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| RESEARCH ARTICLE

Probate and Administration of Estate in Cameroon: An Appraisal of the Common Law Approach

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| ABSTRACT

The legal system of Cameroon is a relic of colonial era. However, it is unique in that it consists of two distinct and often conflicting systems which are the English Common Law and the French Civil Law operating in parallel. This makes Cameroon one of the few examples of such dual legal system in the world. With the exceptions of customary law and areas where harmonization has been possible, the Cameroonian legal system can be described as bi-jural in which French laws apply in the eight French-speaking regions and English law substantially applies in the two English -speaking regions. This paper appraises the structure of succession law and probate practice as applicable in the Common law jurisdictions in Cameroon. The paper notes that death is inevitable and the inevitable happens unplanned sometimes. So, the questions this paper seeks to answer are, what happens to the estate of a person who died intestate? How is such an estate distributed among the deceased's desired beneficiaries? Is there a law guiding the distribution of the estate of a deceased who died intestate? For a person who died testate, what is the process to ensuring that his/her wish stated in the will are fulfilled? What will happen to the estate of a testator who was domiciled outside Cameroon at the time of his death? In carrying out this research, the researcher employed the qualitative research methodology and findings reveals that there are conflicting views on the applicable procedural rules in probate matters in the English- Speaking Regions of Cameroon. The paper concludes that irrespective of how the testator died, there are available laws guiding the management of the deceased estate.

| KEYWORDS

Administrator, Executor, Executrix, Probate, Letters of Administration, Wills, Testate, Intestate

| ARTICLE INFORMATION

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1. Introduction

Black's law Dictionary has defined probate practice as the judicial procedure by which a testamentary document is established to be a valid will.[1]This definition is, however, a little bit restrictive in that, probate practice can broadly be defined as the procedure for granting and revocation of probate and letters of administration both in contested and uncontested cases. Death is an inevitable occurrence and is therefore a necessary end which will come whenever it will come. In majority of cases, making of wills is anathema and abhorred. Intestacy is therefore the norm.[2] Consequently, at death, whether the deceased died leaving a will or not, probate is required for the administration of the estate of the deceased.

[1] Bryan A. Garner (ed.) black's Law Dictionary, 8th Edition. U.S.A;2004,P.1239.
[2]Karibi- Whyte, "Customary Law Succession and will's Law 1992

Until probate is granted, the executor or administrator/administratrix that interferes with the estate of the deceased is an intermeddler or an "executor de son tort" (i.e. executor of his own wrong). Where a person named as an executor in the will of a deceased takes possession and administers or otherwise deals with any part of the property of the deceased and does not apply for probate within fourteen days after the death of the deceased, he may be deemed guilty of contempt of court and shall be liable to such fine, not exceeding fifty pounds as the court, having regards to the condition of such person so in default and the other circumstances of the case, thinks fit to impose.[3]

An executor *de son tort* is someone who, without lawful authority, acts as personal representative of a deceased person. There is a long line of authorities on the question of whether someone is an executor *de son tort* at common law.[4] The position is now governed by Section 28 of the Administration of Estate Act 1925 which provides:

1. If any person, to the defrauding of creditors or without full valuable consideration, obtains, receives or holds any real or personal estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the real and personal estate received or coming to his hands, or the debt or liability released, after deducting—
   a. any debt for valuable consideration and without fraud due to him from the deceased person at the time of his death; and
   b. any payment made by him which might properly be made by a personal representative.

The issue for determination is whether section 28 of the Administration of Estate Act 1925 applies in any given case. The requirements in the section of either defrauding creditors or getting property without full and valuable consideration protects those who, after a death, do acts of kindness, such as safeguarding the deceased's property or arranging the burial. To incur liability under section 28, there must be a negative meddling in the administration. Concealing the death of the deceased from a beneficiary with the intention to receiving or retaining property may amount to acting as an executor *de son tort*.[5]

The grant of probate is a condition precedent to the administration of a deceased person's estate. It is the authority that validates the powers and functions of an Executor to the estate of a deceased, without prejudice to the fact that the authority of an executor to act is derived from the will. The probate grant gives the executor the moral and legal authority to continue to act in that capacity. The executor is not expected to perform the functions of an executor without the grant of probate.

An administrator in probate is a person appointed by the court to administer the estate of the deceased person who left no will and such a person is charged with settling the deceased debt, pay any necessary taxes, take care of the funeral expenses, take care of the beneficiaries to the estate and the distribution of the remainder of the estate according to procedure set down at law.[6]An administrator, however, derives powers to act from the letters of administration and where there is no grant, he cannot act as an administrator.[7]By implication, the grant of letters of administration is the source of an administrator's authority. Thus, while probate confirms the authority of the executor, the letters of administration confer authority on an administrator.

2. Custody of Wills

After the death of a deceased person and the burial ceremonies are over, it is only natural for the relatives of the deceased person to begin the search for his will. Under normal circumstances, a person may in his life time deposit

[3] See Order 48 Supreme Court Civil Procedure Rules Cap 211 of the 1948 Laws of the Federation of Nigeria); Rule 6(2) of the Non -Contentious probate Rules 1987 provides that except with leave of a Registrar (Probate Registrar), no grant of probate or administration with will annexed shall issue within seven days of the death of the deceased and no grant of administration shall issue within fourteen days thereof. Despite the above, there is also no definitive time when the probate process must be started after death.

[4]A good starting point is *Stokes v. Porter* (1558) 2 Dyer 166(b)

[5]*Kay v. Tibbs* [2007] All ER (D) 31

[6]*Tondjo Indah Deborah (administrator of the Estate of Yato Tendjo Micheal v. Ngakui Konissi Martial,* Suit No HCF/017/OS/2012 Unreported. Delivered on the 10th day of December 2012.

[7]*Arije v. Arije* (2010) LPELR -4566 (CA)

the original copy of his will at the probate registry of the High Court of the Division where he resided.[8] Where the relatives of the deceased person are not aware whether the testator left a will or not, they may in writing to the probate registrar demand whether the deceased left a will at the registry.[9] The letter should state the following:

(a) The full names (and any former names) of the deceased;
(b) his last address; and
(c) date of death, supported with a death certificate issued by a government hospital where the deceased died.

Apart from the provisions of Sections 23 and 25 of the Administration of Justice Act 1982 that sets out the procedure to deposit and to withdraw wills deposited at the Probate Registry, the Supreme Court Civil Procedure Rules Cap 211[10]and the Supreme Court Act 1981[11]also provide the procedure to be followed in the deposit and search of a will. Order 48 Rule 4 provides that any person having in his possession or under his control any paper or writing of any person deceased, being or purporting to be testamentary, shall forth with deliver the original to the probate registrar of the court.[12] Any person who fails to do so for fourteen days after having had knowledge of the death of the deceased shall be liable to such fine as the court thinks fit to impose.[13] Where it appears that any paper of the deceased, being or purporting to be testamentary, is in the possession of, or under the control of any person, the court may in a summary way, whether a suit or proceedings in respect of probate or administration is pending or not, order him to produce the paper and bring it into court.[14] Order 48 Rule 5 of the Supreme Court Civil Procedure Rules Cap 211 imposes a duty on the Probate Registrar on receiving an application to ensure that the will is placed under safe custody.

This duty imposed on the Probate Registrar by the Supreme Court Civil Procedure Rules Cap 211 of the 1948 laws of the Federation of Nigeria is equally imposed on the Probate Registrar by Rule 6 of the Non-Contentious Probate Rules 1987 and Sections 122 and 123 of the Supreme Court Act 1981 which are all applicable rules in probate matters. Rule 6 of the Non-contentious Probate Rules 1987 provides:

> "(1) A registrar shall not allow any grant to issue until all inquiries which he may see fit to make have been answered to his satisfaction.
> 2) Except with leave of a registrar, no grant of probate or of administration with will annexed shall issue within seven days of the death of the deceased and no grant of administration shall issue within fourteen days thereof.

[8] See Section 23 and 25 of the Administration of Justice Act 1982. While Section 23 empowers the Probate Registrar with the authority to provide and maintained safe and convenient depositories for the custody of the wills of living persons, Section 25 provides the condition for the deposit of the will and the manner of and procedure for the withdrawal of the deposited will.

[9] See Section 23 and 25 of the Administration of Justice Act 1982. While Section 23 empowers the Probate Registrar with the authority to provide and maintained safe and convenient depositories for the custody of the wills of living persons, Section 25 provides the condition for the deposit of the will and the manner of and procedure for the withdrawal of the deposited will.

