



**In re Estate of Welsa Bange Oganda Ayoo alias Welsa Bange Oganda (Deceased)  
(Succession Cause E081 of 2022) [2024] KEHC 2464 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2464 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE E081 OF 2022**

**G MUTAI, J**

**MARCH 7, 2024**

**IN THE MATTER OF THE ESTATE OF WELSA BANGE  
OGANDA AYOO ALIAS WELSA BANGE OGANDA (DECEASED)**

**BETWEEN**

**ERKA ANYANGO OGANDA ..... APPLICANT**

**AND**

**GEORGE OREJE PETER OGANDA ..... RESPONDENT**

**RULING**

1. The deceased, Welsa Bange Oganda Ayoo, died aged 82 years on 23<sup>rd</sup> June 2021 at Beyond Scope Hospital, Mombasa. The cause of his death was severe respiratory distress due to Covid 19. He was a polygamous man and was survived by one wife and 19 children.
2. The Petition for the Letters of Administration Intestate of his estate was filed on 14<sup>th</sup> October 2022 by the 1<sup>st</sup> Administrator/Applicant in her capacity as the widow. She listed the deceased as having 16 children. In particular, she named the 2<sup>nd</sup> Administrator/Respondent as being the child of the deceased. Although she was required by law to seek the consent of other beneficiaries, the 1<sup>st</sup> Administrator/Applicant only sought the consent of her children. This is evidenced by the consent dated 22nd September 2022 filed together with the Petition. No reason was given for the said curious action.
3. The deceased had a vast estate. The affidavit supporting the petition listed 3 assets in Mombasa and Kisumu whose total value was Kes.150,000,000.00. He appears not to have had any liabilities.
4. The Petition for Grant of Letters of Administration Intestate was objected to by 2<sup>nd</sup> Administrator/Respondent, George Oreje Peter Oganda and his sister Ruth Ariana Oganda, on the grounds that contrary to what had been agreed earlier, they had been left out as co-administrators and that the



schedule of the deceased's assets was inaccurate or incorrect as certain properties of the deceased, to wit:-

1. Title No Kisumu/East Karachuonyo/Rambia/1591;
2. 60% shares in Baogan Hotel Ltd;
3. Sum of Kes.1,398,140.00 awarded by the Supreme Court on 14<sup>th</sup> January 2022 in Petition No. 4 of 2017; Coast Professional Freighters Ltd versus Welsa Bange Oganda Ayoo and 3 Others; and
4. Liability for land rates arrears and penalties of Kes.696,625.00, as at 19<sup>th</sup> January 2023, over Title No Mombasa/Block X/291.

Were omitted, whereas the following properties which he didn't own were added:-

1. Title No Kisumu/East Karachuonyo/Rambira/1570 said to belong to the estate of Onuonga; and
  2. Title No Kisumu/East Karachuonyo/Rambira/1582 said to belong to the Ogandi family.
5. The objection wasn't canvassed as parties entered into a consent, which was adopted by this Court on 25<sup>th</sup> January 2023, vide which Erka Anyango Oganda and George Oreje Peter Oganda were appointed as the o-administrator. The grant appointing the two as such was issued on 24<sup>th</sup> February 2023.
6. The powers and duties of personal representatives of a deceased person are given in Sections 82 and 83 of the Law of Succession Act. In my view, the co-administrators had the duty to identify and collect the properties of the estate, and as provided for by section 83(e) of the Law of Succession Act:-

“within six months from the date of grant to produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.”

7. Before the lapse of six months, the 1<sup>st</sup> Administrator/Applicant filed the instant application. The summons for Removal of Administrator and other Interim Reliefs is dated 26<sup>th</sup> July 2023. It is expressed as being brought under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. Vide the said application, the 1<sup>st</sup> Administrator/Applicant seeks the following 7 reliefs:-
1. That George Oreje Peter Oganda be removed as an administrator for frustrating the lawful administration of the deceased's estate;
  2. That Erka Anyango Oganda, the deceased's widow, be allowed to draw a monthly stipend of Kes.76,106.00 from the estate's income toward her upkeep and other related expenses;
  3. That Erka Anyango Oganda be retained as the sole administrator of the deceased's estate;
  4. That this Court be pleased to allow the 1<sup>st</sup> Administrator to appoint Mr Stanley Kute to be the Manager of the hostel business operated on the deceased's property known as Title No. Mombasa/Block X/291;
  5. That George Oreje Peter Oganda be directed to give a full and accurate account of the funds he has received from the hostel business operated on the deceased property as from 3<sup>rd</sup> March 2022;



