A PAPER\(^1\) DELIVERED ON
PROCEDURE IN
THE LAW OF SUCCESSION CAP.160
LAWS OF KENYA

ACCESSING JUSTICE THROUGH THE COURTS:
THE TRAINING OF MAGISTRATES AND JUDGES IN KENYA

HELD

AT

STANELY HOTEL, NAIROBI
KENYA

BETWEEN 24\(^{\text{TH}}\) – 26\(^{\text{TH}}\) AUGUST 2005

BY M. A. ANG’AWA\(^*\)

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\(^1\) This paper on procedure in the Law of Succession Act was first written in August 2000 for the committee on the establishment of the family court in Kenya. Its main purpose was to inform the Judicial officers of the procedural laws under the act and how litigants can access justice through the courts. The paper was the basis of training of judges and magistrates between 2001 and 2002. It was once used as a training lecture for advocates at Eldoret that was organized by the Law Society of Eldoret and Etyang, J. (as he then was) the judge in charge of the High Court of Kenya at Eldoret in November 2001.

The paper is essentially the same except with modification as to the historical concept in the introduction.
I. INTRODUCTION

1. The Law of Succession Act Cap.160 Laws of Kenya (herein referred to as the Act) is “an act of parliament to amend, define consolidate the law relating to intestate and testamentary Succession and the administration of estate of deceased persons.

2. Historically during the British Colonial error, the people of Kenya were divided along racial and ethic lines. There emerged from this four district groups of laws governing four categorises of peoples.

   a) Statute law –
      These laws mainly applied to Europeans living in Kenya

   b) Hindu Laws
      These laws applied to the group of Asians who profess Hinduism.

   c) Islamic Laws
      Laws that relate to persons who profess the Islamic faith. The groups of peoples include the native African, the Indians, the Arabs and the Europeans who forsoke their religion and profess Islam.

   d) Customary Laws
      Laws that related specifically to the native people of Kenya.

3. In a conference held in London that looked into the future of African law 1959/1960 it outline what role these laws would play as many African countries were gaining independence. E. Contran had been assigned to look into the Civil and Criminal customary laws by the colonial government. He came up with the various recommendation. He also edited the reinstatement of African Personal Law on Marriage, Divorce and Succession Laws.

4. The laws in Kenya pertaining to the personal laws were indeed discrimatory, they were not uniform and did not apply equally to all. Jomo Kenyatta, the first President of Kenya had a vision of seeing the people of Kenya, united not only in the independence of the country Kenya but also united in the personal laws.

5. On 17th March 1967 the President set up a commission\textsuperscript{2} to look into the personal laws. The commission confirmed that the laws were discrimatory.

\textsuperscript{2} Chairman: H. Slade

Members:

i) Chanan Singh
   vii) T.A. Wathy

ii) C.B. Ngala
    viii) D.J. Coward (Public Trustee)

iii) Margaret Mugo
     ix) W. K. Martin (D.C. Nairobi)
6. As to the Succession Laws, Kenya adapted the Indian Succession Act of 1865. This act only applied to Europeans, Goan and Parsees. It dealt with intestate, testate and probate and administrative laws (that is the procedural laws and administration).

7. In 1881, the Probate and administration act was put in place to cater for Succession Procedures to access courts by Asians, Mohammedans and the Budhist.

8. Although the Indian Succession Act 1865 excluded the Asians, Mohammedans and Budhists; this group of persons applied their own personal law till the 1940’s when specific acts on the law of Marriage, Divorce and Succession Acts were in acted.

9. The Africans were excluded from both acts. They were permitted only to apply customary law and the elders would participate in the division of properties. In 1961, the African Wills act was enacted to cater for that African who gained modern wealth that could not be distributed under customary law.

10. The famous case of RE: Maangi

Whereby Farrel J declared the exclusion of Africans from applying the Succession Laws under the then acts was discriminatory. This decision was decided during the time the commission was still undertaking their report.

