



REPUBLIC OF KENYA



In re Estate of Francis Obaga Mwarere (Deceased) (Succession Cause 94 of 2007) [2024] KEHC 1371 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 1371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 94 OF 2007
TA ODERA, J
JANUARY 24, 2024**

**IN THE MATTER OF
SANTINA AKELLO OBAGA 1ST ADMINISTRATOR
JOHN OCHOKI OBAGA 2ND ADMINISTRATOR**

RULING

1. The Late Joel Onwong'a Nyagenchanga died on 6.6.2006. Vide a Grant of Letters of Administration Intestate issued on 21.4.2008, Santina Akello Ojelle alias Santina Akello Obaga and John Ochoki Obaga were appointed to be the Personal Administrators of the Estate of the Deceased herein.
2. A Summons for Confirmation of Grant dated 21.10.2011 was filed and allowed on 25.11.2011. A Certificate of Confirmation of Grant was subsequently issued and dated 25.11.2011.
3. Subsequently, another application dated 15.7.2012 for rectification and confirmation of grant was filed. A Certificate of Confirmation of Grant was issued and the same is dated 10.10.2014.
4. On 12.7.2019, a Summons for Rectification of Grant dated 10.4.2019 was filed. That application was struck out on 19.7.2019 and the Court directed the Petitioners to apply for Confirmation of Grant within 21 days from 19.7.2019.
5. Summons for Confirmation of Grant was only filed on 17.11.2020. The said Summons are dated 9.11.2020. On 29.11.2022, this Court directed that the said application dated 9.11.2020 be heard on 14.3.2023 and further ordered that service be effected on Mr. Mokaya and through substituted service to Fredrick Mwarere within the next 30 days from that date.
6. It would appear from the Court's record, that whilst that application was pending, the Applicants filed another undated Summons for Rectification and Confirmation of Grant. This application is the subject of this Ruling.



7. By an undated Summons for Rectification and Confirmation of Grant and filed by the Administrators/Applicants on 14.7.23, they seek the following prayers:
 1. That the Grant of Letters of Administration Intestate issued to the said Santina Akello Obaga & John Ochoki Obaga and confirmed be rectified.
 2. That the name of Immaculate Nyaboke Obaga And Fredrick Mwabebe be struck out from the list of beneficiaries.
 3. That costs of the application be in the cause.
8. The Applicants swore an undated affidavit. I further note that the undated affidavit does not bear the stamp of a commissioner for oaths. In the affidavit, they depone that they were issued with the grant which grant was subsequently confirmed. They deponed that Immaculate Nyaboke Obaga was deceased and therefore sought to have her name removed from the list of beneficiaries. They further proposed a mode of distribution of the Estate.
9. Attached to the Summons was an undated consent. The signature of John Ochoki is also absent in the consent, which to my mind, is not fatal, given that John Ochoki is one of the Administrators.

Determination

10. I have considered the Application, the supporting “affidavit” and the law.
11. As shall be explained herein, the summons as filed is utterly untenable and for various reasons.
12. First, the application is undated. The affidavit in support is also undated and is not commissioned. Section 5 of the [Oaths and Statutory Declarations Act](#), Cap 15 of the Laws of Kenya provides as follows:
 5. Particulars to be stated in jurat or attestation clause
Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.
13. Section 8 provides thus:
 8. Power to take declarations
A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.
14. Therefore, for an affidavit to qualify to be termed a proper affidavit, it must meet the foregoing provisions. Anything short of that, and the document in reference cannot be referred to as an affidavit or given the weight accorded to an affidavit.
15. The Supreme Court of Kenya has had occasion to address itself on the same in the case of [Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli 7 2 Others](#) (2018) eKLR as hereunder:

“We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same



is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.”