6. That such further or other order be granted as this Court will deem just and expedient; and
7. That costs of this application be in the cause.
8. The 1<sup>st</sup> Administrator/Applicant contended that the 2<sup>nd</sup> Administrator/Respondent had failed to administer the deceased's estate in accordance with the laws and was frustrating efforts by the 1<sup>st</sup> Administrator/Applicant by not cooperating with her on any matter regarding the administration of the estate, yet they are joint administrators. She averred that the 2<sup>nd</sup> Administrator/Respondent lacks respect for her as his stepmother, refuses to talk to her and had frustrated her efforts to have them meet so that they could agree on the way forward. She prayed that a manager for the hostel business be appointed and proposed Mr. Stanley Kute, who she indicated had agreed to earn Kes.40,000.00 all-inclusive per month as his salary. The 1<sup>st</sup> Administrator/Applicant also sought to be provided with a monthly stipend on the grounds that she and her husband wholly relied on the income generated by the hostel business.
9. In support of her application, the 1<sup>st</sup> Administrator/Applicant attached correspondence exchanged between the parties.
10. The application is opposed. The 2<sup>nd</sup> Administrator/Respondent filed a Replying Affidavit sworn on 14<sup>th</sup> January 2024, in which he stated that the application lacked merit and was  

“mired in falsehoods, misrepresentation of material facts, untrue, untenable in law and legally embarrassing.”
11. He argued that although it had been agreed that a joint petition for letters of Administration intestate would be filed, in which he, his sister Ruth Ariana Oganda and the 1<sup>st</sup> Administrator/Applicant and her son Fredrick Otieno Oganda would be co-administrators, the 1<sup>st</sup> Administrator/Applicant surreptitiously filed a Petition seeking to be appointed as the sole administrator. As a result of his objection, the consent adverted to earlier was entered into. The 2<sup>nd</sup> Administrator/Respondent saw in the conduct of the 1<sup>st</sup> Administrator/Applicant a desire to be the sole Administrator/Manager and possibly beneficiary of the estate, to the exclusion of other beneficiaries.
12. The 2<sup>nd</sup> Administrator/Respondent denied that he was uncooperative. He accused the 1<sup>st</sup> Administrator/Applicant of refusing to engage in a discussion with him and of not wanting to pay land rates to the Mombasa County Government. On incomes accruing to the estate, he deposed that incomes were being deposited in the escrow account. He accused the Applicant of frustrating the division of the property of the deceased, of living a lavish life and of, together with her children, harassing the members of the 1<sup>st</sup> family. On those grounds, he alleged that the 1<sup>st</sup> Administrator had come to Court with unclean hands and did not deserve equitable remedy.
13. The 1<sup>st</sup> Administrator/Applicant filed a Supplementary Affidavit vide, which reiterated the contents of her previous affidavit and denied what was stated in it. She accused the 2<sup>nd</sup> Administrator/Respondent of falsifying records at the Companies Registry, disrespecting her, and embezzling the estate's funds.
14. As the sole surviving widow of the deceased, the 1<sup>st</sup> Administrator/Applicant averred that she had a life interest in the estate, which gave her priority in the administration of her late husband's estate and a life interest in the net estate. She also urged that the 2<sup>nd</sup> Administrator/Respondent be ordered to account for all incomes received since April 2022.

### **Submissions by the Parties**

15. The application dated 26<sup>th</sup> July 2023, was canvassed by way of Written Submissions.



### Submissions of the 1st Administrator/Applicant

16. Mr. Amuga, learned counsel for the 1<sup>st</sup> Administrator/Applicant, submitted that the 2<sup>nd</sup> Administrator/Respondent should be removed as an administrator. I was referred to the case *In re Estate of Alice Muthoni Mwibia (deceased)* [2021] eKLR. He urged that the 2<sup>nd</sup> Administrator/Respondent had refused to hold meetings with his client and that they had irreconcilable differences.
17. It was submitted that 2<sup>nd</sup> Administrator/respondent should be removed as an administrator on the ground that being a widow the 1<sup>st</sup> Administrator/Applicant had priority. The Court was referred to the case of *In re Estate of Kamau Wakuru (deceased)* [2016] eKLR in support of the said proposition.
18. Mr Amuga submitted that the 1<sup>st</sup> Administrator/Applicant was entitled to an income from the estate as “she is entitled to a life interest in the estate”. In support of this contention, the counsel referred me to the decision of W. Musyoka, J *In re Estate of John Musambayi Katumanga (deceased)* [2014] eKLR. He submitted that Kes.76,106.00 would be sufficient.
19. It was urged that a manager be employed to run the business existing on Title No Mombasa/Block X/291 as the 2nd Administrator/Respondent had mismanaged it.
20. Lastly, it was submitted that the 2nd Administrator/Respondent should render a true account.
21. The 1<sup>st</sup> Administrator/Applicant filed further submissions in which she reiterated her submissions and denied that the submissions of the 2<sup>nd</sup> Administrator/Respondent had merit.