11. The act was complimentary to the Marriage Bill. The marriage bill to date has never been enacted. The Succession Bill was enacted in 1972. It did not come into operation until 1981 July, the same year as the adoption of the African Charter on Peoples and Human Rights by the then organization of the African Union in Nairobi, Kenya.

12. When the act came into operation, one of the recommendation by the commission that had been made was to have training and awareness on the implementation of the act had never been carried out.

13. This paper will outline the procedure and usage of accessing the court. The jurisdiction of the act will be outlined. A useful brief definition of the various types of grants would be made and thereafter an outline of access to the courts using the various forms be made.
2. **JURISDICTION**

2.1. **Magistrates Courts**

Section 48 gives residents magistrates jurisdiction to deal with estates whose value does NOT exceed Ksh. 100,000/-. Where the magistrates court is situated and where there is also a High court, it is only the High court which will have jurisdiction to deal with Succession Cause.

a) **Revocation of Grants**

Where the application is for revocation of grant only the High Court has jurisdiction to hear such application. The magistrates courts have no jurisdiction to deal with application for revocation of a grant.

b) **Appointment of Magistrates**

The Chief Justice appoints magistrates through notices in the Kenya Gazette for purposes of representing the High Court. A magistrate who has not been appointed by the Chief Justice to represent the High court under section 47 is not permitted to deal with Succession matters.

2.2. **High Court**

Section 47 gives the High Court jurisdiction to hear succession matters\(^3\).

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\(^3\) LN 223/92

NOTE: Limited grant used to be available ad colligenda bona in Nairobi, Mombasa, Kisumu, Nakuru and Nyeri
3. **Types of Grant**

There are different types of Grants. This depends on the manner in which a person dies. When a person dies, his affairs which he may have left undone has to be done or administered. This means debts not paid have to be paid, money owed to the deceased are collected.

Some deceased persons would have written out their wishes as to how they would want their affairs to be conducted. Others would have not written anything. Others would not have done anything at all.

Where a person writes down his wishes, as to how his property and affairs is to be handled, he is said to have died Testate.

The act therefore provides for any person to apply for authority to deal with and handle the affairs of the deceased. Where a will has been written and persons named, such person is referred to as an executor (male)/executrix (female) where no will had been written such person is referred to as an administrator (male) an administratrix (female).

Depending on how the deceased died and left his affairs, different application of grant have to be applied for. In order to understand, this I will state the different types of grants and in which situation they are granted.

3.1. Grant of Probate
3.2. Grant of Letters of Administration with will annexed
3.3. Grant of Probate or “Oral will”.*
3.4. Grant of letters of administration Intestate.
3.5. Resealing of Grant of Probate or Grants letters of administration.
3.6. Limited Grant

3.3. *Proof of oral will*
3.7. Grant for special purposes:-
   a) Limited
   b) Administration Pende Lite
   c) De bonis non

3.1 **Grant of Probate**
a) The deceased died having written a will and named the person to be in charge of his affairs (executrix/executor). The said person named is to apply for the grant of probate unless he refuses or declines to do so.

b) **FORMS**

The executor files Form P.A. 78 (petition) Form P & A 3 (affidavit) the original will plus 2 photocopies of the will and the original death certificate.

c) **Procedure**

If all documents are in order the file is placed before the Hon. Judge by the deputy registrar.
It is given orders to have the matters advertised in the Kenya Gazette. If no objections are raised before 30 days, letters of grant of Probate is issued. Grant issued by Court (P & A 45)

In such letters the copy of the will is attached. Thereafter a period of 6 months the parties come in to confirm the said grant.

Any accounts should be filed within 6 months after the confirmation of grant.