16. Applying the same reasoning to the instant case, the purported supporting affidavit is fatally defective and is hereby struck out. Having been struck out, then there is no affidavit in support of the summons. It follows, therefore, that the summons is fatally defective and only fit for striking out. See paras. 35, 36, 37& 38 in *Otieno & another v Independent and Electoral Boundaries Commission (IEBC) & 2 others* (Petition E002 of 2022) [2022] KEHC 19954 (KLR) (6 July 2022) (Judgment);
17. I am persuaded by the decision in the case of *Z-U-DG v SJK-U* [2021] eKLR, where the Court rendered itself thus:
 25. The making of Affidavits is governed by the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya. Section 5 of said Act provides that-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”
 26. An Affidavit is a statement made on oath. It is the jurat which elevates a written statement to the status of an Affidavit. Without a jurat and in absence of commissioning by a Commissioner of Oaths, a Magistrate or a Notary Public the statement remains a mere unsworn written document and does not have the legal value of an Affidavit.
 27. In the case of *Gideon Sitelu Konchella-vs-julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR, the Supreme Court of Kenya held as follows: -

“Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a commissioner for oaths.
 - (8) We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.”
18. Secondly, the Administrators seek to remove Immaculate Nyaboke Obaga And Fredrick Mwabere from the list of beneficiaries because Immaculate is allegedly deceased and Fredrick cannot be found. Looking at the proceedings of 9.5.2023, John Ochoki Obaga informed the Court that they had been supporting the children of Immaculate and that Alloyce Mwabere who had been living with them, would hold their mother’s property in trust for them. However, to date, no death certificate has been produced as relates Immaculate. This Court cannot possibly presume that a given individual is deceased without proof thereto. Section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya provides that the burden of proof lies with he who asserts. Section 109 of the *Evidence Act* provides as follows:
 109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



19. The burden of proof therefore lay with the Administrator, John Ochoki Obaga, who filed the application to prove that Immaculate is deceased. This burden has not been discharged to date.
20. In fact, it would appear that the Administrators opted to omit her name since they could not obtain her death certificate. Whilst John Ochoki Obaga informed the Court that Immaculate's husband had declined to obtain the death certificate, it is not clear to the Court why the siblings of Immaculate could not make arrangements to obtain the same. That said, there is no proof that Immaculate is deceased. I cannot make such a finding in the circumstances.
21. It would be extremely dangerous to have Alloyce Mwabere hold Immaculate's Share in trust for her children where the same is not expressly stated in the summons for confirmation of grant.
22. If indeed Immaculate is deceased as alleged, what should happen then where a beneficiary dies? The deceased's beneficiary's portion shall devolve to their estate following the natural rules of intestacy under the *Law of Succession Act*. See *Re Estate of Ligabo Inyama Lusala (Deceased)* [2021] eKLR; *Re Estate of Tuaruchiu Marete (Deceased)* [2019] eKLR; *Re Estate of Peter Machisu Shirekuli (Deceased)* [2022] eKLR; and *Re Estate of John Kihara Njau alias Kihara John (Deceased)* [2021] eKLR.
23. As regards Fredrick Mwabere, the Administrators want him out because they cannot locate him. That is not a feasible reason and I cannot approve such an act. Looking at the Certificate of Confirmation of Grant dated 25.11.2011 (since the one dated 10.10.2014 was set aside/revoked), Fredrick Mwabere Obaga's portion would be retained by his mother (and Administrator) Santina Akello Ojele till he attained maturity. I further note that John Ochoki Obaga appeared in Court in the absence of the other Administrator and the beneficiaries and sought to have the application allowed.
24. I find it hard to believe that Santina Akello would be unaware of her son's whereabouts.
25. Furthermore, this Court directed that Fredrick Mwabere be served through substituted service. There is no evidence of that having been done. Therefore, for all intents and purposes, Fredrick Mwabere is not aware of these proceedings. The right to be heard is so sacrosanct that I am immediately required by the law and justice to direct that he be served without further ado. However, there would be nothing to serve viewing as the application is fatally defective.
26. Third, the summons is indicated to have been filed under Sections 71(1), 73 and 86 of the *Law of Succession Act*, Rules 40(1) & 43 of the *Probate and Administration Rules*. Section 71 of the *Law of Succession Act* is on confirmation of grants while Sections 73 and 86 are with regard to the court's duty to give notice to apply for confirmation and for debts to be repaid before legacies, respectively. It is unclear how Sections 73 and 86 of the *Law of Succession Act* apply to this matter.
27. Rules 40 and 43 of the *Probate and Administration Rules* provide for application for confirmation of grant and rectification of grant, and they are more suited to the application.
28. The law is settled on matters rectification of grants. Section 74 of the *Law of Succession Act* provides as follows:
 74. Errors may be rectified by court
Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.
29. Rule 43(1) of the *Probate and Administration Rules* provides thus:
 43. Rectification of grant



