

**FLORENCE MWANAMWALE BILLINGSLEY v THE ESTATE OF THE LATE DR.
JOHN WESLEY BILLINGSLEY (1990 - 1992) Z.R. 120 (H.C.)**

HIGH COURT
W.M. MUZYAMBA, J.
8TH OCTOBER, 1991
(HP/1563 OF 1991)

Flynote

Succession - Grant *ad colligenda bona* - When issued.

Headnote

A grant *ad colligenda bona* is meant to preserve a deceased's estate and may be granted before a full grant is made. Either a person entitled to a full grant or a total stranger who is concerned with the estate may apply to the Court for a grant *ad colligenda bona*. A grant *ad colligenda bona* cannot be issued to an individual where any life or minority interest arises in an estate. In those situations an application should be made for the appointment of two or more individuals or a trust corporation with or without an individual.

For the plaintiff: S. B. Nkonde, Jacques and Partners.

Judgment

W. M. MUZYAMBA, J.:

This is an application by the plaintiff for a grant (*ad colligenda bona*). The application is supported by an affidavit of the plaintiff sworn on 2nd September, 1991. Paragraphs 5-11 of the said affidavit read as follows:

- "5. That I have had letters of administration granted to the Administrator-General on the 30th day of April, 1986 and numbered 54/86 revoked by the judgment of the Court in the case of Florence Mwanamwale Billingsley and the Administrator-General and Reverend Ernest Gerald Billingsley 1990/HP/442 dated the 15th day of July 1990 by Commissioner Florence Lengalenga.
6. That I have consequently through my advocates proceeded to try and obtain letters of administration in my favour.
7. That, however, it is taking time to get the same while the estate has no particular administration in the meantime.
8. That I am particularly worried of the following properties:
 - (i) Stand 46/737a Emmasdale Lusaka 16 semi-detached houses and one block of four bedsitters.
 - (ii) Stand 24/737a Emmansdale Lusaka comprising 13 terraced houses, nine blocks of bedsitters and two semi-detached houses.
 - (iii) Stand 65/441a Roma a dwelling house.
 - (iv) Stand 231 Kamwala Lusaka a commercial property, divided into two shop premises.
9. That these properties are quickly degenerating because of disuse; the tenants refuse to pay rent or sign leases, contending that they can only do so with a legally appointed

adminstrator.

10. That some tenants even change occupation at will and it has been difficut to check them with legal force.
11. That the expediency of the matter to try and preserve the estate therefore compels me as a person legally entitled to a Grant to apply for a grant limited to the collecting and getting in and receiving the estate and doing such acts as

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may be necessary for the preservation of the same till a further representation be granted."

The Court examined the proceedings in case No.1990/HP/442 referred to in para.5 above. The affidavit in support of those proceedings was sworn by the plaintiff herein and para. 4 to 16 of the said affidavit read as follows:

- "4. That I am the plaintiff herein and depose to the facts in this affidavit from my knowledge.
5. That I am the widow of the late Doctor John Wesley Billingsley (hereinafter called 'the deceased') who died on 30th November, 1985 in Lusaka, Zambia.
6. That the deceased died intestate.
7. That the deceased left three minor children (hereinater called 'the three children') namely:
 - (i) John Mao Tse Tung Billingsley, a boy born in Zambia on 25th April, 1975.
 - (ii) Rose Billingsley, a girl born in Zambia on 15th February, 1977.
 - (iii) Alice Elizabeth Billingsley, a girl born on 15th April, 1981.
8. That I am the natural mother of the three children referred to para 7 hereof.
9. That following the death of the deceased on 30th November, 1985 first defendant, by virtue of his office, obtained letters of administration numbered 64/86 30th April, 1986.
10. That the first defendant has since been the adminstrator of the estate of the deceased.
11. That in September 1981, the deceased took John Mao Tse Tung Billingsley and Rose Billingsley to Racine, Wisconsin, United States of America, for the purposes of education. Alice Elizabeth Billingsley was taken to Racine, Wisconsin, United States of America in late 1983.
12. That by judgment dated 23rd January 1987 the subordinate Court of the First Class for the Lusaka District re-affirmed that the custody of the three children of the family is vested in the plaintiff. This was decided in case No. 1986/MO/4.
13. That by a judgment of the Circuit Court, Family Court Branch, Racine County, State of Wisconsin, United States of America, dated 5th April, 1988, that Court decided that the guardianship of the three children be given to one Florence Billingsley.
14. That as widow of a deceased who died intestate I am a beneficiary in law.
15. That I am unhappy with the estate of the deceased being handled in the following manner:
 - (i) The first defendant has persistently charged low rentals for flats in Emmasdale, Lusaka, left by the deceased, despite my objections. A two bedroomed flat is rented at K250.00, a figure I consider extremely low for Lusaka.
 - (ii) The first defendant has allowed a Doctor E. Mkumba to occupy house on

Plot No. 380 A/O Roma Township, Lusaka, since the death of the deceased without payment of rent.