3.2. **Grant of letters of administration with Will annexed**

a) This is where a person who dies leaves behind his will but has not named the person who should handle his affairs. Any beneficiary can apply for Grant of Letters of administration with Will attached.

b) **Forms**

The execute files Form P & A 79 (petition) and P & A 3 (affidavit) an original will, two photocopies of the will, a death certificate.

c) **Procedure**

The same is followed as 3.1 (c) above. Grant issued by Court (P & A 43)

3.3. **Grant of Probate of proof of oral will.**

Where a person, under customary law gives an oral will and dies within three months, the beneficiary can apply for Grant of Probate of proof of oral will. Grant issued by Court (P & A 44)
3.4 **Grant of Letters of Administration Intestate.**

This is where a person dies having not written a will or given instructions as to what should occur to his estate/or property. Any person may apply for grant of letters of administration intestate. This though, must first be applied for by a person who is a survivor and in the order of consanguinity (ie wife, husband, children, Parents etc.).

b) **Forms**

i) In a general situation the following forms should be filed

- P & A 80 (petition)
- P & A 5 (affidavit)
- P & A 12 (affidavit of means)
- P & A 11 (affidavit of justification of proposed sureties)
- P & A 57 (guarantee of personal sureties)
- Death certificate (mandatory).

ii) Widow or a widower - adult children as survivors

Where the applicant is a widow with adult children, the following forms are filed:

- P & A 80 (petition)
- P & A 5 (affidavit)
- P & A 12 (affidavit of means)
- Death certificate

The adult children are required to give consent to the widow/widower to apply for the grant (P & A 38 is the form filed as to consent).

iii) Widow/widower with minor children as survivors

Where the applicant is a widow/widower with minor children as survivors, the forms filled are:

- P & A 80 (petition)
- P & A 5 (affidavit)
- P & A 12 (affidavit of means)
- P & A 11 (affidavit of justification of proposed sureties)
- P & A 57 (guarantee of personal sureties)
- Death certificate (mandatory)

This is the same as in the number 3.4(b)(i) above dealing with a general situation. The difference is that there must be two persons to apply for the grant. This is because
there is created a trust as a result of the death of the spouse. This trust is known as a continuing trust (See Section 58).

Section 84 deals with continuing trust where there is a life interest.

In applying for Grant of letters of administration intestate the total number of persons to apply is four,(see section 56(1) (b) being grant made in respect of the same property). Nonetheless where an affidavit has to be sworn, it is sworn by any of the four (rule 7(8)).

Grant issued by Court (P & A 41)

3.5. **Resealing**  
(rules 42 (2))

a) Where a foreigner dies abroad but has property in Kenya. A grant is applied in his country. It is then brought to this the High Court of Kenya court for resealing. This means the foreign grant is filed and normal procedure of gazettment takes place.

Where a Kenyan dies abroad, his domicile determines where he should apply for the grant. If he generally resides in Kenya but dies abroad then the grant would apply in Kenya.

The common wealth countries allows application in any of its countries.

b) **Forms**

P & A 81 or P & A 82 (petition)  
P & A 7 (affidavit)

Certified copy of the Grant issued by foreign country.

c) **Procedure**

The grant from the foreign country is filed. The file is minuted, the notice to the Kenya Gazette is issued. If there are no objections then letters are issued. A grant given by the High Court can be used in the foreign courts for resealing. Grant issued by Court (P & A 81)

3.6. **Limited Grant**

a) In order to ensure that an estate does not go to waste or that there is a pending case required to be administered an applicant can apply for Limited Grant. This is actually known by the words:-
Grant of administration ad colligenda bona defuncti.
Under section 67 rule 36.

(Note this is different from rule 14, 5th schedule where grant is limited to filing suit only.  (See below)).

The grants can only be applied for and made all the High Courts of Kenya.

b) **Forms**

   P & A 85 (petition)
   P & A 19 (affidavit)
   Copy of death certificate (where signature endorsed by the applicant is required).

c) **Procedure**

   The deputy registrar after confirming the papers are in order, places the file before the Hon. Judge who gives orders accordingly. The Limited grant is thereafter issued.