[10] Order 48 Rule 4

[11] See Sections 124, 125 and 126 of the Supreme Court Act 1981. Section 124 provides: All original wills and other documents which are under the control of the High court in the principal registry or in any district probate registry shall be deposited and preserved in a place as the Lord Chancellor may direct; and any wills or other documents so deposited shall, subject to the control of the High Court and to probate rules, be open to inspection. Section 125 provides: any office copy, or a sealed and certified copy, of any will or part of a will open to inspection under Section 124 or any grant may, on payment of the prescribed fee, be obtained (a) from the registry in which in accordance with section 124 the will or documents relating to the grant are preserved. Section 126 on its part provides that (1) There shall be provided, under the control and direction of the High Court, safe and convenient depositories for the custody of the will of living persons; and any person may deposit his will in such a depository on payment of the prescribed fee and subject to such conditions as may be prescribed by regulations made by the president of the family Division with the concurrence of the Lord Chancellor.

[12] See equally Section 122 of the Supreme Court Act 1987 and Rule 50(2) of the Non-Contentious Probate Rule 1987.

[13] Section 123 of the Supreme Court Act 1981 mandates the court to issue a subpoena against any person in keeping of the will of a deceased person to deposit same at the probate registry. As per Rule 50(2) of the Non-Contentious Probate Rule 1987, if any person served with the subpoena denies that the will is in his possession or control, he may file an affidavit to that effect in the registry from which the subpoena is issued. Failure to file the affidavit or attend to the subpoena the person may be cited for contempt of court.

[14]See order 48 rule 5 of the Supreme Court Civil Procedure Code and Section 123 of the Supreme Court Act 1981 as read with Rule 50(2) of the Non-Contentious probate Rules 1987

Section 122 of the Supreme Court Act 1981 on its part provides:

(1) Where it appears that there are reasonable grounds for believing that any person has knowledge of any document which is or purports to be a testamentary document, the High Court may, whether or not any legal proceedings are pending, order him to attend for the purpose of being examined in open court.
(2) The court may-
    a. Require any person who is before it in compliance with an order under section (1) to answer any question relating to the document concerned; and
    b. If appropriate, order him to bring in the document in such manner as the court may direct.
3) Any person who, having been required by the court to do so under this section, fails to attend for examination, answer any question or bring any document shall be guilty of contempt of court.

Section 123 of the Supreme Court Act 1981 on its part provides that:

> "Where it appears that any person has in his possession, custody or power any document which is or purports to be a testamentary document, the High Court may, whether or not any legal proceedings are pending, issue a subpoena requiring him to bring in the document in such manner as the court may in the subpoena direct."

It is submitted that the restriction not to grant probate within fourteen days from the date of death of the testator is to give ample time to any person having in his possession or under his control any paper or writing of any person deceased, being or purporting to be testamentary to deliver the original to the probate registrar of the court for safe custody and for any other directives as the court may think fit to make. Further, as per Rule 6 of the Non-Contentious Probate Rules 1987, after the passing away, the executors of the estate or administrator(s) of the estate must complete certain tasks within a specific number of days before letters can be granted. Except otherwise with leave of court, the applicants for grant of probate are barred by statutes from obtaining grant within fourteen days of the death of deceased (intestate succession)

Where the will is discovered either at the probate registry or a person in possession has delivered it to the probate registrar, a date will be fixed for the opening and reading of the will and all the interested relatives of the deceased will be invited to appear at the probate registry on the said date. At times, where the will is in the custody of the deceased's solicitor, he may invite interested family members to a named place for the purpose of opening and reading of the will.[15]

As per section 1(2) and (3) of the Administration of Estate Act 1925 the devolution of real and personal estate of a deceased person is on the personal representative. The personal representatives of the deceased are deemed in law his heirs and assigns within the meaning of all trust and powers. The personal representatives are the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate. In this regard, the personal representative (executor) appointed in the will to administer the estate is authorized to read the will. The executor has a number of important duties to carry out. One of these duties is to contact the beneficiaries to notify them of:

- The deceased's death
- The appointment of the executor
- What they are entitled to inherit (this entails reading the will to the beneficiaries.

From the above, it is noted that the executor appointed in the will and at his behest, the probate registrar or the solicitor who drafted the will are entitled to read out the will before probate is granted. Apart from the persons listed above, any person or institution storing the will is not under any duty to show or to release the will to strangers. In other words, the person or institution must act with caution not to release the will to a wrong

[15] The named place may be his chambers, the deceased residence or any other convenient place.

person.[16]There are instances where the deceased leaves behind a will but failed in the will to appoint an executor, in such a case, any interested party can apply for the will to be read and may take steps to ensure that the will is admitted to probate. At this point the court can, while granting to probate, appoint an executor to execute the will. In the case where the appointed executor is reluctant to perform his duties, he may under Rule 47 of the Non-Contentious Probate Rules 1987 be cited by the probate registrar. The citation is aimed at calling on him to accept or denounce to serve as an executor of the deceased estate.[17]Any interested party[18] may institute the action for the executor to be cited either to take grant or to denounce the grant.

3. International/Foreign Wills

The form of an international will is regulated by the Convention of International Wills concluded at Washington on the 26th of October 1973. The Convention provides a uniform law on the form of an international will and as per section 27 of the Administration of Justice Act 1982, the Convention on International Wills has the force of law in the United Kingdom. The question for determination here is, should the convention though not ratified by Cameroon be applicable to Cameroon irrespective of the fact that Cameroon is a sovereign state with absolute power over its own laws and liberties? Or on the strength of Section 15 of the Southern Cameroons High Court Law 1955, the convention should be applicable in Cameroon by dint of the fact that it is the law as applicable in England for the time being? It is argued that applying this unratified convention (treaty) by Cameroon will amount to a violation of the territorial integrity of Cameroon and a breach of all existing rules on the ratification and application of a convention by/on a non-party to the convention.

The above argument is predicated on the fact that international conventions are treaties signed between two or more nations that act as an international agreement. A treaty is a binding agreement between nation- states that forms the basis for international law. Authority for the enforcement of these treaties is provided by each signing party's adherence to the treaty.[19] Conventions generally have built in mechanisms to ensure compliance, such as procedures for inspections. These treaties also include methods to enforce noncompliance, such as economic sanctions.[20]

Despite the above analysis, Section 28 of the Administration of Justice Act 1982 sets out the procedures for admitting a foreign will to probate. It prescribes that an international will certified by a solicitor or a notary public may be deposited with the probate registrar for necessary probate procedure for the grant of probate. It is submitted that the intention of the law makers with regard to international will is to ensure the security of the properties acquired by a deceased person in foreign jurisdictions not covered by the laws of the place where the deceased resided before death. As per Section 28 of the Administration of Justice Act 1982 which must be read in conjunction with Section 23 of same, if the international will which is certified in Cameroon by either a solicitor or notary public records properties which are within the jurisdiction of any of the probate registrars in the English-Speaking Regions of Cameroon, probate may be granted with regards to such properties. The procedure to obtain grant must be the same as those for the grant of local wills.

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[16] See Rule 58 and 59 of the Non-Contentious Probate Rules 1987 as read with section 124 of the Supreme Court Act 1981. Rule 58 states "An original will or other document referred to in section 124 of the Act (The Supreme Court Act 1981) shall not be open to inspection if, in the opinion of a registrar, such inspection would be undesirable or otherwise inappropriate."; Rule 59 of the Non-Contentious Probate Rule stipulates that "where copies are required of original wills or other documents deposited under section 124 of the Act, such copies may be facsimile copies sealed with the seal of the court and issue either as office copies or certified under the hand of a registrar to be true copies.

[17] When a testator dies, it is the lot of an executor, if he is willing to act, to assume control and management of the estate and to take necessary steps for its administration. A person appointed an executor is not bound to take up the office. Rule 47 (3) however calls for citation of an executor who has intermeddled in the estate of the deceased to show cause why he should not be ordered to take a grant.

[18] Section 3(A) (2) of the Administration of Justice Act 1982 provides that actions shall be brought by and in the name of the executor or administrator of the deceased if (a) there is no executor or administrator of the deceased, or (b) no action is brought within six months after the death by and in the name of the executor or administrator of the deceased, the action may be brought by and in the name of all or any of the persons for whose benefit an executor or administrator could have brought it. See equally the provision of Rule 47 (3) of the Non-Contentious Probate Rules 1987 which permits any person interested in the estate at the time and after the expiration of six months from the death of the deceased to institute an action to protect the estate or for the court to cite the executor to take up administration or relinquish same.

[19] Louis Myers., "Public International law: A Beginner's Guide" found at https://guides.loc.gov/public-international-law, late visited 28/07/2023.

[20] Ibid

It is noted that where the will emanates from a foreign jurisdiction and where evidence as to the law of any country is required, Rule 19 of the Non-Contentious Probate Rules 1987 provides in its sub section 1 and 2 that (a) an affidavit from any person whom, having regards to the particulars of his knowledge or experience given in the affidavit, he regards as suitably qualified to give expert evidence of the law in question; or (b) a certificate by, or an act before, a notary practicing in the country or territory concerned. It is submitted here that the primary function of a technical expert witness in this regard is to explain the application of the relevant law (field of expertise) to the question or matter before the court. This must be done in a way that the decision maker (Judge) and the lawyers can make sense of it. Even though many judges develop some level of expertise in some areas, it is unlikely that experience will enable them to deal with conflicting technical evidence, particularly in highly specialized areas, without assistance from experts.