### Submissions of the 2nd Administrator/Respondent

22. The 2<sup>nd</sup> Administrator/Respondent submitted that the application be dismissed. Counsel urged that the deceased had two wives: Gloria Achieng Oganda (deceased), who had 8 children, and Erka Anyango Oganda (deceased), who had 10 children. He indicated that rent collected from the hostel business was Kes.80,000.00 per month and that paying Kes.40,000.00 to a manager would not make sense.
23. It was submitted that as the appointment of the 2<sup>nd</sup> Administrator/Respondent was a product of consent, the same could only be varied or set aside with the consent of the parties. I was referred to the decision of the Court of Appeal in *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, where the Court cited *Setton on Judgment and Orders* (7<sup>th</sup> Edition) Vol 1, page 124 and reiterated that:-

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court... or if the consent was given without sufficient material facts or in general for a reason which would enable a Court set aside an agreement.”
24. Counsel submitted that this Court heard the application on 31<sup>st</sup> July 2023 and determined it, directing that income be channelled to an escrow account in the name of the advocates on record. This, it was urged, had been complied with.
25. The 2<sup>nd</sup> Administrator/Respondent submitted that it was the responsibility of the 1<sup>st</sup> Administrator/Applicant to show that he had not cooperated with her, but that she failed to do so.
26. The 2<sup>nd</sup> Administrator/Respondent referred to the peculiar nature of polygamous estates. It was urged that as this is a polygamous estate, it was only fair and just that there be an administrator from each house.



## Analysis and Determination

27. I have considered the application, the affidavits of the parties, the written submissions and the applicable law. In my view, the following issues fall for determination by this Court: -
1. Whether the 2<sup>nd</sup> Administrator/Respondent ought to be removed as a co-administrator;
  2. Whether the 1<sup>st</sup> Administrator/Applicant should be the sole administrator;
  3. Whether the 1<sup>st</sup> Administration/Applicant should get a monthly stipend of Kes.76,106.00 towards her upkeep and other related expenses;
  4. Whether an administrator of the hostel business ought to be appointed; and
  5. Should the second Administrator/respondent provide a full and accurate account of the funds he has received from the hostel business?
28. I shall look at each of the issues in turn.

### Should the 2nd Administrator/Respondent be removed as a co-administrator?

29. The 1<sup>st</sup> Administrator/Applicant avers that the 2<sup>nd</sup> Administrator/Respondent has failed to cooperate with her with a view to having the estate administered. For that reason, she seeks to have him Removed. This is denied by the 2<sup>nd</sup> Administrator/Respondent. The latter produced correspondence which appears to show parties engaged each other on the possibility of holding meetings.
30. As administrators the 1<sup>st</sup> and 2<sup>nd</sup> Administrators had equal responsibility to administer the estate and needed to show goodwill towards each other. Upon reading the documents filed in Court, I cannot discern that goodwill. In particular, it would appear to me that the 1<sup>st</sup> Administrator/Applicant is uncomfortable with the fact that the Respondent is a co-administrator, something that she appears not to have wanted from the get-go, judging from the fact that she filed the instant petition without involving the 1<sup>st</sup> family and listing herself as the sole administrator.
31. Although she asserts that the 2<sup>nd</sup> Administrator/Respondent refused to cooperate with her to administer the estate, I have not seen evidence of that assertion. On the contrary, Annexure “GPO-04” shows that the parties were in negotiations during the material time. In any case, the administration of the estate requires a joint effort.
32. In my view, the first Administrator/Applicant did not discharge her burden of proof to show that the second Administrator/Respondent was frustrating the distribution of the estate.
33. Although I agree with the decision of Mary Kasango, J *In re Estate of Alice Muthoni Mwihia (deceased)* [2021] eKLR, I am unable to find that the 2<sup>nd</sup> Administrator/Respondent has been an impediment to distribution. The application before me appears to have been filed with alacrity to procure an outcome desirable to the 1<sup>st</sup> Administrator/Applicant. No reason has been given to my satisfaction to justify the exercise of my undoubted discretion under section 47 of the *Law of Succession Act* and 73 of the *Probate and Administration Rules* to remove the 2<sup>nd</sup> Administration/Respondent.