   No parties ever appear before the judge. No advertisement is required, although this may be debatable. Grant issued by Court (P & A 47).

   A party must apply for a full grant in order to divide and dispose of the deceased assets.

3.7 **Grant for Special Purposes**

   Grants can be issued for special purposes.

   These grants are as follows:-

   1) Probate Limited to purposes specified
   2) Administrator Pendente lite
   3) Grant of letters de bonis non

3.7.1 **Probate Limited for purposes specified in the will.**

   *Rule 11 of 5th schedule.*
Where the will specifies that the probate shall be for the purposes specified, a grant is issued limited only to that which is specified.

Where a person who wishes to sue on behalf of the estate. That person can be issued with a grant limited to representing the deceased in a suit. See para 14 and 15 of Schedule 5th.

A person not normally entitled to the grant may be appointed whether limited or otherwise. Grant issued by Court (P & A 47A)

3.7.2. **Administration pendente lite**

   **schedule 5 rule 10**

Where parties are disputing over the estate, the estate in the meantime should not be left unadministered.

The courts to ensure the estate is not wasted can appoint any person or general administrator (The Public Trustee) to administer the estate whilst the dispute proceeds. This is known as Administration pendente lite. No division or apportionment of properties is to be done during this time. Forms issued by Court (P & A 90)

3.7.3. **Grant of letters of administration De Bonis non or Probate at rest Schedule 5 r 17, 20 rule 12.**

Where the executor/executrix or administrator/or administratrix dies, then another person can now apply to take over the grant. They would apply for letters of administration de bonis non for purpose of completing the estate.

There is no need for such a person to hold letters of administration for the former administrator or executor.

This is not a substitution under the civil procedure rules but under the Succession act. Forms issued by Court (P & A 86)

4. **Who is entitled to a grant?**

The persons who are entitled to apply for a grant are:-

i) Persons who have been appointed in a will as executors.

ii) Persons who are NOT a minor, of unsound mind or bankrupt.

iii) Any person can apply for a grant but priority is given to spouses, children, parents according to the degree of consanguinity. Not more than 4 people may apply at once.
5. **Objections**  
**Section 68 and 69(1)**

All the grants once applied for must be advertised in the Kenya Gazette. This means that notice is given to the members of public that a grant is being made.

After a lapse of 30 days if no objections are raised, letters can be issued.

If an objection is made within the 30 days of advertisement then, the procedure to use is as follows:-

An objection is filed in triplicate in the court. The objection is entered into a register (for objections) by the Registrar. (rule 17(1)).

The Registrar then sends a notification FORM P & A 61 to the applicants, alternatively he may send a copy of the objection by post (rule 17(4)).

The Registrar will also send FORM 67 to the objector requiring him to file an answer to the petition by way of cross application together with the supporting affidavit. (rule 17(5)).

**Summary**

1. Publication in Kenya gazette of grant

2. Objection filed within 30 days.

3. a) Registrar gives petitioner form 61 notifying him of Objections, and registers in a register for objection (see rule 17 (12))

   b) Registrar gives the objector Form 67 notifying him to file an answer to the petitioner by way of cross application and replying affidavit.

Once all the papers have been filed, it is THE REGISTRAR who refers the matters to court for directions. The directions is done by the judge as to who is entitled to start during the trial.

It is the Registrar who will notify both parties (petitioner and objector) of the Time and place set for hearing of the petition answer and cross application.

Objections may be withdrawn by way of a notice to withdraw.  
P & A 64 rule 17(9).
An objector may amend his objections by lodging amended answer and cross application. A copy is required to be served on the petitioner.

The dispute is determined (see Section 69(2)).

If no objections has been filed the answer and cross-petition the court may proceed as if no objections had been raised (see section 68 and 69,(1) 70 and 71).

6. **Confirmation**

6.1.a) After 6 months has expired, the grant may be confirmed if there is no objection pending.

   (rule 40(1).

b) **Forms**

   i) Where a grant has been issued for a will.

