

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
FAMILY APPEAL NO. E019 OF 2023

TERESIA KANGONDU1ST
APPELLANT

CONSOLATA NJABANI 2ND
APPELLANT

GAABRIEL NKUNJA 3RD
APPELLANT

JADIEL MUGAMBI 4TH
APPELLANT

PURITY KANARIO 5TH
APPELLANT

GLORY WANJA 6TH
APPELLANT

VERSUS

**JOSEPH MUTURIA M' ITABARI
RESPONDENT**

(Being an appeal from the Ruling and Order of the Maua Succession Cause No. E136 of 2022 at Maua CM delivered on 11/09/2023 by Hon. C. K. Obara - SPM).

JUDGMENT

Background.

1. M' Itabari M' Mukiri (deceased) died 20th September, 2022.

2. Vide an application dated 25th November 2022, Joseph Muturia M' Itabari petitioned the Chief Magistrates Court at Maua for a grant of letters of administration ad litem.
3. The said Joseph Muturia M' Itabari, now the respondent in this appeal, describing himself as the son of the deceased, sought the limited grant of letter for purposes of prosecuting Maua Chief Magistrate's Court ELC case number 110 of 2021, between the deceased and one Kennedy Kimathi.
4. On 15th December 2022, the lower court issued a limited grant ad litem under section 54 of the Law of Succession Act.
5. Vide an application dated 15th May 2023, the appellants herein moved the lower court seeking a revocation of the said grant. The application was based on the grounds that the respondent had filed the cause in the lower court secretly and without informing other members of the family who included the deceased's spouse and the respondent's siblings.
6. After hearing the application, the lower court delivered a ruling on 11th September 2023 and dismissed the said application.

7. Aggrieved by the said ruling, the appellants filed the Memorandum of Appeal dated 22nd September 2023.

The appeal

8. The Memorandum of appeal set out the following grounds:

- a)** That the learned magistrate erred in law and in fact by considering extraneous issues by attempting to deal with alleged distribution of the estate of the deceased (M' Itabari M' M' Mukiri) in an application for Limited grant ad Litem for purposes of being sued and or suing thereby misdirecting herself thereby arriving at a wrong conclusion.
- b)** That the learned trial magistrate erred in law and in fact by finding that no consent was required from the 2nd house (the house of the 2nd appellant) to petition for limited grant to represent the deceased contrary to the obvious provisions of the Law of Succession Act, Cap 160, Laws of Kenya given that the deceased died intestate thereby arriving at an erroneous conclusion and finding.
- c)** That the learned trial magistrate erred in law and facts by ignoring the fact that the 2nd appellant had priority over the respondent to be issued with a grant to represent the estate of the deceased and thereby arriving at a wrong conclusion and finding.
- d)** That the learned magistrate erred in law and in facts when she failed and or ignored to properly consider and or take into consideration the fact that the appellants

had alleged that the respondent had been impersonating the deceased proprietor while filing the case before the trial court and that the deceased was never interested in the case in the first place thereby arriving at an erroneous conclusion.

- e)** That the learned trial magistrate erred in law and in fact by failing to consider and/or take into account the fact that there were five (5) applicants in the application dated 15th May 2023 and therefore even if the 2nd and 3rd appellants were witnesses in Maua ELC case No. E110 of 2021, for an adverse party to the alleged deceased interests, there were several other applicants, appellants herein i.e. the 1st, 4th and 5th appellants who would equally be competent to be issued with the grant ad litem for purposes of prosecuting the said suit hence arriving at an erroneous conclusion.
- f)** That the ruling of the learned trial magistrate (Hon. C. K. Obara) was made against the weight of evidence and submissions presented before the honourable court thereby arriving at an erroneous conclusion.
- g)** That the ruling of the learned trial magistrate (Hon. C. K. Obara) dated 11th September 2023 is bad in law.

9. The appellants sought the following orders:

- a)** This honourable court be pleased to set aside the decision i.e. the ruling and order of Hon. C.K Obara (SPM - Maua) dated 11th September 2023 in Maua Succession Cause No. E136 of 2022 and in its place, the

honourable court be pleased to issue an order that the Limited grant to the estate of M' Itabari M' Mukiri be issued to one of the appellants and the respondent, being appointees of both houses.

b) The appellants be awarded the costs of this appeal before this honourable court and those of the trial court.

Appellants' submissions

10. Citing Rule 26 of the Probate and Administration Rules, it was submitted that the respondent had a duty to seek the consent of every person entitled to also apply in the same degree or in priority. That in this case, the respondent filed the succession cause secretly and that the mere fact that the 2nd appellant was a witness of the defendant in the said ELC case did not affect her right and that of her family from having their case heard.
11. On the requirement of a consent the appellant cited the decision of **Re Estate of Charles Matyala Ikinya (deceased) 2021 e KLR.**
12. It was further submitted that the trial court failed to take account of the order of priority as provided for under section 66 of the Laws of Succession Act. That the 2nd appellant was entitled to the limited grant in priority over the respondent.