### Should the 1st Administrator/appellant be the sole Administrator?

34. It is clear from the foregoing that this Court has declined to remove the second Administrator/Respondent as an administrator. Thus, this issue is moot. This Court must, however, express its own opinion on the appointment of Administrators where a deceased is polygamous.



35. In my view, having personal representatives from each house puts all houses on an equal footing and ensures that administration is not only just but also seen by disinterested third-party observers as just. Although there may be situations where, due to misconduct or other sufficient reasons, only one personal representative may be appointed, such situations are rare. In this case, going by her conduct, the 1st Administrator/Applicant, rather than administering the estate, desires to have her way by all means. The prayer is thus denied.

**Should the 1st Administrator/Applicant receive a Monthly Stipend of Kes.76,106.00?**

36. It has been submitted that the 2nd Administrator/Respondent has denied the life interest of the 1st Administrator/Applicant. With respect, there appears to be a misunderstanding of what life interests are. Life interests arise out of section 35 of the Law of Succession Act in relation to succession where the deceased person is monogamous. Polygamous succession is governed by section 40 of the Act. It is important that I set out the 2 sections below.

37. Section 35 of the Act states:-

“

“1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

(a) the personal and household effects of the deceased absolutely;  
and

(b) a life interest in the whole residue of the net intestate estate:  
Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to –

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;



- (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
  - (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;
  - (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
  - (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.
- (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

Whereas section 40 states:-

- “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

38. It is my view that a widow in a polygamous marriage holds a life interest only in that part of the net estate of a deceased person that is attributable to her house. She cannot thus claim a life interest in the whole estate.
39. From the foregoing it is my view that the decision of the Courts in *Tan Katungi versus Margrethe Thoming Katungi & Another* [2014] eKLR and *In re Estate of Walter Kiplangat Arap Chamdany (deceased)* [2021] eKLR are inapplicable in this matter as they were all in respect of monogamous marriages.
40. Further, and for clarity, the law, as I understand it, in regard to polygamous marriages is that the properties of the deceased are divided to each house on accordance with the formula given on section 40 of the Act. Thereafter, the widow has a life interest in the net estate of the deceased due to her household.
41. Thus, in this case, the 1<sup>st</sup> Administrator/Applicant has no life interest in the estate of the deceased that belongs to the 1<sup>st</sup> house. To be able to ascertain over which assets she has life interest the estate must be distributed.
42. Thus, in my view, her interest calls for her to move with alacrity to ensure that the estate is administered. Rather than be the spanner in the works, she ought to be a cog in the wheel to ensure that administration is completed without further delay.



### **Should an Administrator be Appointed?**

43. I agree with counsel for the 2<sup>nd</sup> Administrator/Respondent that the primary goal of succession proceedings is the distribution of the estate of the deceased through confirmation of the grant. As was noted in the case of *Florence Makena v John Maruri M'Ibure & 3 others* [2017] eKLR:-

“the Court must not forget that the primary duty of a Court in Succession cause is distribution of the estate of the deceased”

44. In my view, the appointment of a Manager does not aid that goal. It preserves the *status quo*. The administrators were supposed to file summons for Confirmation of Grant six months after the grant was issued. That wasn't done, and the estate remains un-administered to date.

45. I am aware that the 2<sup>nd</sup> Administrator/Respondent's dealings with the hostel business are unclear and will require an enquiry. That does not, however, justify the subsistence of a *status quo* that is not favourable to the conclusion of this matter.

### **Should the 2nd Administrator/Respondent Provide a Statement of Account?**

46. Under section 83(e) of the *Law of Succession Act*, the administrators are required to provide accounts within 6 months of their appointment. This is a joint obligation. Therefore, this issue should await the filing of the Summons for Confirmation of Grant.

### **Disposition**

47. The upshot of the foregoing is that I have not found merit in the application before me. The same is dismissed. Allowing the application will not be helpful.

48. This being a family matter each party shall bear own costs.

49. In the interests of justice and so that this matter is concluded without further delay the administrators are hereby directed to file Summons for Confirmation of Grant within 90 of the date hereof.

50. Orders accordingly.

**DATED AND SIGNED THIS 7<sup>TH</sup> DAY OF MARCH, 2024 AT MOMBASA.**

.....

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr. Amuga for the 1<sup>st</sup> Administrator/Applicant;

Mr. Onyango for the 2<sup>nd</sup> Administrator/Respondent;

Arthur - Court Assistant.