The above procedure is adhered to when the foreign will has not been admitted to probate in a foreign jurisdiction. In the event where probate has been granted in a foreign jurisdiction, parties then need to subscribe to the procedure for the execution/enforcement of foreign court decision and arbitration awards in Cameroon.[21]As per the law,[22] the president of the Court of First Instance, or the Magistrate he or she shall delegate for this purpose, is the judge in charge of litigation related to the execution of judgments regarding foreign court decisions, public Acts and Arbitral Awards. The party who seeks the recognition or enforcement of a foreign court decision in civil, commercial or Labour matters shall file a petition to the judge in charge of litigation related to the execution of judgments of the place or likely place of enforcement[23] with the following documents:

a) A copy of the decision which fulfils the conditions required for its validity.
b) The original copy of proof of service of the decision or any other act that justifies, proof of service.
c) A certificate of Non-appeal issued by the registrar.
d) Where applicable, a copy of the summons served on the party who failed to appear, a certified copy issued by the Registrar of the court that delivered the decision and any other documents to prove that the summons was duly served within the prescribed time limit.

The judge in charge of litigation related to the execution of judgments shall ensure that:

a) The decision was delivered by a court that has jurisdiction in its country of origin.
b) Parties were duly served, represented or found to be in default.
c) The decision may be enforced in its country of origin.
d) The decision is neither repugnant to public policy in Cameroon nor to a final decision delivered in Cameroon.[24]

As per this procedure, once the foreign decision is rendered enforceable by the Court of First Instance of the place where the property covered by the foreign will is situated, Counsel can then seize the probate registrar with an application for him/her to take account of the foreign grant and to ensure enforcement of same by resealing the grant. Once a decision is taken by the probate registrar, the foreign will is rendered enforceable as any other judgment delivered in Cameroon. Counsel may have to subscribe to the prescribed procedure outlined in Rule 37 (5) of the Non-Contentious Probate Rules 1987 on the resealing of foreign grant.

4. Types of Grants of Authority to Administer the Estate of Deceased Persons

There are three (3) categories of grant of authority to administer the estate of deceased persons. These are:

a. **Grant of Probate**- This is issued where a deceased died testate, leaving a valid will with the executors appointed in the will to carry out the wishes of the testator.

b. **Grant of Letters of Administration with will annexed-** This grant is issued where a deceased person died testate but without appointing executors; or the appointed executor(s) predeceases the testator; the executor

[21] Law No 2007/001 of 19 April 2007 to institute a judge in charge of litigation of judgments and lay down conditions for the enforcement in Cameroon of foreign court decisions.
[22] Section 5 of Law No 2007/001 of 19 April 2007
[23] Section 6Law No 2007/001 of 19 April 2007
[24] Section 7Law No 2007/001 of 19 April 2007

appointed validly renounces probate;[25] The Executor has been cited but has not taken out a grant of probate;[26] where the court under its discretionary powers passes over the Executor and appoints another person; where the executor is incompetent to take probate for reason of infancy or mental or physical incapacity;[27]when the Executor is out of jurisdiction and applies that the grant be made to his attorney.[28]

c. **Grant of Letters of Administration without Will –** This is issued where a deceased person died intestate (without a will) and so did not appoint executors.

5. Commencing Probate Actions

Probate proceedings are significantly different from other civil actions in the courts of records. Their commencements are also different. There are basically two types of administration in the event of death. There is probate or administration with will annexed and administration without will. While the former is called testate succession, the latter is known as intestate succession. Both types of administration have distinct forms of commencement.

5.1 Commencement of Intestate Succession

Section 9 of the Administration of Estate Act 1925 provides that where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the probate Judge in the same extent as formerly in the case of personal estate it is vested in the ordinary. Normally, on the death of a person intestate (without a will), the family members are expected to seat in a family meeting to select the next-of-kin.[29] Once the next-of-kin has been appointed by the family members in a family meeting,[30] the next of kin shall apply for the next-of-kin declaration from the Customary Court of the area were the deceased owned properties. Upon application to the Customary Court by the next-of-kin, the Customary Court upon receipt of the application and after hearing the applicant and at least two witnesses and if satisfied with the application,[31] shall deliver a Next-of-Kin Declaratory Judgment[32] in favour of the applicant (the next-of-kin).

As noted above, the appointment of a next- of- kin in a family meeting ordinarily should not be made in violation of the express provision of Rule 22 of the Non-Contentious Probate Rules 1987 which fixes the order of priority for the grant of probate in cases of intestate succession. Any appointment made in violation of the standard position imposed by Rule 22 may be set aside by the High Court in favour of the statutory order fixed by the Non-Contentious Probate Rule 1987. It was held by the Court of Appeal in the case of *Noumbissie Nee Wanji Mary v. Nganjui John*[33]that the next-of-kin Declaratory Judgment granted by the Customary Court cannot tie the hands of the High Court to grant letters of administration following the priority fixed by Rule 22 of the Non-Contentious Probate Rule 1987. Equally, it was held in *Kange Winifred v. Molua Daniel Vesai (Next of Kin of the Estate of Teke Isaac Molua*)[34] that in an application for letters of administration, the applicant attaches the next of kin declaration as one of the documents. However, the fact that any person so named in the order of priority goes to get a next of kin declaration does not *ipso facto* change that order. That declaration is not a *sine qua non* for being granted

[25] See Rule 37 of the Non-Contentious Probate Rules 1987. It provides "Renunciation of probate by an executor shall not operate as renunciation of any right which he may have to a grant of administration in some other capacity unless he expressly renounces such right."

[26] Rules 37 and 47 of the Non-Contentious Probate Rule 1987

[27]Rules 32 and 35 of the Non-Contentious Probate Rules 1987

[28]Rule 31(1) of the Non-Contentious Probate Rules 1987

[29]The selection of the Next-of-Kin should not be done in violation of the provision of Rules 22 of the Non- Contentious Probate Rule 1987 which fixes the order of priority for grant in case of intestacy.

[30] The appointment is made through a minute arrived at in the meeting which must be approved by every member appending his/her signature on the document.

[31] The application must be supported by the death certificate of the deceased person

[32] It was held by the Court of Appeal of the South West Region in Suit No CASWP/53/2006 between *Nfor V.E Mukete v. Niba Che Albert (Administrator and Beneficiary of the Estate of James Niba (Deceased) Suing by attorney Njongwe Christina),* Reported in CCLR Part 16 at P. 83 that a next-of-kin is a creation of law, he is a legal person known to the law, he has a beneficial interest in the intestate's estate and can therefore sue. As per the decision under review, a next-of-king has rights and obligations peculiar to him and capacity to sue vested in him when these rights have been or are in danger of being violated or adversely affected.

[33] Suit No CASWP/2/2000, Reported in (2000) CCLR Part 9 at P.1

[34]Suit No CASWR/63/2015, Reported in SLR, Vol. Thirteen at 102

letters of administration though courts have often demanded that a declaration of next of kin is one of the requirements for compiling the document for an application for letters of administration. The court maintained that the next-of-kind declaration is not a compulsory requirement for letters to be granted for there is nowhere in our procedural law or the law of England where it is so stated. The next of kin declaration as per the decision in *Kange's* case must be regarded as optional and facultative merely intended to ease the job of the Court.

It was equally held in the case under reference that in probate and succession matters the persons who have legal capacity to sue and be sued are the administrators of an estate or beneficiaries where the deceased died intestate and trustees, executors, and beneficiaries where the deceased died leaving a will. On whether a next of kin decision attributes capacity to sue and be sued over the estate of the deceased, the Court of Appeal in *Kange Winifred v. Molua Daniel Vesai (Next of Kin of the Estate of Teke Isaac Molua*)[35] had this to say:

> "Generally, to administer property of a deceased person one must obtain letters of administration in the case of intestacy or be appointed an executor in the case the person left behind a will. In the present case it is clear from the writ that the Respondent is not the owner of the landed property that he is trying to evict the appellant from. He is therefore clearly administering the estate of late Teke Isaac Molua. To do this, he obtained the next of kin declaration from the Customary Court … We think that the proper position of the law from statutes and case law is that a next-of-kind declaration confers no legal status to any person who obtains it to enable him to sue or be sued. In the case where a person dies intestate any person wishing to administer his property or estate must first obtain letters of administration. Clearly in the case in hand the Respondent is administering the property of Late Teke Isaac Mbua because it is not his property. Since he is not equipped with Letters of Administration, he has no capacity to sue or be sued."

