficiary of the estate of a deceased person. The danger with the path Nyamu Advocate has followed is that the record may not show the persons beneficially entitled to the estate and their respective shares thereto. Again, the property becomes the property of the company which will be dealt with in accordance with the Company’s Memorandum and Article of Association and the Companies Law; which may not necessarily accord with the intent or purpose of the law on inheritance. I could be wrong on this but it is food for thought.”

I align myself with the same sentiments. The question which comes to my mind is in whose name shall the grant of representation be issued? It goes without saying that it shall be in the name of the Incorporated Company unlike in Trust Corporations whereby the property vested in them, is held for the benefit of the trust concerned. The incorporated company shall have the leeway to deal with the property as it deems fit without involving the intended beneficiaries, thereby bringing the whole succession proceedings to disrepute.

I reiterate that the proper governing body referred to under **Sections 56 and 57 of the Law of Succession Act** is a trust corporation which is incorporated under the **Trustees (Perpetual Succession) Act Cap 164**.

For the above reasons, I find that the petitioner has no *locus standi* to bring these proceedings on behalf of the estate of William Ochola Ondera (deceased) for the intended beneficiaries of the estate. The petition for letters of administration dated 13/11/2019 as filed is incompetent and the same is struck out with costs to the objectors.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 1ST DAY OF DECEMBER, 2021.

R. WENDOH

JUDGE

Ruling delivered in the presence of

In person Petitioner.

Mr. Oywer holding brief for Mr. Kisera for the Objectors.

Evelyn Nyauke Court Assistant.