13. It was further submitted that had the court found the 2nd appellant unsuitable to be an administrator then it ought to have appointed any other member of the 2nd house as a co-administrator.
14. The appellant thus urged the court to allow the appeal, revoke the grant and allow one of the appellants to be an administrator for the purpose of prosecuting Maua Court ELC case No. E11 of 2023.

Respondent's submissions

15. It was submitted that no proper grounds for revocation of the grant were provided as required under section 76 of the Act. That there was no evidence that the respondent acted fraudulently or concealed any material facts that would warrant a revocation of the grant. Cited in support of this submission was the decision in **Re Estate of Prisca Onyango Nande (deceased) (2020) eKLR**. Also cited was the decision in **Re Estate of Mayangi Obuki (deceased) 2020 eKLR**.
16. On whether the trial court erred in granting the letters of administration and litem to him, the respondent argued in the negative and cited the decision in **Re Estate of Henry Kithia Mwitani (deceased) (2021) e KLR, Karega and 2 Others vs Kiama and 2 Others (2022)**

KEHC 9880 (KLR) and In Re Estate of Swaleh Karama Hantoosh (deceased) 2024 KEHC 6741(KLR).

17. The respondent argued that in the circumstances the consent was not required as the only grant issued was that of letters of administration ad litem.
18. The respondent further submitted that the dispute in question in the ELC case is land fraudulently transferred to one Kennedy Kimathi which was commenced by the deceased himself prior to his death. That in the trial case the 2nd and 3rd appellants filed witness statements which were adverse to the claim by the deceased. The respondent thus questioned how the appellants would want to have a grant to pursue a suit that they were appearing in support of the said Kennedy Kimathi. That a grant of letters of administration to the appellant as sought would compromise the said suit.
19. The respondent thus submitted that the learned magistrate neither erred in law nor in fact in dismissing the appellant's application. That the grant issued to him was not meant to enable him to distribute the estate, but only to prosecute the land case on behalf of the estate.
20. The respondent urged the court to dismiss the appeal with costs.

Analysis and determination

21. Being a first appeal, this court's duty is to evaluate the evidence and arguments made before the trial court and arrive at its own independent conclusion (***see Selle v Associated Motor Boat Co. Limited (1968) EA 123***).
22. The sole issue for determination is whether the trial court ought to have revoked the grant ad litem on the grounds set out in the application before it and in this appeal.
23. To determine this issue, there is need to look at the material laid before the trial court.
24. The respondent moved the court for letters of administration ad litem for the sole purpose of prosecuting Maua ELC case No. E110 of 2021. It is evident from the lower court record that he did not seek the consent of any other beneficiary prior to filing the petition. A limited grant ad litem was subsequently issued by the lower court on 29th November 2022.
25. In dealing with the application dated 15th May 2023, the learned magistrate found that if any notice was required, then it was to be issued to the members of the 1st house, because the suit parcels of land were those allocated to that house.
26. The learned magistrate also found that the 2nd and 3rd appellants had been listed as the defendant's witnesses in

that ELC case and as such, their interests were adverse to those of the deceased and not aligned to those of the respondent herein. That the grant issued to the respondent was not meant to empower him to distribute the estate but to prosecute the case that his father had commenced.

27. The power of the court to revoke a grant of letters of administration are set out under section 76 of the Act. It states as follows: -

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) that the proceedings to obtain the grant were defective in substance;

(b) that 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;

(c) that 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(1) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

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

28. Therefore, if any of the reasons set out or any other ground that the court may find, a grant so issued can be revoked.

29. In the instant case, the respondent moved the court as a son of the deceased and obtained the letters of administration and litem.

30. The best place to start is to look at the nature and response of a limited grant ad litem.

31. A grant of letters of administration ad litem is one form of the temporary or limited grants issued by the court for a special purpose. The law recognizes that the road to the issuance of a full grant is paved with many hurdles, due to several requirements and takes time. The issuance of these temporary grants is meant to safeguard the estate of a deceased before the full grant is issued.

32. Section 54 of the Act provides for the issuance of Limited Grants. It provides as follows: -

54. Limited grants

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.

33. Section 49 of the Act empowers a Resident Magistrate to issue a Temporary Grant. It provides as follows: -

49. Territorial jurisdiction of magistrates

The Resident Magistrate within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings, have in respect

of that estate the jurisdiction conferred by section 48:

Provided that—

(i) the magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other resident magistrate where it appears that the greater part of the estate is situated within the area of that other magistrate or that there is other good reason for the transfer;

(ii) if the deceased had his last known place of residence outside Kenya, the High Court shall determine which magistrate shall have jurisdiction under this section;

(iii) every Resident Magistrate shall have jurisdiction, in cases of apparent urgency, to make a temporary grant of representation limited to collection of assets situated within his area and payments of debts, regardless of the last known place of residence of the deceased.

34. The grant in question was clearly issued by the Lower Court pursuant to the Jurisdiction conferred upon it under Section 49 (iii) of the Act.