(iii) The first defendant has not supervised the activities at Central African Chemical Industries Limited and gives lack of personnel as the reason. This has resulted in those managing the company to accumulate a lot of wealth in a short time to the detriment of beneficiaries.

(iv) The first defendant has endeavoured to sell the flats in Emmasdale to Finance Bank Zambia Limited without my consent and to my detriment and of the children.

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16. That because of the incidences in para. 15 above there is now mistrust and lack of confidence in the first defendant."

It is quite clear from the affidavits that the deceased, or John Wesley Billingsley, died intestate leaving a widow, the plaintiff herein, and three children, all of whom are still minors and various real property.

It is also quite clear that the Administrator-General for Zambia was on 30th April, 1985 appointed administrator of the estate of the deceased and that the grant of letters of administration was revoked by the Court on 25th July, 1990 at the instance of the plaintiff.

Section 11 ss (3) of the High Court Act, Cap. 50 provides:

"11(3) The jurisdiction of the Court in probate cases and matters shall, subject to this Act and any rules of the Court, be exercised in substantial conformity with the law and practice in force in England on 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911)."

What is the law on the matter in England up to 17th August, 1911? I have read various English statutes and books and it would appear to me that the application is brought under s. 78 of the Court Probate Act, 1857. The practice and procedure is found in Tristram and Coote's *Probate Practice*, 24 ed. At page 394 it is stated:

"When the estate of a deceased person may be endangered by delay in administering it, the Court is not bound to wait for an application by the person entitled to a grant under the rules, but may grant letters of administration *ad colligenda bona* for the purpose of preserving the property."

Such grants are always of administration only; where the deceased died testate, the will is not proved or annexed to the grant.

The grant is made under the Court's general powers, and is not expressed to be by virtue of any specific statutory provision.

Where any life or minority interest arises in the estate of the deceased, whether under his will or on intestacy, administration *ad colligenda bona* cannot be granted to a sole individual and application should be made for the appointment of two or more individuals or a trust corporation with or without an individual.'

At page 369 of the same book it is said:

"A grant *ad colligenda bona* may be made not only to a person whom the Court considers suitable, but also to the persons who are entitled to a full grant but in the interests of the estate cannot wait or to entire strangers who have been brought into connection with the matter."

It is quite clear from the above quotation that a print *ad colligenda bona* is meant to preserve a deceased's estate and may be granted before a full grant is made and that either a person entitled to full grant or a total stranger who is concerned with the estate may apply to Court for a grant *ad colligenda bona*.

It is also quite clear that a grant *ad colligenda bona* cannot be issued to an individual where any life or minority interest arises in an estate.

In this case a full grant was made to the Administrator-General but later revoked at the instance of the plaintiff who is no doubt entitled to a full grant. Since the revocation of the full grant appears to have done nothing

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positive to obtain a full grant. Having caused the revocation of a full grant she cannot now be heard to complain that the estate is deteriorating due to lack of administration and in my considered view a grant *ad colligenda bona* cannot issue after a full grant has been revoked, to an applicant who caused a revocation of the full grant.

Further, in this case there is both life and minority interests. The life interest being the surviving spouse, the applicant herself and the three minor children represent the minority interest. As such there should have been a joint application. The situation would of course be different if there was only life interest and the surviving spouse was the applicant. For these two reasons I would refuse the application.

In case I am wrong in my reasoning I have to consider the effect of s. 35 of the Estate Duty Act Cap. 660.

Subsections (1) and (2) thereof provide:

- "35(1) No grant of representation to the deceased shall be made unless a certificate of the Commissioners is produced to the effect that the person applying for such grant of representation has made and delivered to the Commissioners a proper estate duty affidavit as to the estate of the deceased, or that the Commissioners permit the grant to be made.
- (2) The Commissioners may, if they think fit, refuse to give such a certificate until the estate duty has been paid or security for the payment thereof has been given to the satisfaction of the Commissioners."

In s.2 of the Act, the word 'representation' is defined as probate, letters of administration, confirmation or other instrument appointing a person the executor, administrator, or other representative of the deceased or to administer any of his assets.

In English law a similar provision is found in s.38 of the Stamp Act 1815 which provides that a grant of representation will not issue unless the applicant has first filed an affidavit as to the total value of the deceased's estate so that duty may be paid thereon.

It is quite clear therefore, both in our law and the English law, that no grant of representation can issue unless an estate duty affidavit is filed, in our case with the estate duty Commissioners, and a certificate issued by them to that effect. At page 165 of Rees's *Probate Handbook*, 3rd ed., it is stated that in case of an application for a grant *ad colligenda bona* no declaration of estate or jurisdiction of sureties to the bond is required. The author makes a distinction between a declaration and an affidavit. I find, therefore, that the English practice, just like ours, requires that an affidavit of estate duty be submitted before any grant is made. The applicant in this case has not complied with s. 35 of the Estate Duty Act. The application would therefore also fall on this ground.

The net result is that the application is refused. In passing off I would like to say that in my view the estate should not have been made a defendant for the obvious reason that it cannot without an administrator defend itself. The action should therefore have been titled.

Application refused.
