

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E181 OF 2024

REV. ZACCHEAUS OKOTH 1ST APPELLANT
THE REGISTERED TRUSTEES

ARCHDIOCESE OF KISUMU 2ND APPELLANT

- VERSUS -

JEMIMA JUMA (Suing as the legal representative of the estate of
ERASTUS IAN KHANDIRA – DCD) RESPONDENT

**(Being an appeal from the ruling and order of Hon. D.O. Onyango CM
delivered on the 12/9/2024 in Ksm CMCC No. 303 of 201, Erastus Ian
Khandira v Rev. Zaccheaus Okoth & Anor)**

J U D G M E N T

1. **ERASTUS IAN KHANDIRA**, the deceased herein sued the appellants vide a plaint dated **25/5/2016** seeking **Kshs. 12,180,322/-** being debt accrued from the appellants following construction and sale of houses on behalf of the appellants.
2. Before the suit could be concluded, on the **1/8/2023**, **ERASTUS IAN KHANDIRA** passed on. Subsequently, the respondent herein, **JEMIMA JUMA**, the deceased’s widow vide an application dated **11/6/2024** sought to be substituted in place of the deceased stating that she had obtained a *grant ad litem* vide *Miscellaneous Succession Cause No. E042 of 2024*.
3. The appellants opposed the application vide Grounds of Opposition dated **28/6/2024** in which they stated that the respondent lacked *locus standi* to be

substituted in place of the deceased as the limited grant only permitted the applicant to file suit on behalf of the estate of the deceased.

4. In its ruling delivered on the **12/9/2024**, the trial court found the objection by the appellants to be more about form than substance and contrary to the provisions of **Article 159 (2) (d) of the Constitution** as well as the overriding objective of the **Civil Procedure Act**. It thus proceeded to allow the respondent's application.
5. Being dissatisfied with the said Ruling/Order, the appellants lodged this appeal vide the Memorandum of Appeal dated **18/9/2024** and raised four (4) grounds of appeal as follows: -

a) The trial magistrate erred in law and fact in finding and holding that a limited grant ad litem to the respondent specifically for the limited purpose of 'filing suit' could be used by the respondent to be substituted in the place of the deceased plaintiff for the purpose of prosecuting the already filed suit.

b) The trial magistrate erred in law and fact in holding that the objection which the appellants raised against substitution of the deceased by the respondent who was only holding a limited grant as litem issued for the limited purpose of filing suit was "more about form than substance and contrary to the spirit of the provisions of Article 159 (2) of the Constitution...", yet the objection was grounded on a weighty issue of law and substance.

c) The trial magistrate erred in law and fact in finding and holding that the limited grant which was issued to the respondent satisfied the provisions of section 82 (a) of the Law of Succession Act.

- d) The trial magistrate erred in law and fact in disregarding or refusing to follow binding precedents which were cited to the court by the appellants yet the cited authorities were on point and were relevant.*
6. The appeal was disposed off by way of written submissions. The appellant submitted that the grant given to the respondent was limited to filing suits only and not to prosecute an already existing suit. That a limited grant can only be used for the purpose for which it is given as was held in the cases of **Lydia Ntembi & Another v The Hon. A.G. [2009] eKLR**, **Julian Adogo Ongunga & Another v Francis Kiberenge Bondera [2016] eKLR** & **Gabriel Njoroge v Absa Bank Kenya PLC [2021] eKLR**.
 7. That the issue raised before the trial court was not a matter of form or technicality as the trial magistrate found but an issue of law and thus ***Article 159 (2) of the Constitution*** and the overriding objectives of the Civil Procedure Act could not aid the respondent. Reliance was placed on the case of **Kipngetich Kalya Kones (Suing as the Administrator of the estate of Kipkalya Kiprono Kones (deceased) v Wilson Kiplangat Kones [2021] eKLR** where the court held *inter alia* that ***the issue of locus standi is a point of law that goes to the root of any suit, its absence therefore renders a suit fatally defective.***
 8. That the trial magistrate erred by failing to apply binding precedent, Reliance was placed on the case of **Rift Valley Sports Club v Patrick James Ocholla [2005] eKLR** whereas the decisions relied on by the trial court were not helpful to the respondent's case.

9. On the other hand, the respondent submitted that **Order 24 Rule 3** provides for the procedure in case of death of one of several plaintiffs or of sole plaintiff. That the appellants have an issue with the form in which the grant was issued being '*for purposes of filing suit*' as opposed to '*for purposes of substitution*' and not substance of the grant. Reliance was placed in the case of **Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi Deceased) (2016) eKLR.**
10. That being the legal representative of the deceased's estate as per the grant *ad litem* issued, she can act on behalf of the estate of the deceased's estate in the pending suit thus she had the locus standi to substitute the deceased by the grant.
11. That the appellants failed to demonstrate the prejudice they are likely to suffer in the event the deceased is substituted by the respondent.
12. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**
13. In **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal held that: -

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must

reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

14. In the present case, the issue before the trial court was that the respondent lacked the *locus standi* to continue with the suit initiated by the deceased. The appellants contended that since the respondent had obtained a Limited Grant of Letters of Administration *Ad Litem* instead of a full grant, then she lacked the legal capacity to continue and maintain the already filed suit.

15. *Sections 54 of the Law of Succession 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.”

16. Consequently, the matter for determination before the court is whether the trial court erred in allowing the respondent to be substituted on behalf of the deceased and connected to this issue is whether having been issued with Limited Grant of Letters of Administration *Ad Litem*, she had thus been bestowed with the powers set out in *section 82(a) the Law of Succession Act*.