35. Rule 12 the Probate & Administration Rules provides for the grant of any of the Limited Grants under the Act. It provides as follows: -

An application for a grant of representation to be limited in any of the several respects described in the Fifth Schedule to the Act shall be by petition in the appropriate Form and shall be supported by such evidence by affidavit in Form 19 as is required by these Rules including such evidence as is sufficient to establish the existence of the facts and circumstances relative to the particular respect in which the grant is to be limited.

36. Rule 14 then provides for the grant ad litem as follows;

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.

37. As a son of the deceased the respondent had the requisite locus to apply for the said grant. Section 66 of the Act provides for the preference to be given to a certain person to administer an intestate estate. It provides as follows:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide, the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

38. By use of the term “**preference**” the Act is setting an order of priority and not excluding any party. Therefore, the court may, if the circumstances so require, depart from that order of preference.
39. This gist of the appellants’ case is that their consent was not sought prior to the filing of the cause in the lower court. That the 2nd applicant ranked higher in order of preference and as such the letters of administration ad litem ought to issue to her. The trial court did not address that issue. It only found that her interests were adverse to that of the estate.
40. In **Karega and 2 Others vs Kiama and 2 Others** (supra) the court cited the decision in **Winrose Emmah Ndinda Kiamba vs Agnes Nthambi (2021) eKLR** where it was held as follows: -

“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 10th July, 2020.”

41. In **Meru Succession Cause NO. E009 OF 2023 In The Matter of the Estate of Mukindia Mutuangiri - Deceased** I also dealt with a similar issue. I held as follows;

‘I agree with the said decision in regard to the application of some requirements in Petitions for a full grant to those in a Limited Grant. However, I do not think that the strict requirements referred to by the

court include a consent from other persons with equal or higher priority.

In my view, a consent of such parties ought to be obtained prior to coming to court. And it is for obvious reasons. For instance, what is to prevent another party's seeking a similar grant before another court, or even before the same court?

The strict requirements referred to by the court would, I believe be applicable to such documents as Notice to the Registrar and Notice from the Registrar, Gazettement and so on. Such requirements would defeat the purpose or urgency of the application.

It is thus my finding that even in an application for a limited grant, a Petitioner ought at the way least to first seek the consent of all persons who rank equal or higher in preference under the Act. If such consent is not forthcoming, then a citation ought to issue, if the court deems it fit. This would eliminate the possibility of multiple petitions as set out above. It would also serve notice to the potential administrator of the estate that such a grant is in existence.

From the evidence before the lower court, the respondents never sought any consent and did not issue any citation. It is also apparent that the grant issued to them only came to be known when the ELC suit was filed.

Would the lack of consent of itself be a ground to revoke the grant? I think that the circumstances of the case would determine that question.

By obtaining the grant and filing the suit, no prejudice was caused to any of the beneficiaries as the respondents do not have the powers to do anything else apart from prosecute the case. If they are successful, then that property will be available to the estate's beneficiaries.

Looking at the unique circumstances of the case, where the respondents alleged that they stood to be prejudiced by the purported fraudulent transfer of part of the estate, and that appellant is alleged to have colluded with the defendant in the ELC suit to bring this application, I think that it would be great injustice if the grant to the respondents is revoked.

For the foregoing reasons, I find no reason to interfere, with the Magistrate's

discretion. The said discretion was not exercised erroneously or in application of wrong principles'.

42. Would the lack of consent by the appellants herein of itself be a ground to revoke the grant?
43. I think that the circumstances of the case would determine that question.
44. As held above, I still think that there is need for a consent to be filed, unless the circumstances of the case are clear that such consent would not have been easily obtained, or the delay in doing so would prejudice the estate.
45. In my opinion, the grant of the letters of administration litem to the respondent did not occasion any prejudice to the appellants. Looking at the unique circumstances of the case, it would have been quite improper to issue a grant of letters of administration to a party who had clearly demonstrated that he/she had interests to those of the deceased who had filed the suit in question prior to his death. I agree with the respondent that if that was to happen, then the suit would be compromised. It does not require rocket science to decipher who stands to benefit and who stands to be prejudiced if such a thing was to happen.

46. There was no ill will or fraudulent intent exhibited by the respondent in obtaining the grant in question. The sole intention was to prosecute the case filed by the deceased prior to his death.
47. In my view, there is no sufficient ground to set aside the ruling of the learned magistrate. She correctly assessed the situation and made the right decision given the unique circumstances of the case.
48. It is further noted that while the appellants have concentrated on having the grant ad litem revoked, there has been no evidence tendered to show that they have applied for a full grant in regard to the estate. Had they been keen to do so they would have filed the requisite petition.
49. Once the full grant is issued then the grant ad litem would become absolute, unless the court finds it necessary to have it continue until the determination of the case. In that latter event, the respondent would have a duty to account to the appointed administrator and the beneficiaries on the outcome of the suit so that if it was successful, then the suit land would be included as part of the estate. If not successful, then the said land would be excluded.

50. Having considered the matter, I find that the appeal is wanting in merit and it is dismissed.

51. Being a family matters, I find it appropriate to order that each party bear its own costs. It is so ordered.

Dated, Signed & Delivered at Meru this 15th day of January, 2026.

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H. M. NYAGA
JUDGE