The decision in Kange's case must be contrasted with that taken in *Nfor V.E Mukete v. Niba Che Albert (Administrator and Beneficiary of the Estate of James Niba (Deceased) Suing by attorney Njongwe Christina.*[36] It was held by the Court of Appeal of the South West Region in *Nfor V.E Mukete's case* that a next-of-kin is a creation of law, he is a legal person known to the law, he has a beneficial interest in the intestate's estate and can therefore sue. As per the decision in Nfor Mukete's case, a next-of-kin has rights and obligations peculiar to him and capacity to sue vested in him when these rights have been or are in danger of being violated or adversely affected.

On the above cases, the first issue to note between the two conflicting authorities is that while the appeal in *Kange Winifred's case* emanates from the Court of First instance that of Nfor Mukete originated from the High Court. Second, by virtue of Section 18(b) of law No 2006/015 of 29th December 2006 as amended in 2011 of the Law on Judicial Organization only the High Court is vested with competence in matters of inheritance, reasons why applications for letters of administration of estates and probate of wills are done in the High Court. In Kange's case, upon the death of one Teke Isaac Molua, the respondent was designated next of kin of the deceased by the Buea Customary Court. Armed with the next of kin decision only, he brought an action before the Court of First Instance Buea by applying for a writ of possession over a parcel of land of the deceased occupied by the appellant. At the threshold of the trial, counsel for the appellant raised a preliminary objection on grounds that the plaintiff did not have the legal capacity to bring such an action, for he had not obtained letters of administration of the estate of the *de cujus*. The court overruled the preliminary objection and held that the next-of-kind decision gives the plaintiff the legal capacity to sue over the estate of the deceased.

It is submitted that until probate is granted, anyone who interferes with the estate of the deceased is an executor of his own wrong. In other words, at the death of a person intestate, the intestate property of the deceased person is reserved for the management of the Administrator general who has the duty to protect the said estate until

[35]Supra

[36]Suit No CASWP/53/2006 Reported in CCLR Part 16 at P. 83

probate is granted. Section 9 of the Administration of Estate Act 1925 provides that where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the probate judge in the same extent as formerly in the case of personal estate it is vested in the ordinary. As per Section 9 of the Administration of Estate Act 1925, if the holder of the next of kin declaratory judgment conceives that his interest in the estate is being threatened, he or she can validly institute an action before the High Court for the Probate Registrar to take steps to protect the estate. This view is supported by the general principle of law which provides that any one family member can apply to protect his interest in an estate.[37] However, the competence of such a person will be determined by the cause of action before the court. It is submitted that had Kange's case been filed in the High Court, the court would have assumed jurisdiction under Section 9 of the Administration of state Act 1925 to determine the issues with the mind set to preserve the estate. This would have been done in spite of the fact that the applicant was not armed with letters of administration.

Again, the appointment of the next-of-kin cannot be made in violation of the right of the female children or wife to inherit or to administer the estate of their deceased father or husband. Any such violation will obviously be held by the courts to be repugnant to natural justice, equity and good conscience and of course to be contrary to public policy. This was the position taken in the case of *Nyanja Keyi Theresia & 4 Ors v. Nkwinga kNjanga and Keyim (Administrators of the Estate of Keyi Peter*.[38] The facts presented in court are that the deceased who was polygamously married died in 1977. During his illness and burial ceremony, his brother and his cousin took care of him. After the burial, on the strength of a family meeting, the deceased's brother and cousin were appointed next of kin to the deceased's estate on behalf of the children who were by then adults. They were subsequently issued letters of administration over the deceased's estate. The deceased's daughter disapproved of the way her father's estate was administered, alleging that the administrators had failed to consider the interest of the deceased's children and had been cruel to them. The administrators claimed that the deceased's daughter and her mother had been partially responsible for the deceased's death and, by virtue of that fact the daughter was not entitled to benefit from the estate.

The court found that the defendant (administrator of the estate) had not established any proof that the deceased died as a result of the actions of his daughter and her mother. And even if there had been problems between them, the fact would not be weighty enough to divest her of her father's estate, even on the strength of a family meeting. Accordingly, the court revoked the letters of administration granted to the defendants for poor management of the estate and made an order issuing new letters of administration to the deceased's daughter on behalf of all the beneficiaries. The court, in delivering the judgment, reiterated the position of statutory law with respect to intestate succession, thus:

> "The law has made statutory the order of priority of administration of estate . . . From the above statutory provision, the plaintiffs who are the children of the deceased . . . have priority over the first defendant who is the brother of the deceased who comes in the fourth position and the second defendant who comes in no place at all as cousin. The first and second defendants relied on the minute of the family meeting . . . where it was decided that the cousin of the deceased and . . . brother of the deceased were nominated administrators of the estate of the deceased. In that family meeting, the estate was divided to all the members of his African family including his nephews. . . At this modern time when law has made provision on the distribution of intestate succession, it is absurd for any person or group of persons to set in a primitive manner and permit people to reap from where they did not sow. Even if such a decision were rooted in the culture of the deceased and the defendant, it is certainly repugnant to natural justice, equity and good conscience. No matter what problem the deceased

[37]See the Nigerian Supreme Court Decision in *Akin Adejumo & 2 Ors v. Ajani Yusuf Ayantegbe*., S.C 204/1986, ALL NLR at 468 which provides that where probate has not been granted any of the beneficiaries of an estate can validly intervene or take steps to protect their interest in the estate. Because of their interest in the estate, the law does not treat them as strangers to any transaction touching on the estate.

[38] Suit No HCF/AD/57/97-98, Unreported

> had with his children that did not and does not deprive them of their right of inheritance particularly as the deceased died intestate."

This case reveals the conflict between the human rights value of gender non-discrimination on the one hand and the customary value of patriarchy on the other. The deceased's brother and cousin were granted administration over the deceased's estate on the strength of a family meeting and by virtue of the fact that they took care of the deceased during his illness and burial. Although the deceased's children were capable in their own right to administer the estate, they neither demonstrated nor questioned the rationale of appointing their uncle and father's cousin as administrators. In a non-customary jurisdiction, the conduct of the daughters in virtually 'assisting' relatives to assume control over their deceased father's estate may be regarded as unreasonable. However, in Cameroon, this is rarely an isolated situation for, to reiterate, female children may only inherit property in the absence of suitable male heirs, be they brothers or relatives.[39] Thus, it may not be presumptuous to conclude that had the defendants not abused the administration of the estate the daughters of the deceased would not have shown any interest whatsoever in it. The daughters had found themselves forced to seek administration over the estate for reasons not associated with discrimination. Nonetheless, the court was swift to identify gender discrimination in the custom under consideration, which denies female children the right to intestate succession. Invoking the repugnancy test, among others, it rejected the enforcement of the custom as being contrary to a written law and therefore unenforceable.

Similarly, in *Noumbissie Nee Wanji Mary v. Nganjui John*[40]which is an appeal against the High Court of Meme Division delivered on the 13thday of November 1998, the court granted letters of administration to the present respondent (Uncle to the late Noumbissie Albert) at the lower court in the matter listed as *The Estate of Noumbissie Albert Fange* and discountenanced the caveat[41] filed by the appellant (wife to the deceased Noumbissie). Dissatisfied with the decision, the appellant, through her counsel, gave notice and grounds of appeal and filed among others the following ground of appeal: that the learned trial judge erred in law when he ordered that letters of administration over the estate of Noumbissie Albert Fange be granted to the uncle when there is a surviving widow (the caveatrix) and the first child of deceased who is now a major.

The brief facts of the case are that Noumbissie Albert Fange (deceased) was involved in a ghastly motor accident at Mutengene and died. He was married to two women: Noumbissie Nee Wanji Mary and Manjie Agnes Nkwako. Both wives at the material time were teachers. Mary lived with the deceased husband in their matrimonial home at Kosala, Kumba. Agnes lived in her own home at Fiango, Kumba. Late Noumbissie had four children with Mary and two with Agnes. Nganjui John, the present respondent, was the paternal uncle of the late Noumbissie Albert. He educated the latter, married him a wife, Mary, and bought a plot of land on which they had their matrimonial home. He also got the money found with the deceased and bought a taxi. The proceeds of the taxi were used to pay the debts of the late man. He was equally responsible for the education of deceased Noumbissie's children.

According to the appellant (deceased wife) she was the one paying her children's school fees and the respondent (uncle to the deceased) was not helping her in any way whatsoever. On this basis the appellant opposed the grant of letters of administration to the respondent. She claimed to be capable of administering the estate on behalf of her children and herself. It was upon these facts that the court granted the letters of administration to the respondent.

