



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of Japheth Birabu Rukehe (Deceased) (Probate & Administration
001 of 2021) [2024] KEHC 17179 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 17179 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

PROBATE & ADMINISTRATION 001 OF 2021

JR KARANJA, J

FEBRUARY 23, 2024

IN THE MATTER OF THE ESTATE OF JAPHETH BIRABU RUKHEHE (DECEASED)

RULING

1. This matter revolves around the Grant of Letters of Administration Intestate issued to James Agalomba Lugohe (Respondent/Petitioner) on 15th December 2016 by the Principal Magistrate Court at Kapsabet respecting the Estate of the late Japheth Birabu Rukohe (deceased) who died on 18th February 2000 at the age of seventy five (75) years and said to have been survived by the Respondent and two daughters, Hellen Mogonda Bilavu and Florence Kangoha Bilavu.
2. At the time of his demise, the deceased was the registered owner of a parcel of land described as Parcel No. Nandi/Kapkangani/441 which was wholly transmitted or distributed to the Respondent when the grant was confirmed on 15th August 2017 with the issuance of the necessary certificate of confirmation of grant. It was expected that the distribution of the estate would mark the end of this succession cause and discharge the Respondent from his obligations as the administrator of the estate. But, that was not to be due to the several applications that followed the confirmation of the grant.
3. A perusal of the record by this court reveals that nine (9) months or so after the confirmation of the grant, on the 18th April, 2018, Caroline Lilian Jelimo (Applicant/Objector) applied for revocation and/or annulment of the grant and in particular, the certificate of confirmation of grant dated 15th August 2017 on the basis that she was the widow of the late Manasseh Amugambi Bilavu who was also a son of the deceased herein and who passed away on 4th March 2015.

In the application, the Objector also applied to have the Kapsabet Probate and Administration Cause No. 76 of 2016 transferred to the High Court. Notably, that was the cause in which the impugned grant was issued and confirmed.

4. A further application dated 12th June, 2018 was filed by the Objector seeking once again the transfer of Kapsabet Probate & Administration Cause No. 76 of 2016 to the High Court as well as a temporary injunction order to restrain the Respondent/ Petitioner from interfering with the estate property by selling and/or cultivating it.



The Respondent filed a replying dated 16th July 2018 opposing the application notwithstanding this fact that his notice of preliminary objection dated 12th July 2018 had already been filed.

5. The Preliminary Objection was primarily based on the grounds that the application dated 12th June 2018 was bad in law, legally untenable and fatally or incurably defective as the Objector/Applicant was seeking to revoke a grant issued to herself respecting the estate of Manasseh Amugambi Bilavu.

It is however, instructive to note that although both of the Objector/Applicant's applications dated 18th April 2018 and 12th June 2018, referred to the estate of Manasseh Amugambi Bilavu, the affidavits in support of both applications indicated that what the objector was actually seeking was revocation of the grant issued to the Respondent respecting the estate of Japeth or Japhet Birabu Rukohe dated 15th December 2016 and confirmed on the 15th August 2017, with the issuance of the necessary certificate of confirmation of grant.

6. Both the aforementioned applications by the Objector were made in Eldoret High Court Probate and Administration Miscellaneous Application No. 14 of 2018, which was eventually transferred to this High Court to become the present Kapsabet High Court Probate and Administration Miscellaneous Cause No. 001 of 2021.

All the foregoing clearly indicate that the Objector's application dated 18th April 2018 and 12th June 2018 related to the estate of the deceased herein, the late Japhet Binabu Rukohe alias Japheth Binabu Rukohe and not the estate of Manasseh Amugambi Birabu or Bilavu.

The headings on the relevant summons referring to the estate of Manasseh Amugambi Birabu were clearly erroneous and misleading most likely arising from an accidental slip or typographical error.