- (1) Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was issued.
30. My understanding of Section 74 of the Law of Succession Act is that rectification is only for clear matters being errors in names, descriptions, time and place of deceased's death and the purpose of the grant, where the same is limited.
31. I am strongly persuaded with the finding *in Estate of Hasalon Mwangi Kabero* [2013] eKLR where the Court held that the provisions of the Civil Procedure Rules are not analogous to the provisions of Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules. The Law of Succession Act only permits rectification of grants in 3 delineated areas:
- A. Errors in names and descriptions of persons or things;
 - B. Errors as to time or place of death of the deceased; and
 - C. In cases of a limited grant, the purpose for which such limited grant is made.
32. The Court in *Estate of Hasalon Mwangi Kabero* (Supra) further held that an error is essentially a mistake. That mistake must however fall within the ambit of section 74 of the Law of Succession Act and rule 43 of the Probate and Administration Rules.
33. Therefore, the Administrators cannot purport to seek the prayers in the application through a Summons for Rectification of Grant- i.e deleting beneficiaries' names, re-distributing the estate, adding more properties to the estate and so on.
34. It is surprising that the applicant disguised the summons herein as that of rectification of grant yet he was seeking confirmation of grant and he proposes to inherit most of the properties to the detriment of the other beneficiaries . The grant dated 25.11.2011 was revoked on 19.7.2019 and hence there is need for all beneficiaries to attend court for confirmation.
35. The application dated is fatally defective for the
36. Before I conclude, I note that there are various pending applications in the file, one dated 9.11.2020 seeking confirmation of grant and another dated 27.9.2019 seeking accounts. No action has been taken as regards the said applications. It is important that litigation comes to an end and there is expeditious disposal of matters. It is an abuse of court process for the administrator and/or administrators to file numerous applications without disposing them off. I hereby direct that before any other applications are filed by the 2nd administrator herein he should dispose off the pending applications. Application dated 27.9.19 be heard on all beneficiaries and 1st administrator to attend court to attend court .
37. In the end, and for the reasons given, I am inclined to strike out the undated application filed on 14.7.23, There shall be no order as to costs.
38. Before I conclude, I note that there are various pending applications in the file, one dated 9.11.2020 and another dated 27.9.2019. No action has been taken as regards the said applications. It is important that litigation comes to an end and there is expeditious disposal of matters. It is an abuse of court process for the administrator and/or administrators to file numerous applications without disposing them off.



I hereby direct that before any other applications are filed, as I suppose the Administrators will file, the subsisting applications be disposed of within the next 30 days.

DATED, DELIVERED AND SIGNED AT KISII THIS 24TH DAY OF JANUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Mr. John Ochoki Obaga the Administrator/Applicant

Other beneficiaries absent

Oigo - Court Assistant

Court: Applicant what do you wish to do with application dated 27.9.19? It is a stumbling block herein.

Applicant: I seek the help of this court as the other beneficiaries do not want to come to court. I wish to withdraw the application dated 27.9.19 so that we proceed to confirmation of grant.

Order: Application dated 27.9.19 is marked as withdrawn. all the beneficiaries be served through the area chief.
Hearing on 16.5.24.

T. ODERA

JUDGE