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[39] F. Lotsmart, I. Sama-Lang, L. Fombe and T. Ramata., *"Land Tenue Practices and Women's Rights to Land in Anglophone Cameroon"*. International Development Research Centre (IDRC), 2013 p 25. The researchers present the arguments obtained during interviews and focus group discussions particularly in matrilineal societies like Kom and Wom that, only permanent members of the family can inherit land. They brought out the School of thought who argues that the girl child's identity is 'elsewhere' because as the put "she is pilgrim", 'she does not belong', 'she will have land where she will get married', or "why does she need to own land in her name when she can use land for the rest of her life?" Married women, they argued should not have a say in land ownership and management in the family, the needs of her male siblings who have wives in need of these lands occupy prime position. Given her landed property is tantamount to carting away family land into another family.

[40]Suit No CASWP/2/2000. Reported in (2000) CCLR Part 9 at p.1

[41]A Caveat is an opposition filed by any interested party to an estate, opposing the grant of letters of administration over the estate which the applicant for grant seeks to administer.

It was at the Court of Appeal argued on behalf of the appellant (deceased wife) that the lower court erred at law by not respecting Rule 21(1) of the Non-Contentious Probate Rules, 1987 on the order of priority for grant in case of intestacy. It was said that the rightful person to have been declared administrator of the estate of Noumbissie (deceased) was the appellant, since she was the surviving wife of the late man. It was further argued by the appellant that a distant relative like the respondent could not inherit some one's property as against the person's surviving spouse or children.

It must be noted that the lower court had relied on the next of kin's declaration granted by the Customary Court to the respondent to grant letters of administration which is the subject matter of the appeal. Next of kin declarations are granted by the Customary Court as in this case when the applicant show proof that he had been appointed in a family meeting by the family members as the next of kin (in this case a distant male relative was appointed over the deceased wives). It was argued that the next of kin's declaratory judgment granted by the Customary Court to the respondent ought not to have tied the hands of the High Court to have granted letters to the deceased wife.

In rendering its decision, the Court of Appeal interpreted Rule 21(1) of the Non-Contentious Probate Rules 1987 which lays down the order of priority that the court will follow in granting letters of administration. Under this order the surviving spouse stands first. In the instant case late Noumbissie had two wives. The question which the court was constituted to answer was: should it be the two spouses who should take pride of place and be granted letters of administration jointly? The action was instituted only by one wife, the appellant (the first wife), without considering the existence of the other wife. The evidence from the lower court reveals that the appellant (first wife) claimed she did not know that her late husband had another wife. The court held that it was quite bizarre that the appellant claimed she did not know of the relationship between late Noumbissie and Agnes for all the long period they had been together in Kumba, a relationship that resulted in the birth of a child as far back as 1982. The only inference the court drew from the claim of ignorance of that relationship is that both wives had a very strained relationship. In these circumstances both spouses could not be made joint administrators. In like manner the court held that to grant letters of administration to the appellant would be inimical to the other spouse and her two children. Although the court took steps to revoke the letters of administration granted to the respondent, same was not handed to the wives as co administrators. The court rather asked them to reconcile their differences, if any. The revoked letter of administration was handed to the Administrator General of Estates.

After the Next-of-Kin Declaratory Judgment has been delivered and a copy of the judgment handed to the next-of-kin, if he conceive that he is entitled to be the administrator of the estate he may make an application for a grant of letters of administration.[42] The application for grant of letters of administration is made to the Probate Registrar of the Probate Division within the jurisdiction of the Customary Court that issued the declaratory judgment. It should be stressed that this application does not amount to the commencement of probate action.

The next of kin, who applies for letters of administration, is referred to as the applicant for grant. The probate clerk enters the application in a special register meant for that purpose and publishes the application. The purpose of such a publication is to give notice to anyone who wishes to challenge the grant. If after publication, the grant is not challenged within 21 days, the probate registrar shall proceed to seal the grant, in the presence of witnesses.[43]

[42] An application for grant can be made personally by the applicant or can be made through Counsel/Solicitor. See Rules 4 and 5 of the Non-Contentious Probate Rule 1987. Rule 4 provides: (1) A person applying for a grant through a Solicitor may apply at any registry or sub-registry. (2) Every Solicitor through whom an application for a grant is made shall give the address of his place of business. Rule 5 on its part provides that (1) A personal applicant may apply for grant at the registry or sub-registry. (2) Save as provided for by Rule 39 a person a personal applicant may not apply through an agent, whether paid or unpaid, and may not be attended by any person acting or appearing to act as his adviser. (3) no personal application shall be proceeded with if- (a) it becomes necessary to bring the matter before the court by action or summons; (b) an application has already been made by a solicitor on behalf of the applicant and has not been withdrawn; or (c) the registrar so direct. (4) after a will has been deposited in a registry by a personal applicant, it may not be delivered to the applicant or to any other person unless in special circumstances the registrar so direct. Note should be taken that Rule 39 cited in Rule 5 of the Non-Contentious Probate Rule 1987 deals with international or foreign will.

[43] As per Rule 8 of the Non-Contentious Probate Rule 1987, the application for a grant shall be supported by an oath by the applicant in the form applicable to the circumstances of the case, and by such other papers as the registrar may require.

Where the grant is challenged, the person challenging the grant is referred to as a caveator. In opposing the grant, the caveator is expected to file a caveat within 21 days upon the publication of the application for grant.[44]Rule 44 of the Non-Contentious Probate Rules 1987 provides that:

> "(1) any person who wishes to show cause against the sealing of a grant may enter a caveat in any registry, and the registrar shall not allow any grant to be sealed (other than a grant *ad colligenda bona* or a grant under section 117 of the Act (The Supreme Court Act 1981)) if he has knowledge of an effective caveat; provided that no caveat shall prevent the sealing of a grant on the day on which the caveat is entered."

The provisions of Rule 44 of the Non-Contentious Probate Rules1987 are consistent with the provisions of sections 107 and 108 of the Supreme Court Act 1981. Section 107 provides thus:

> "Subject to probate rules, no grant in respect of the estate, or part of the estate, of a deceased person shall be made out of the principal registry on any application if, at any time before the making of a grant, it appears to the registrar concerned that some other application has been made in respect of that estate or, as the case may be, that part of it has not been either refused or withdrawn."

Section 108 on its part provides:

> "(1) a caveat against a grant of probate or administration may be entered in Probate registry. (2) On a caveat being entered, the probate registrar shall immediately send a copy of it to the registry to be entered among the caveats in that registry"

It is the provision of Rules 44 (3) of the Non-Contentious Probate Rule 1987 that a caveat shall be effective for a period of six months from the date of entry thereof, and where a caveator wishes to extend the said period of six months, he or his solicitor may lodge at, or send by post to, the registry at which the caveat was entered a written application for extension. An application for extension as aforesaid must be lodged, or received by post, within the last month of the said period of six months, and the caveat shall thereupon be effective for an additional six months from the date on which it was due to expire.[45] It is equally the law that a caveat which has been extended as stated above may be further extended by filing of a further application for extension subject to the same conditions as set in Rule 44(3)(b) of the Non-Contentious Probate Rules 1987.[46]

The applicant for grant is expected to be notified with the caveat. Upon receipt of the caveat, the applicant for grant may cause to be issued from the registry in which the caveat is filed a warning against the caveat, he shall equally state his interest in the estate of the deceased and shall require the caveator to give particulars of any contrary interest in the estate; the warning or a copy thereof shall be served on the caveator forthwith.[47]

As per Rule 44 (6) of the Non- Contentious Probate Rules 1987, a caveat can be entered by persons with no interest in the estate. The Rule Provides that a caveator who has no interest contrary to that of the person warning, but wishes to show cause against the sealing of the grant to that person,[48] may within eight (8) days of service of the warning upon him (inclusive of the day of such service), or at any time thereafter if no affidavit of interest has been filed by the caveator, issue and serve a summons for directives.[49]On hearing the summons for direction, the

[44] See Rule 44 of the Non-Contentious Probate Rule 1987.
[45] Rule 44 (3) (b) of the Non-Contentious Probate Rule 1987
[46] Rule 44 (3) (c) of the Non-Contentious Probate Rule 1987
[47] Rule 44 of the Non-contention Probate rule 1987
[48] For example, if the applicant for grant caused the death of the testator. A person who commits the murder of the deceased is generally debarred on grounds of public policy from taking a benefit on the intestacy of the deceased in the same way as if the deceased died leaving a will.
[49] Rule 44 (6) of the Non-Contentious Probate Rule 1987

probate registrar may give a direction for the caveat to cease to have effect. Every caveat in force when a summons for direction is issued shall remain in force until the summons has been disposed of unless the probate registrar gives directives for the caveat to cease to have effect.[50]

A caveator having an interest contrary to that of the person warning may within eight (8) days of service of the warning upon him (inclusive of the day of such service) enter an appearance at the probate registry in the form of an affidavit of interest which shall be served on the person warning (applicant for grant) forthwith.[51]A caveator who fails to enter an appearance to the warning may at any time withdraw his caveat by giving notice at the registry. At this stage the caveat shall cease to have effect.[52] If no appearance (affidavit of interest) is entered to the warning issued by the applicant for grant (person warning), the applicant for grant (person warning) may at any time after eight (8) days of service of the warning upon the caveator (inclusive of the day of such service) file an affidavit in the registry in which the caveat index is maintained. Upon service of the affidavit on the caveator, the caveat shall cease to have effect.[53]

Despite the above, any caveat in respect of which an appearance to a warning has been entered shall remain in force until the commencement of a probate action.[54]Upon receipt of the said affidavit of interest filed by the caveator, the applicant for grant (the person who issued the warning) is expected to file a writ of summons in which the applicant for grant and caveator become plaintiff and defendant respectively. It is only at this stage that a probate action is said to commence.