      Form 108 (application)
      Form 8 (affidavit)

   ii) Where a grant have been issued for letters of administration with will annexed.

      Form 108 (application)
      Form 8 (affidavit)

   iii) Where a grant has been issued for letters of administration intestate.

      Form 108 (application)
      Form 9 (affidavit)

   iv) Where confirmation is required within 6 months under S.71(3) of the act.

      Form 109 (Application)
      Form 8 on 9 (affidavit)

or Whichever is applicable

The difference in the forms for letters of administration is that the said forms must disclose the appointment of each survivor who is entitled to the said of estate.
All the list of beneficiary must be disclosed.
See rule 40 (3) (a)(b)(4) of the Probate and Administration Rules.

C) **Procedure**

Once the application has been filed as per above forms respectively, a date is taken in the registry and the applicant appears before the Hon. Judge.

Form 37, consent to the confirmation of grant may be filed in certain cases. This form would dispense with the attendance of all parties who are entitled to the estate.

The Hon. Judge being satisfied with the application would duly confirm the grant.

6.2 **Protest rule 15, Rule 40**

If a person wants to be informed when a grant is to be confirmed, he should file a caveat (see rule 15 (1) . FORM P & A 28.)

This would then be recorded in a book/register. On the day the matter comes up for confirmation of the grant then the Registrar at once notifies the applicant (Form P & A 111) warning him of the making of the caveat. He then asks the applicant to file Form 10 if he wishes to object to the confirming of the grant.

If Form 10 is not filed, the grant is confirmed on receiving P & A 37 - consent of all parties.

If form P & A 10 is filed, then the court would order directions to be taken in chambers on notice FORM 74 to the applicant.

In a magistrates court, the direction would be to place the matter before the High Court to determine on its behalf. At the time of hearing the application for confirmation would be read to the parties. The protest would also be read to the parties.

If satisfied, the grant may be confirmed. If not the High Court would hear the full evidence of the parties.

7. **REVOCATION**

Section 76 r 44

a) After a grant has been confirmed, no objections to it may be filed or protest. The parties have only one option and that is to seek revocation of the said grant (See exceptions below).

b) **Forms**

P & A 107 (Application)
c) **Procedure**

i) An applicant would file form P & A 107 and P & A 14 in the High Court, in the Succession case itself. Where the file is in the subordinate court a miscellaneous application is filed; but a succession file would actually be opened in the High Court.

Immediately on receipt of this application the registrar issues Form P & A 70 to the applicant (seeking the revocation) which notifies him of when he would attend to the judge. This is done ex part.

Once the date is given, the applicant appears before the judge (ex parte) for directions. The judge would then direct which persons should be served with the application (Form 107,14). The persons would normally be those who may be effected by the revocation.

The Hon. Judge must also state the mode of service ie personal service or service other than personal including the manner of effecting such service.

The applicant is to then serve, on the persons named, Form 107,14 and a notice under Form 68.

Each person so served may file an affidavit stating whether they supports or opposes the application and the grounds for so doing.

Once all the affidavit have been filed the Registrar would give notice to all concerned to appear before the High Court for hearing.

The court may either proceed to determine the application or make such orders as it deem fit.

ii) **Courts Own motion**

The court may also of its own motion revoke a grant (See rule 44(5)).

Where it does so, it must give a notice in Form 69 and serve on persons concerned.

The reasons as to why there should be revocation is outlined in Section 76 namely:

a) Proceeding obtained were defective in substance.
b) Grant obtained fraudulently.

c) Grant obtained by means of untrue allegation of fact.

d) Person whom grant was made has failed to apply for confirmation of grant within 1 year; or to proceed diligently with the administration; Or has failed to produce the inventory or accounts of the administration; of grant as required under S.38(e) (g).

7. **CITATIONS**

   **Rule 21,22 and 23**

   a) What happens if the person entitled to apply for the grant fails to do so?