7. The record shows that none of the aforementioned applications by the Objector were heard and determined meaning that they remain pending to date unless overtaken by subsequent events relating to this matter in so far as it relates to the Estate of the deceased herein, the Late Japhet/ Jafet Birabu Rukohe also known as Japheth Birabu Rukohe.
8. As at 14th September 2018, the two applications remained pending even though it was on that date that the Objector filed an application for rectification of the cause file to refer or make reference to the late Japheth Birabu Rukohe alias Japheth Birabu Rukohe as the deceased herein instead of the late Manasseh Amugambi Bilavu.

On the same date, a third party, Beatrice Aduma, filed an application to be enjoined as an interested party in this cause.

Both applications were allowed by the court on 12th November 2018 and 18th December 2019 respectively, thereby correcting the error of this cause being related to the estate of Manasseh Amugambi Bilavu rather than Japeth Birabu Rukohe also known as Japheth Birabu Rukohe, the deceased herein.

9. The Objector, after a period of time filed another application dated 9th October 2019 for a temporary injunction order restraining the Respondent from further intermeddling with the estate property pending hearing and determination of the application.th October 2019 and this was apparently confirmed on the 18th December 2019 when the application came up for inter-parties hearing and the court ordered that the existing "status-quo" be maintained pending the hearing and determination of the suit. The interested party was formally enjoined in the matter.

In that regard, the court granted an ex-parte interim injunction order on the 14



10. Nonetheless, the Respondent filed a notice of preliminary objection dated 16th December 2019 respecting the Objector’s application dated 9th October 2019. The court ordered that the preliminary objection be canvassed by way of written submissions and in a virtual mention or hearing of the matter on the 12th October 2020, the Respondent in the absence of the Objector and interested party indicated that his submissions had already been filed.

Indeed, it was only the Respondent’s submissions dated 14th January 2020 which had been filed on 17th January 2020. The court therefore fixed the matter for ruling on the preliminary objection on 2nd November 2020 on which date the ruling was accordingly rendered in the absence of the Objector and the Interested Party.

11. The ultimate effect of the ruling was to bar the Objector from these proceedings and indeed the entire succession cause for want of “locus-standi” due to her alleged failure to obtain a grant of representation respecting the estate of her late husband, brother to the Respondent herein.

It was apparently this turn of the events that precipitated the present application dated 11th December 2020, in which the Objector seeks orders for review of the ruling made on 2nd November 2020 by way of setting aside and for reinstatement of the applications dated 18th April 2018 and 9th October 2020 for hearing interparties.

12. The application is based on the grounds set out in the appropriate chamber summons as fortified by the Applicant’s averments contained in her supporting affidavit deponed on 11th December 2020 and is opposed by the Respondent on the basis of the grounds of opposition dated and filed herein on 11th March 2021.

The hearing of the application was by way of written submissions which were filed personally by the Applicant and by the Respondent through Mukabane and Kagunza Advocates.

13. Having given due consideration to the application on the basis of the supporting grounds and those in opposition thereto as well as the rival submissions, it is this court’s opinion that the basic issue emerging for determination is whether this court is “functus officio” in dealing with the application and if not, whether the applicant is deserving of this court’s exercise of discretion in her favour in reviewing the ruling made herein on 2nd November 2020 and in reinstating for hearing her applications dated 18th April 2018 and 9th October 2019 (not 9th October 2020 as erroneously indicated in the chamber summons).

14. On the doctrine of “functus officio” it was submitted by the Respondent that having delivered a ruling on 2nd November 2020 holding that the Objector lacked the “locus-standi” to seek revocation of the impugned grant in any manner, this court was “functus officio” in respect of the present application.

On the other hand, the Applicant submitted that the impugned ruling did not prevent this court from hearing and determining any application arising from the ruling such as an application for review and/or setting aside or varying the ruling. That, in that regard, this court is not “functus officio”.

15. Considering that “functus officio” presupposes a situation where a dispute or case has been fully heard and finally determined and that a ruling on an interlocutory application would not be capable of determining a matter in finality, it would follow that this court is not “functus-officio” in considering and determining the present application which clearly arises from the impugned ruling which was not a final judgment or order regarding the ongoing dispute between the Applicant and the Respondent over the material estate property belonging to the deceased.