Being a contentious action, the applicant for grant is expected to commence the action by way of a Writ of Summons. This procedure is consistent with Order 2 Rule 2 of the Supreme Court Civil Procedure Rules Cap 211 of the 1948 laws of the Federation of Nigeria.[55] It must be noted that the Writ of Summons is the traditional mode for the commencement of civil actions in the High Courts in the Anglophone Regions of Cameroon. The Writ of Summons is prescribed by Order 2 Rule 2 of the Supreme Court Civil Procedure Rules which states that "every suit shall be commenced by a writ of summons signed by a Judge, Magistrate or other officers empowered to sign summonses." Although the rules of court state that the writ should be issued by a Judge, Magistrate or other officers empowered to issue summonses, in practice lawyers do file an application for a writ of summons which is detailed out as a statement of claim.[56] The plaintiff in the probate action must ensure that the following documents are pleaded:

a. The death certificate of the deceased
b. Identification of all the beneficiaries
c. Declaration of next-of-kin
d. Inventory of the property sought to be administered.
e. Particulars of freehold/leasehold property left by the deceased.
f. Bank attestation (where necessary).

Note must be taken that there are vacillating opinions of judges in relation to the applicable probate procedure. This has caused untrammeled hardship to litigants and Counsel. Out of the thirteen (13) High Courts in the thirteen Divisions that make up the Anglophone Regions of Cameroon, twelve (12) are holding on to the fact that the appropriate mode of commencing probate action is by way of a Writ of Summons. This is however not the case

[50] Rule 44 (8) of the Non-Contentious Probate Rule 1987
[51] Rule 44 (10) of the Non-Contentious Probate Rule 1987
[52] Rule 44 (11) of the Non-Contentious Probate Rule 1987
[53] Rule 44 (12) of the Non-Contentious Probate Rule 1987; except with the leave of the probate registrar, no further caveat may be entered by or on behalf of any caveator whose caveat is either in force or has ceased to have effect by an order of the probate registrar or where the caveator fails to enter an appearance to the warning.
[54] Rule 44 (13) of the Non-Contentious Probate Rule 1987
[55] Procedural Rule regulating the conduct of civil trials in the High Courts in the Anglophone Cameroon
[56]The Writ of Summons is used in commencing every suit that involves contentious issues, per Justice Charles Namme Menyoli in *Bapi Ada v. Bapi Goerge, HCF*/031/OS/2013 Unreported

with the High Court of Fako Division where all probate actions commenced by way of a Writ of Summons are struck off the cause list in favour of the procedure stipulated by Part 57 Probate, Inheritance, Presumption of Death and Guardianship of Missing Persons; the Civil Procedure rules 1998 UK; as read with Part 57 Practice Directions in relation thereto.

We understand that rule 22 of the Non-Contentious Probate Rules 1987 provides the order of priority for the grant in case of intestacy. The question for determination now is, what will happen to the estate where children with the right to inherit or administer the estate are minors? Rule 32 of the Non-Contentious Probate Rules 1987 provides that where a person to whom a grant would otherwise be made is a minor, administration for his use and benefit, limited until he attains the age of eighteen years, shall, unless otherwise directed be granted to the statutory or testamentary guardian, or to any guardian appointed by the court of competent jurisdiction, provided that where the minor is sole executor and has no interest in the residuary estate of the deceased , administration for the use and benefit of the minor limited as aforesaid, shall, unless the probate registrar otherwise directs, be granted to the person entitled to the residuary estate.

The probate registrar may by order assign any person as guardian of the minor, and such assigned guardian may obtain administration for the use and benefit of the minor limited. To be appointed, the intended guardian must file an application supported by an affidavit to be so appointed guardian.[57] Where there is only one person competent and willing to take a grant, such person may unless the probate registrar otherwise direct, nominate any fit and proper person to act jointly with him in taking grant.[58]

5.2 Commencement of Testate succession

Once the testator died leaving behind a will, the will is expected to be admitted to probate. For this to be done the applicant who may have been appointed by the deceased as the executor of the will have to file for it to be admitted to probate. The application for a will to be admitted to probate may either be contentious or non-contentious in nature. In other words, it may be admitted in Solemn form or Common Form.[59]

Where the validity of the will is not contested or the right of the executor to take out probate is unchallenged,[60](common form, that is to say without resort to litigation) the executor is expected to file an Originating Motion Supported by an Affidavit for the will to be admitted to Probate.[61] The application should capture the executor(s) as the applicant(s) and all the beneficiaries as respondents. In *Lanjum Lazar & Another v. Mary Ndengwe*[62]letters of administration was granted on the basis of an Ex-parte Motion supported by an affidavit filed by the appointed executor. The present applicants (beneficiaries) who were not served with the ex-parte application sought from the same court to set aside the ruling of the court admitting the will to probate. Their application to set aside the ruling obtained ex-parte was granted on grounds among others that the applicants in the above-cited suit were never served with the application in which they prayed the court for letters. After the deliberation, the court held that the ruling admitting to probate the will of the deceased Ndengwe Siantu Simon and ordering the grant of letters of administration to one Ndengwe Alain Bruno was made in complete violation of the provisions of Rule 20(a) of the Non-Contentions Probate Rules 1987 and the rules of court which require that such an application be made on notice.

The court in setting aside the ruling held that the failure to have put the applicants (in the application to set aside) herein on notice smacks of bad faith and a nefarious desire to commit fraud. That should the ruling of the court made ex parte on the 22 day of July 2011 be allowed, it will prejudice the applicants herein in their person and substance. Upon the above findings, the court ordered setting aside the ruling obtained ex-parte and equally

[57] Rule 32(2) of the Non-Contentious Probate Rule 1987

[58] Rule 32(3) of the Non-Contentious Probate Rule 1987

[59]Afolayan, A.F & Okolie P.C., "Modern Civil Procedure Law" (Logos: Deesage Nigeria Limited, 2007) at P. 536

[60]The facts as to whether the will may be challenged or contested or not can only be determined after the reading of the will. The atmosphere on the reading of the will may ascertain whether the will shall be contested on not.

[61]*Lanjinu Lazah & 1 Or. v. Mary Ndengwe*, Suit No HCF/0239/OM/2011 Unreported, delivered on the 16th Day of July 2012

[62] Suit No HCF/0239/OM/2012

ordered revoking letters of Administration issued to one Ndengwe Ndengwe Alain Bruno over the estate of late Ndongwe Siantu Simon consequent upon the said Ex Parte ruling.

In *Werner Steidle v. Julie Oben Abange& 4 Others*[63] an Originating Motion was filed for a will to be admitted to probate and for the applicant to be appointed executor of the will. Counsel in this case had filed an Originating Motion for the will to be admitted to probate without depositing the will with the probate registry for safe keeping[64] and did not take steps to ensure that the will be read in the presence of the family members. This procedural defect made it difficult for counsel to ascertain the complex nature of the suit or to determine whether the will was to be admitted following the Common or Solemn form.

When the court processes were served, counsel for the respondent (counsel for some of the beneficiaries)[65] filed a counter affidavit raising serious issues which were highly hostile to the affidavit in support of the Originating Motion. The hostile nature of the affidavit made it so contentious and complicated in a way that the issues raised could only be resolved by the court calling for (*viva voce evidence*) oral evidence. After taking arguments from opposing counsel, the court held that the action was procedurally defective as it ought to have been commenced by a Writ of Summons. Secondly, the court held that it could not attach weight to the photocopy of the will which was attached to the affidavit in support of the Originating Summons as an exhibit. The court took this stand on grounds that the will was not deposited for safe custody or for due preservation and that the exhibit attached was not a certified transcript of the will in violation of Order 48 rule 18 of the Supreme Court Civil Procedure Rules Cap 211.[66]

Although the court relied on the Supreme Court Civil Procedure Rules Cap 211 in rejecting to admit the will to probate, there are similar provisions under the Non-contentious Probate Rules 1987 to be given the same interpretation as the court did in *Werner Steidle's* case. Rule 58 and 59 of the Non-Contentious Probate Rules 1987 as read with Section 124 of the Supreme Court Act 1981 states: Rules 58 "An original will or other document referred to in section 124 of the Act (The Supreme Court Act 1981) shall not be open to inspection if, in the opinion of a registrar, such inspection would be undesirable or otherwise inappropriate."; Rule 59 stipulates that "where copies are required of original wills or other documents deposited under section 124 of the Act, such copies may be facsimile copies sealed with the seal of the court and issued either as office copies or certified under the hand of a registrar to be true copies.