17. *Section 82(a) the Law of Succession Act* provides as follows;

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

18. It should be pointed out that the provisions in **section 82 of the Law of Succession Act** can only be fully exercised by a substantive administrator, which is the person holding, not a Limited Grant, but a full Grant.
19. From the pleadings on record, it is clear that the respondent obtained a Limited Grant of Letters of Administration *Ad Litem* vide **Miscellaneous Succession Cause No. E042 of 2024**. The said Limited Letter of Grant was *‘limited to the purposes only for filing suit until further representation were granted’*.
20. The appellants cited two decisions of the High Court in support of their contention that a limited grant of letters of administration is limited for the purposes only for which it is issued. These were, **Julian Adogo Ongunga & Anor vs. Francis Kiberenge Bondera [2016] eKLR** and **Gabriel Njoroge vs Absa Bank Kenya PLC [2021] eKLR**. The trial court does not seem to have considered the holdings in those cases. Neither did it give reasons why it failed to apply the reasoning therein.
21. In **Julian Adogo Ongunga & Anor vs. Francis Kiberenge Bondera (supra)**, it was held: -

“The law further provides for various forms of limited or special grants. They include, but not limited to, Limited Grant of Letters of Administration Ad Litem. Limited Grant of Letters of Administration Ad Colligenda bona, Limited Grant of Letters of Administration Ad Debonis Non, Limited Grant of Letters of

Administration durante minora aestate ... and due to their limited nature each such grant ought to be used for the specific purpose only. Given that more than one limited grant or a combination of grants can be issued depending on the circumstances of a case, there is every reason to deal with a limited grant as it specifically provides. That will undoubtedly bring order and decorum in dealing with an estate of a deceased person noting that there may be need to obtain a full grant in future”.

22. In Lydia Ntembi Kairanya & Another v The Hon AG [2009] eKLR, it was held that: -

“From what I have been saying therefore there is no dispute that the plaintiffs filed and have prosecuted this suit on the strength of a limited grant of letters of Administration Ad Litem issued to them jointly by this High Court .. it is not disputed that that grant authorized the plaintiffs to file this suit. But that is as far as that limited grant of letters of administration Ad Litem can go. That grant does not contain authority of power to prosecute a filed suit. It did not contain the power to collect or receive proceeds of the suit should the plaintiffs be successful. There should have been included in the limited grant. ... Though the plaintiffs prosecuted this suit therefore, they did it without legal power to do so and they lack legal power to collect or receive proceeds from, prosecution of this suit in the event of success...”

23. The general rule is that a personal representative of a deceased person must obtain a full grant in order to act on behalf of the estate of a deceased.

However, in special circumstances the law permits Limited Grants to be issued for specific purposes. The jurisdiction to issue Limited Grants of Administration is by virtue of **section 54 of the Law of Succession Act, Cap 160 of the Laws of Kenya (“the Act”)**. It provides thus: -

“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”.

24. The **Fifth Schedule** to the **Act** provides for the various Forms of Limited Grants. The applicable provision to Limited Grants for suits is **paragraph 14**. It provides: -

“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 is unwilling to act, letters of administration may be made to a 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 ...”

25. In this regard, the Limited Grant when issued will specifically state the purpose for which it is issued. In **Peter Owade Ogwang vs. Jared Obiero Ouya [2014] Eklr.**, the Court of Appeal agreed with the High Court that a Limited Grant *ad colligenda bona* issued under **section 67 of the Act** as read with **Rule 36(1) of the Probate and Administration Rules** did not permit the filing or prosecution of a suit. However, it went further and clarified that: -

“In our view, notwithstanding that the appellant was armed with only a grant of letters of administration *ad colligenda bona* and

therefore did not invoke paragraph 14 of the Fifth Schedule of the Law of Succession Act, the order of Mbaluto J allowing the appellant to represent the estate of the deceased father, the 2nd plaintiff, in effect converted the grant of letters of administration ad colligenda bona to a grant limited to the prosecution of the case before the High Court especially as the respondent never challenged it in that court.”

26. My understanding of that holding is that, it may not be the form that matters but the substance and content of the grant issued.
27. In the present case, the Limited Grant of Letters of Administration *Ad Litem* dated 28/6/2024 that was issued to the respondent appearing at page 12 of the Record of Appeal was in the following terms: -

“Be it known that Letters of Administration Ad Litem of all the Estate of the above named ERASTUS IAN KHANDIRA who died Domiciled in KENYA on the 01.08.2023 which devolves to and vests in his Personal Representatives but limited to the purposes only for filing Suit and until further representation were granted by this Court to JEMIMA JUMA. ...”

28. It is very clear from the wording of the grant the purpose for which it was issued. It was for filing suit and not to continue or prosecute an already existing suit.
29. The trial court was of the view that that was a technicality that is excusable under **Article 159 of the Constitution**. I do not think so. That was an issue of jurisdiction. As already found out above, only a full grant that permits a representative to do everything that is permitted in law. Where there is a

limited grant under *section 54 of the Act*, the same must be specific for which purpose it is issued and it will be limited to that purpose only.

30. Accordingly, this Court finds that the grant that the respondent had did not permit her to take over and prosecute an already filed suit. It permitted her to file a suit.
31. As regards prejudice that may be suffered, while no other party has taken any grant, if the same is taken in future, nothing will stop such representative from pursuing the appellant. That may amount to double jeopardy.
32. Accordingly, in view of the foregoing, I find the appeal to be meritorious and I allow the same with costs.

It is so decreed.

DATED and **DELIVERED** at Kisumu this 28th day of **November, 2025**.

A. MABEYA, FCI Arb

JUDGE