



# LEGAL ALERT

## CUSTODIANS OF YOUR LEGACY: WHAT TO KNOW BEFORE APPOINTING AN EXECUTOR UNDER KENYAN LAW

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While drafting a will, central to a person's mind is the question 'Who will ensure my property is disposed of according to my wishes? This is where executors come in, the custodians of your legacy. Appointing the right executor is not just a legal formality, it is the foundation of ensuring your estate is managed smoothly, debts are settled, and beneficiaries receive what is due to them without unnecessary delays or disputes.

An executor is a personal representative of a deceased estate and who is appointed in a will as is stipulated under section 6 of the Law of succession act (LSA). Executors have the power to dispose of the property according to the testator's wishes and intentions.

### WHO MAY BE APPOINTED AS AN EXECUTOR

While a testator may appoint **as many executors** as they wish in a will, the law imposes **specific legal qualifications and procedural limits** on who may actually serve in that role. Under **Section 56 of the Law of Succession Act (Cap. 160)**, only **adults of sound mind** who are **not bankrupt** are eligible to apply for a **grant of representation** and thus act as executors or administrators of an estate. Importantly, a body corporate is disqualified from serving as an executor unless it is either the **Public Trustee** or a registered trust corporation. The courts have consistently upheld these restrictions to ensure that executors are capable of discharging their fiduciary duties effectively. For example, in *Re Estate of Jane Wanjiru Muthee* [2014] eKLR, the court removed an administrator who had developed a mental incapacity and was no longer competent to act. Additionally, while multiple executors can be named in a will, **Rule 25(b) of the Probate and Administration Rules** limits the number of individuals who may be granted representation to **a maximum of four**. This procedural cap was affirmed in *Re Estate of Late Sheldon Oyaro Mukhaye* [2012] eKLR, where the court applied the rule to restrict the number of executors receiving a grant.

### WHAT HAPPENS IF YOU FAIL TO APPOINT AN EXECUTOR?

Appointing an executor does not determine the validity of a will. Where a testator fails to appoint an executor, the court has discretion under **Section 66 of the Law of Succession Act** to appoint an administrator to manage and distribute the estate. This section provides a hierarchy of priority starting with the surviving spouse, followed by children, parents, siblings, and then more distant relatives. However, as the courts have repeatedly held, this order is not mandatory. In *Re Estate of Margaret Muringi Muhoro (Deceased)* and *Re Estate George Ragui Karanja (Deceased)* [2016] eKLR, the courts emphasized that the list is a guide rather than a strict rule. The court retains discretion to



appoint any suitable person in the best interests of all concerned. This position was reaffirmed in ***Re Estate of Gamaliel Otieno Onyiego (Deceased) [2018] eKLR***, where the court underscored that Section 66 gives priority as guidance, but ultimate discretion lies with the court. It is therefore advisable to appoint an executor(s) to avoid the decision being left to the court and his avoids delays, potential disputes among beneficiaries, and the risk of the court selecting administrators who may not align with the deceased's wishes.

## EXECUTORS AS CUSTODIANS: DUTIES, POWERS, AND LIMITS

An executor's duties do not wait for the ink on the grant of probate to dry, they begin from the very date of the testator's death. The grant merely acts as confirmation of their powers. This concept, known as the **"principle of relation back"** under **Section 80 of the Law of Succession Act**, means that any intermediate acts carried out from the date of a testator's death are in valid .

This principle was underscored in ***Re Estate of Fanice Mary Khanali Aura (Deceased) [2019] eKLR***, where Justice Musyoka (as then was) stated that where the court held that an executor's authority flows directly from the will and is not contingent on a formal grant.

Courts have also clarified the scope of an executor's authority before a grant of probate is issued. In ***Re Estate of Lawrence Nginyo Kariuki (Deceased) [2021] KECA***, the Court of Appeal held that an executor's powers arise from the will itself and take effect from the moment of the testator's death not from the date of the grant, unless the will is being contested. The Court found that actions such as collecting rent and preserving estate assets do not amount to intermeddling, provided they are done in good faith and within the bounds of the executor's duty.

As custodians of a deceased estate, executors wear many hats from being protectors and managers to being a distributors of the estate. Their duties and powers as set out under section 82 and 83 of the LSA include, power to represent the deceased estate in suits, duty to pay reasonable deceased burial expenses, duty to collect deceased pool of assets including debts, cover costs of obtaining grants, and within 6 months after receipt of grant provide a complete and accurate inventory of the estates assets as provided under section 83 of the LSA.

In ***Re Estate of Estate of Daudi Owino Olak (Deceased) [2022] eKLR***, the court held that the executors of the estate owed a fiduciary duty to the beneficiaries of the estate of the deceased and reiterated that they are required to produce to court accounts within 6 months of issuance of grant. This duty obliges executors to act in **utmost good faith**, with **loyalty, diligence, and transparency**, and in the **best interests of the estate and its beneficiaries**. It encompasses responsibilities such as collecting and preserving the estate's assets, settling debts and liabilities, and distributing the estate strictly in accordance with the terms of the will and the law. Further , as was reiterated in ***Re Estate of Julius Mimano (Deceased) [2019] eKLR***, executors have an additional duty to represent the deceased in suits involving the deceased property. However, in an aim to protect a deceased estate, the executors duties are limited to ensuring that they distribute the testators estate as per the will, they are however prohibited from sell immovableproperty before confirmation of the grant and if they buy from the estate they may challenged by the beneficiaries. See ***Isaac Gakua Mwangi v Chief Executive Officer Women Enterprise Fund [2018] eKLR***

In ***Rupal Shah & another v Ramesh Bhagwani Shah (2015) eKLR*** the court removed an executor from administering the estate on grounds that his laying claim against the estate created conflict of interest as he seemed to advance his personal interest against the estate.



## REMOVAL OF EXECUTORS

The law provides for the removal or substitution of executors where their conduct or circumstances make them unsuitable to continue administering the estate. Under **Section 76 of the Law of Succession Act**, a grant of representation may be revoked or annulled on various grounds, including where:

- The executor has failed, after due notice and without reasonable cause, to apply for confirmation of the grant within the required period;
- The executor has failed to proceed diligently with the administration of the estate;
- The executor has failed to produce accounts or otherwise comply with court directions;
- The executor has become incapable of acting due to illness, mental incapacity, or imprisonment;
- The grant was obtained through concealment of material facts or fraudulent means.

Courts have not hesitated to revoke grants and remove executors who breach their obligations. In **Re Estate of Jane Wanjiru Muthee [2014] eKLR**, the court replaced an administrator who had developed a mental condition, while in **Re Estate of Daudi Owino Olak [2022] eKLR**, the court emphasized the executor's duty to account as a key standard by which their continued suitability is assessed.

In conclusion, an executor's role in the distribution of an estate cannot be overlooked. They are the true custodians of a deceased legacy tasked with the responsibility of ensuring an effective succession planning.

Should you have any questions on this legal alert, please do not hesitate to contact us,



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