From the above provisions, it is submitted that in the case where the will was deposited, the probate registrar must ensure that the will is read for parties to determine the procedure to adopt for the will to be admitted to probate. However, if the will is read by counsel or the executor of the will, the probate registrar is to be notified of the development. In view of filing an originating motion for the will to be admitted to probate,[67] the executor or counsel at this stage may request for a certified transcript of the will which shall serve as an exhibit in the application. In the case of a writ of summons, the will is expected to be pleaded without necessarily obtaining a certified copy of same.

To admit a will in solemn form entails there is a possibility that the will shall be contested or challenged. That is to say the validity of the will is,

[63] Suit No HCF/052/OM/2016

[64] See Rule 58 and 59 of the Non-Contentious Probate Rules 1987 as read with section 124 of the Supreme Court Act 1981. Rule 58 states "An original will or other document referred to in section 124 of the Act (The Supreme Court Act 1981) shall not be open to inspection if, in the opinion of a registrar, such inspection would be undesirable or otherwise inappropriate."; Rule 59 of the Non-Contentious Probate Rule stipulates that "where copies are required of original wills or other documents deposited under section 124 of the Act, such copies may be facsimile copies sealed with the seal of the court and issue either as office copies or certified under the hand of a registrar to be true copies.

[65] Barrister Tchana Anthony

[66] See equally Order 48 Rule 19. It states "No original will shall be delivered out for any purpose without the direction in writing of the court where the Will is filed."

[67] In cases where the will is not challenged by the beneficiaries or anyone interested in the estate

a. contested;
b. The appointment of an executor is challenged;
c. Probate is sought to be revoked or denied.

The beneficiaries or any person interested in the deceased's estate may file a caveat against the grant of probate. The position of the law and procedure to be followed has been outlined in the preceding sections of this chapter. In summary, the procedure is as follows;

- Discovery, marking and reading of the will;
- Application for probate by executors;
- Caveat
- Warning
- Appearance to warning
- Probate action (full trial)
- Grant or refusal of grant depending on the outcome of the probate action in court (judgment of the court).

Being a contentious probate action, the action must be commenced by a writ of summons which is the most common mode to commence an action where there is possibility of contest.[68] As noted above, the procedure for the time being applies in all the High Courts that make up the Anglophone Regions of Cameroon but for the High Court of Fako. The procedure applicable before the High Court of Fako has been addressed below.

6. Revocation procedure

One of the problems associated with the grant of letters of administration is the fact that the person whom the deceased never intended to administer his property may apply for and be granted letters of administration, and this has resulted to several cases of revocation of administration.[69] Where probate or letters of administration has been granted, it can be revoked upon an application for revocation made to the court.[70]Grant of probate or letters of administration can be revoked on many grounds including the grounds of:

(i) Where the grant is made mistakenly on false or fraudulent representation in respect of the estate of a living person, the grant will be revoked[71]; or
(ii) On the discovery of the will or codicil of the deceased; or
(iii) Revocation for the purpose of better administration of the estate; or
(iv) Revocation at the instance of the court; or
(v) Where the original grantee disappears without having fully administered the estate, the original grant can be revoked and grant of letters of *administration de bonis non* is made;
(vi) Where the grantee becomes incapacitated, the grant is revoked.[72]

Apart from the above grounds, the wordings of Section 121 (1) of the Senior Courts Act 1981, clearly disclose that grants may be revoked under two circumstances:

a. Where the grant ought not to have been granted,

[68] Order 2 Rule 2 of the Supreme Court Civil Procedure Rules Cap 211 of the 1948 Laws of the Federation of Nigeria

[69]*Yekwuo Jeremiah Ambo v. Abia Moses Amba*, Suit No HCF/AE.08/2016: Judgment No HCF/CIV/045/2023 Unreported delivered on the 01 day of March 2023

[70] See section 121 of the Administration of Estate Act 1987; It was held in *Dione Elonge Regina Din Pratt v. Luma Pratt Gerald & 6 others*, Suit No HCF/AE.19/2010/PA/2021 that as enunciated in sections 113, 116 and 117 of the Senior Court Act an application for revocation of grant, limited grant, *Ad colligenda bona*, a grant pending suit are essentially within the preserve of the court as opposed to the probate registrar. However, some of these powers are vested in the probate registrar who can act more expeditiously than the court where the situation is urgent. Section 52 of the Non-Contentious Probate Rule 1987 reads: An application for an order for (a) a grant under Section 116 of the Act, (b) a grant ad *collingenda bona* may be made to a probate registrar; the application must be supported by an affidavit setting out the grounds of the application.

[71] In T*he Goods of Napier* (1809) 1; *Phill p. 83: Ephram v. Asuquo* (1923) 4 NLR p. 98.

[72] In the *Estate of Adekanbi Fetuga* P.H.C 3540 Lagos High Court Unreported- a will was found three years after the original grant had been made, the grant was therefore revoked. referred to in Jegede M.I.: Law of Trusts, Bankruptcy and Administration of Estate

b. Where the grant contains an error.

It should be noted, however, that revocation is not granted indiscriminately as substantial reasons must be adduced for the revocation of the grant.[73] Upon grant of probate an interested party may challenge such a grant. He is required to seize the court for revocation. The party applying for revocation is made the plaintiff, while the holder of letters is known as the defendant. A probate action must be begun by a writ of summons issued out of the probate registry.[74] Once an action for revocation is filed, letters of Administration must be lodged with the court.[75] This must be done within seven days upon the commencement if they are held by the person commencing the action and within fourteen days by any of the defendants who has them in his possession. A person who does not comply with these provisions may be compelled to do so by order of the courts.[76] All persons entitled to or claiming to be entitled to the estate of the deceased person under an unrevoked grant of probate or letters of Administration shall be made parties to any action for the revocation of the grant.

One disturbing question that comes to mind when filling an action for the revocation of grant is, what are the legal implications if letters of administration are taken in respect of a deceased's estate and the properties are duly vested in the beneficiaries, and it is later discovered that the deceased died leaving a valid will? Would probate of the discovered will be granted by the courts and the properties re-vested to the beneficiaries under the will; what happens to the interests of third parties who have acquired properties from beneficiaries under the letters of administration? Whether the vesting of p roperties to beneficiaries under the letters of administration be reversed and declared void?

The Administration of Estate Act 1925 and the Non-Contentious Probate Rules 1987 do not contain an express provision on the revocation of grant of letters of administration upon the discovery of a will made by the deceased. However, the courts have been called upon to determine issues bordering on the revocation of letters of administration generally.[77] Thus, in the case of *Asamoah v. Ofori Alias Renner*[78]a claim for the revocation of letters of administration granted to the defendant was opposed by the defendant on grounds that, once letters of administration were granted to an applicant, they were irrevocable. On this the court held thus:

> "Again, the contention that administration cannot be revoked is erroneous. Administration may be revoked for good cause, e.g. when, more in this case, it is granted to a person other than the person lawfully entitled to it."

Essentially, the court held that letters of administration granted by the court can be revoked for good cause. Will such a good cause include the revocation of letters of administration upon the discovery of a will by a testator? In the English case of *Morris v. Browne & Anor,*[79] the court held that letters of administration should be revoked in circumstances where the deceased had not died intestate but had made a valid will. The defendants, who were two of the deceased's children, obtained a grant on the basis that the deceased died intestate. Under the intestacy rules the defendants stood to receive a share of the estate as two of the deceased's children. However, the claimant, another daughter of the deceased, discovered the will which appointed her as the sole executrix and main beneficiary. She therefore applied to the court for revocation and sought to admit the will to probate. The application for revocation was not opposed. The court found that the defendant had procured the letters of

[73] Rule 41 of the Non-Contentious Probate Rule 1987 provides that: (a) subject to paragraph (2) below, if a registrar is satisfied that a grant should be amended or revoked, he may make an order accordingly. (2) Except on the application or with the consent of the person to whom the grant was made, the power conferred in paragraph (10 above shall be exercised only in exceptional circumstances.

[74]Order 2 Rule 2 of the Supreme Court Civil Procedure Rules Cap 211

[75] The High Court of Fako, had in *Yekwuo Jeremiah Ambo v. Abia Moses* (Supra) ordered the defendant who had letters of administration to deposit same at the registry of the court before hearing in the case commenced.