16. The preliminary objection dated 16th December 2019 arose from the Applicant's application dated 9th October 2019. However, whereas the application related to the estate of the deceased herein, Japet, Japhet or Japheth Binabu Rukohe, the preliminary objection as may be deciphered from its supporting grounds related hitherto erroneously, to the estate of the Applicant's late husband, Manasseh Amugambi Bilavu. It was this error which informed the impugned ruling to the effect that the applicant lacked "locus standi" in this matter for failure to obtain a grant or representation respecting the estate of her late husband a brother to the respondent herein (James Agolomba Lugohe).
17. The ruling was made oblivious of the fact that on the 12th November 2018, the entire cause was rectified to correct the name of the deceased from Manasseh Amugambi Bilavu (Applicant's late husband) to the actual deceased herein, Japheth Birabu Rukohe. This was done pursuant to the Applicant's application to that effect dated 14th September 2018, in which the Applicant clearly alluded to the error in the description of the deceased brought about by a typographical error. The Applicant also indicated in her supporting grounds at paragraph six (6) that she had been granted a limited grant ad litem respecting the estate of her late husband thereby implying that she had the necessary "locus-standi" in this matter.
18. The said limited grant was duly annexed to the material application. It was dated 23rd March 2018, meaning that it was granted long before the application dated 9th October 2019 was made by the Applicant and for which the Respondent raised the preliminary objection dated 16th December 2019, which led to the impugned ruling of the 2nd November 2020.
19. The present application smacks of an application for review of the impugned ruling by way of setting it aside or otherwise. Such an application would ordinarily be brought under Order 45 of the Civil Procedure Rules which is applicable in succession matters by dint of Rule 63 (1) of the Probate and Administration Rules. The provision (Order 45 (1) Civil Procedure Rule) is the gate away for a review application and provides for review of orders on account of "inter-alia" some mistake or error apparent on the face of the record or for any other sufficient reason.

The Applicants Chamber Summons giving rise to the present application does not indicate the provision of law under which it was brought. Nonetheless, this omission related more to form and/or procedural technicality rather than the substance of the application and was therefore not fatal.
20. The grounds and averments in support of the application leaves no doubt that the application is essentially for review of the impugned ruling on account of a mistake and/or error apparent on the face of the record in relation to the name of the actual deceased person and the estate property subject of the succession cause. This was clearly magnified upon due consideration of the history of this matter as indicated herein above.
21. It would therefore follow that the present application is merited for exercise of this courts discretion in favour of the Applicant and also in exercise of the courts inherent powers under Rule 73 of the Probate and Administration Rules so as to meet the ends of justice and prevent abuse of the court process by the Respondent.

The Interested Party despite being duly notified did not participate in the present proceedings.
22. In sum, the present application on the basis of all the reasons foregoing is hereby allowed to the extent that the ruling of the court dated 2nd November 2020 is set aside and the Objector/ Applicant's application dated 18th April 2018, being a summons for revocation of the grant issued to the Respondent respecting the estate of the deceased Jafet/ Japhet/ Japheth Birabu Rukohe is hereby reinstated for hearing and determination in accordance with the provision of the [Law of Succession Act](#).



The application dated 9th October 2019 is also reinstated to give effect to the order made by the court in respect thereof on the 18th December 2019 to the extent that the existing “status-quo” be maintained pending the hearing and determination of the succession cause/suit i.e. the summons for revocation and/or annulment of the impugned grant of letters of administration intestate dated 15th December 2016 as confirmed on 15th August 2017 in favour of the Respondent.

23. In that regard, the application dated 18th April 2018 will today be given a mention date for direction on the date and mode of hearing. Otherwise each party shall bear own costs of this application.

Ordered accordingly.

DELIVERED AND DATED THIS 23RD DAY OF FEBRUARY, 2024

HON. J. R. KARANJAH,

JUDGE