      Any applicant may apply for the grant. He does this by drawing a citation signed by the registrar and supported by an affidavit.

   b) **Forms**

      i) Where there is a will - P & A 31
      ii) Where there is no will - P & A 32
      iii) Creditors  P & A 36.

   c) **Procedure**

      Service of the citation is done on the citor. The method of service is as directed by the registrar.

      It requires that the person cited to appear within 15 days of service. The citor is to be served with a copy of the form with the seal.

      If the time given to the citee to appear has expired and the persons cited has not entered appearance the citor may petition the court that the grant be made to herself. Alternatively summons to be taken out or notices to persons cited be made or orders requiring such persons to take out the grant or the grant be taken out by others.

      Proof of service is required. Once this has been granted, letters of administration is applied in the normal way.

   d) **Purchaser**

      A good example of a citation is that of a purchaser.
The public trustee has prior rights to the estate over a creditor. The creditors/purchaser has to ask the consent of the Public Trustee to apply for the letters. If granted, a purchaser or creditor may prove that the estate owes him money by attaching a sale agreement. He can apply for letters of administration by way of first serving citations to all the beneficiaries where none are willing to take out letters of administration.

9. **DEATH CERTIFICATE**

In each application for letters of grant, there must be a death certificate.

The consolidated practise rules undated issued by the Law Society from the courts to them states:

> “F. 1. .........................

2. **Death certificate**

   A death certificate must accompany any application for probate or letters of administration.

   a) If the application is not made by an advocate and

   b) If the death took place outside Kenya”.

(Section 118 presumption of death must be made formally in the civil courts for the registrar of death to issue certificate.)

10. **RENOUNCIATION**  

    (rule 18)

    All the survivors must be notified of the probate.

    Whether the estate is intestate or testate, the survivor may wish to renounce the estate.

   b) **Forms**

    Forms 98 to 102

   c) **Procedure**

    Once a renunciation has been filed the person having so renounced is NOT permitted to retract.

    An executor is allowed to renounce his rights to administer the estate.
11. **RECTIFICATION OF GRANT**

Rule 14(1)

(1) On application for a grant and before a grant is issued rule 14(1) to apply.

**Procedure**

Notice under P & A 62 (no affidavit required) is filed in the Original application file.

Where there are objectors, notice to be served on objector.

Where there are none or the amendment is minor, Registrar may permit the amendment without notice to any party.

(2) Where a grant has been issued with or without a confirmed grant. Section 74 and rule 43 apply.

**Procedure**

The applicant is to file Form P & A 110 for summons for rectification of grant together with an affidavit or Form P & A 13 (unless exempted by the Registrar).

The application is placed before the court without delay. The court makes orders as to the rectification of grant. However, the court may direct that a notice to the parties including the applicant be issued that they attend before the court on the said application.

The procedure in both cases i.e. whether under rules 14(1) are administratively in the first instance.

12. **APPEALS**

There lies an appeal from the Lower court to the High court. This is filed in the same manner as in normal appeals.

**Section 50**

“An appeal shall be to the High court in respect of any order of decree made by a magistrate in respect of any estate and the decision of the High Court Orders shall be final.”

Only a Muslim’s estate can be appealed to the Court of Appeal on a point of law. This may be done with leave of the court. (See section 50 LN 21/90)
13. **PUBLIC TRUSTEE**

   Situation arises where there is no one to administered the estate of the deceased. Such estates are taken over by the department of the Public Trustee. They then apply for a grant on expiring of such notice in the Kenya gazette. Namely, after an estate has remained unadministered for six months the public trustee has a right to take over the said estate.

   The public trustee is exempted from having two administrator where there is a continuing trust under section 58. Namely, where minors are involved two administrators are not required.

   In applying for a grant the Public Trustee is to follow the same procedure as prescribed in the act for other litigants.

14. **TRUST COMPANIES ARE PROVIDED FOR**

   Thank You.

   *PUISNE JUDGE*
   
   High court of Kenya