[76] Ibid

[77]*Yekwuo Jeremiah Ambo v. Abia Moses Amba,* Suit No HCF/AE.08/2016; *Mary Fangda Watat v. Keryim Wandji (Epse) Djeutchou Clarisse,* Suit No HCF/AE.166/2017; *Dione Elonge Regina Din Pratt v. Luma Pratt Gerald & 6 others*, Suit HCF/AE.19/2010/PA/2021

[78] [1961] GLR 269

[79] [2017] Found at https://.www.ashfords.co.uk last visited on the 6/08/2023.

administration on the basis of an inaccurate statement that the deceased had died intestate. For this reason, the court went ahead to revoke the letters of administration granted to the defendants.

It is submitted that the doctrine of laches which is used by the courts to deal with an inordinate delay occurring in filing an action does to apply to estop a will discovered after probate without will annexed has been granted from being admitted to probate. It is understood that as a general rule, laches is a doctrine or an equitable defense. As per the doctrine, the courts will not help those who sleep over their rights. This doctrine, however, does not apply with actions for revocation. This view was expressed in *Re Coghlan (Deceased), Briscoe v. Broughton*[80] where the claimant brought an application to revoke letters of administration upon discovery of a will of the deceased after 25 years; the court held that laches or undue delay in applying for revocation of letters of administration upon the discovery of a will does not necessarily disentitle an applicant to the order. This was especially the case where it could be shown that there were parts of the estate that were left un-administered. A further consideration which can influence the court will be if a grant of probate to the will, will not be a futile exercise.

On what happens after an application for the revocation of letters of administration is granted by the court, Samuel Azu Crabbe[81] notes as follows:

> "If an action for the revocation of a grant of probate, or letters of administration, succeeds, any person who had acquired part of the assets from the personal representative must return such assets."

Thus, where property devised under the will is still in the possession of the beneficiary under the revoked letters of administration, he would be required to return this property to the executor under the will for a transfer to the proper person as specified in the will. This issue gets complicated when upon the grant of letters of administration by the court, the administrator goes ahead to partition the property to the various beneficiaries who then transfer such properties to third parties. In such circumstances, what happens to the interest of such third parties who acquired those properties? Section 27 of the Administration Estate Act 1925 titled protection of persons acting on probate or administration provides that:

> "(1) Every person making or permitted to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation. (2) Where a representation is revoked, all payments and disposition made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of all payments or dispositions made by him which the person to who representation is afterwards granted might have properly made."

Section 37 of the Administration of Estate Act 1925 titled "validity of conveyance not affected by revocation of representation" is equally instructive in addressing the issue under consideration. The Section provides:

> "(1) All conveyance of any interest in real or personal estate made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this Act, of the probate or administration. (2) This section takes effect without prejudice to any order of the court made before the commencement of this Act and applies whether the testator or intestate died before or after such commencement."

[80] (1948) 2 All E.R. 68, CA

[81] Samuel Azu Crabbe., "Law of Wills in Ghana, 2nd Edition" (Ghana: Vieso University Ltd, 1998) at P. 265

The clear import of these provisions is that the interest of the administrators and that of third parties who acted on the directives of the administrator and on the strength of the letters of administration are protected notwithstanding the revocation of the letters of administration upon the subsequent discovery of a will. It is noted that this provision only protects those who acted in good faith. In other words, it protects only bona fide purchasers for value without prior notice. In *Hewson v. Shelly*[82] the deceased was assumed to have died intestate, because no will was found at the time of his death. He, however, left a piece of land which was sold to one Shelly by his wife, who had by that time obtained letters of administration from the court. It was subsequently discovered that her husband had left a will in which he had appointed one Hewson as executor. The grant of probate was made to him by the court and letters of administration granted to his wife were accordingly revoked. Hewson, the executor filed an action in court against Shelly claiming the return of the land. The claim was dismissed on the grounds that Shelly had purchased the land in good faith.

6.1 Effect of revocation

All persons making payments or dispositions in good faith made to a grantee before revocation are indemnified and protected although the grant is defective or invalid.[83] Any payment or disposition made in good faith before the grant is revoked confers a valid discharge upon the payer. All conveyances of any interest in real or personal estate made to a purchaser by a person to whom probate, or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation. In *Hewson v. Shelley*[84], the principle of law as stated therein is that the person for the time being clothed by the court of probate with the character of legal personal representative is actually the legal representative and enjoys all the powers of a legal representative unless and until the grant of probate or letters of administration is revoked or has been determined.

7. Resealing of grant of letters of administration

As a rule, an application to enforce a court judgment may be made throughout the Republic.[85] However, before a personal representative who has been granted probate or letters of administration in one High Court of a region can effectively administer real properties of the estate located in another region, the grant of probate or letters of administration has to be resealed in the High Court of that other region.[86]

Resealing is, therefore, the legal process whereby a grant that had been made or sealed by a High Court of one region is again sealed with the seal of a High Court of another Division in a different Region. The effect is that the grant is thereby extended to cover the real properties of the estate situate in another Region that has effected the resealing as if it was originally granted by the High Court of the Division.[87] The action for resealing of probate is made by the holder of the grant of probate or by any person authorized in writing to apply on his behalf to the probate registrar followed by taking the oath to lead resealing. Rules 30 and 37 of the Non-Contentious Probate Rule 1987 are instructive in the application for the re-sealing of a grant. Rule 39(5) outlines the procedure to adopt for the re-sealing of a grant. The Rule states: every grant lodged for resealing shall include a copy of any will to which the grant relates or shall be accompanied by a copy thereof certified as correct by or under the authority of the court by which the grant was made, and where the copy of the grant required to be deposited under does not include a copy of the will, a copy thereof shall be deposited in the registry before the grant is resealed. As per Rule 39(6), the registrar shall send notice of the resealing to the court which made the grant and where notice is received in the principal Registry of the resealing of a grant, notice of any amendment or revocation of the grant shall be sent to the court by which it was resealed.[88]

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[82] (1914) 2 Ch. 13, C.A

[83] Sections 27 and 37 of the Administration of Estate Act 1925

[84][1914] 2 ch. 13 (C.A**)**

[85] Section 11 of Law 2006/015 of 29th December 2006 (as amended) on the Law on Judicial organization.

[86]*Lijadu v. Franklin* (1990) 1 ANLR P. 110.

[87] Section 11 of Law No 2006/015 of 29th December 2006 (as amended(on Judicial Organization) enjoins the enforcement of a court judgment in the Republic.

[88] Rule 39(7) of the Non-Contentious Probate Rule 1987

It is submitted that despite the fact that section 11 of Law No 2006/015 of 29th December 2006 (as amended) on the Law on Judicial Organization authorizes or validates the enforcement of court judgments throughout the national territory, the act of resealing a grant should be encouraged for the effective management of the estate that extends beyond regions. It is noted that where probate has been successfully re-sealed, it has the same effect as if a fresh grant of probate or letter of administration has been granted in respect of the estate, and the administrators or executors are entitled to exercise authority on any property in the jurisdiction.

7.1 Power and duties of administrators

By virtue of the Administration of Estate Act (1925), the appointed administrator has power to manage the estate of the deceased.[89] He acts in the same capacity as the deceased before his death. He administers the property of the deceased for the interest of all the beneficiaries, since he is acting in their interest. All the beneficiaries are answerable to him including creditors and debtors. He has power to sue anyone who attempts to disrupt his smooth function as administrator.

On the other hand, he can be sued by any of the beneficiaries if he mismanages the property of the deceased and acts contrary to the rules given to him by the court. He is personally liable for any illegal, willful and negligent acts committed when executing as the administrator (such as mismanagement and misappropriation of the estate) he has the duty to pay the debts of the deceased and to recover his debts. The administrator has the power to advertise to creditors and to those claiming to have beneficial entitlement to the estate, once the claim has been submitted, he has the power to pay the debts, and all the claims made within a period of one month. He equally has power to incur expenditure on the maintenance and improvement of the property belonging to the estate under his charge. The administrator has discretionary powers to distribute the property to the beneficiaries when necessary.[90] He also has powers to apply to the court for directives regarding the distribution of the assets under his charge.[91]

7.2 Limitations of the power of administrator

An administrator of an estate is simply a manager of the estate for the benefit of all the beneficiaries and must render account of his/her administration.[92]He can be sued by the beneficiaries for any misappropriation or mismanagement of the estate. This is why he is required to have an updated account of all the income and expenditure of the estate and also the detailed inventory of the estate.[93]

8. Conclusion

There are several laws and court rules on the administration of estate of a deceased person which guilds the verification of claims of people entitled to the deceased person's estate. Without the laws, rules and measures put in place, a lot of persons entitled to the deceased's estate will be cheated out of what rightfully belongs to them. Except in few cases where there are limitations to testamentary freedom, the courts have held in several cases that a testator's wish must prevail, so the probate rules and laws are not to cause hardship on the beneficiaries. On the contrary, it is to ensure that the devolution of the deceased's estate is done rightly and that the beneficiaries are well catered for after all debts and death expenses have been paid.

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