



**In re Estate of Kibibi Binti Abdulali (Deceased) (Probate & Administration
68 of 1983) [2023] KEHC 467 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PROBATE & ADMINISTRATION 68 OF 1983
JN ONYIEGO, J
JANUARY 26, 2023**

BETWEEN

MARYAM ABDALLAHKARIMI APPLICANT

AND

ABDULHAMID EBRAHIM AHMED RESPONDENT

RULING

1. The deceased herein Kibibi Binti Abdulali died intestate on 19th August 1982. Prior to her death, she had executed a written will dated 19th March 1982 in which she appointed her grand-nephew Abdulhamid Ebrahim Ahmed as the sole executor. She bequeathed her entire estate to the said executor absolutely.
2. On 10th June 1983, the executor petitioned for a grant of representation. The estate was then gazetted on 5th August 1983 *vide* gazette notice number 2871. However, on 5th September 1983, Baby Karimjee who claimed to be a niece to the deceased filed an objection to the making of the grant on grounds that the content of the will in question required further investigation before a grant could be made and that the will or part of it was made by such importunity that took away the free agency of the testator.
3. By a notice dated 6th September 1983, the deputy registrar wrote to the objector requiring her within 30 days to file an answer to petition and cross application for a grant of representation. However, from the record, there is no evidence of compliance to the said notice. Consequently, a grant of probate of written will was issued on 18th October 1983 to the executor. The same was confirmed on 22nd May 1985.
4. *Vide* a summons for revocation dated 14th April 2021, one Maryam Abdalla Karimji claiming to be the great grand-daughter to Mushi Binti Mwalimu mother to the deceased sought orders as follows;
 - a. The grant of probate dated 18th October 1983 to AbdulHamid Ebrahim Ahmed be annulled and or revoked;



- b. the honourable court do appoint the applicant herein Maryam Abdalla Karimji as the administrator of the estate of Kibibi Binti AbdulAli(deceased)
 - c. that the matter be referred to the Kadhi's court for hearing and final determination
 - d. That costs of this application be provided for.
5. The application is anchored on grounds set out on the face of it and an affidavit in support sworn by the applicant on 14th April 2021. According to the applicant, she was a daughter to one Abdallah Karimji who was a child to karimje Abdulali who was a child to mishi Binti mwalimu who also was the mother to kibibi binti Abdulali the deceased herein. That she was a great grand -daughter of one Mishi Binti Mwalimu(now deceased) being a daughter of Karimji Bin Abdullahi(now deceased) who was one of the legal successors and heirs at law of the estate of the late Mishi Binti mwalimu who was his grand- mother. She therefore stated that the deceased herein was her grandfather's sister who died without leaving a child.
 6. According to the applicant, when Mishi Binti Mwalimu died, she left her properties under the Wakf arrangement. That the two properties were plot number 79 section Utange Mombasa measuring 8.6 acres and plot 455 section III in Mombasa island measuring 0.039 acres. That the wakf properties were to last for the benefit of generation to generation in equal shares. According to her, the wakf was not construed to be for any heir's exclusive use. That the dissolution and nullification of the wakf by a court order made on 24th August 1981 upon application by Kibibi Binti Abdulali the deceased herein and Ali Bin Ebrahim vide Mombasa Civil case no.520 of 1981 was without justification as both of them were beneficiaries to the estate of Mishi Binti Mwalimu.
 7. She further claimed that the will used to obtain the grant herein could not apply as there was already a will created by Mishi Binti mwalimu established in 1931 governing the Wkf. That if the deceased herein ever intended to do a will, then, she should have done one in respect of her specific portion but not on the entire property owned by Mishi Binti Mwalimu thus disinheriting the rest of the beneficiaries in respect to the estate of Mishi Binti mwalimu.
 8. It was further argued that under the Mohamedan law, the executor herein being a grand -nephew to the deceased could not qualify to inherit the deceased's property. That the deceased was aged over 80years when she allegedly made the will in question hence had no capacity to execute a will. In conclusion, she urged the court to revoke the grant and then refer the matter to the kadhi's court for determination
 9. In response, the respondent/petitioner/executor herein filed a replying affidavit sworn on 21st June 2021 thus opposing the application. He averred that the application is an abuse of the court process thereby reopening proceedings that were concluded 38yrs ago. That the court had determined the veracity of the will in question through the objection filed by Bebi Karimji and her brother Abdalla Karimji leading to the court confirming the grant. That the applicant being a grand- niece to the deceased has no *locus* to file a claim in respect of the estate of the deceased.
 10. That when the succession cause in respect of the estate of Mishi Binti Mwalimu was being handled by the public trustee, the heirs entered into a consent on the mode of distribution of the estate which was adopted. A copy of the said consent marked AEA-3 was attached as evidence. He further deposed that even the resultant Sketch plan at the point of distribution was consented to by abdalla Karimji the father to the applicant. In support of that allegation, a copy of a letter written by the public trustee to M/s H.A.T Anjarwalla his then advocate was attached and marked as AEA-4.
 11. That the application herein has been filed with an ill motive 38years down the line yet no appeal nor review application has ever been filed. That the estate has since been distributed and some sold to 3rd



- parties. That plot no.75/1/MN measuring 8.6 acres was subdivided into 3 portions namely; 6745/1/mn for Bebi Kirimji, 6746/1/mn to abdalla kirimji father to the applicant and 6747/1/mn for Abdul Hamid Ebrahim and his sister Malika Ebrahim. To confirm this assertion, copies of deed plans were attached and marked as AEA-5.
12. He went further to state that plot no.6746/1/mn for abdalla karimji was further subdivided and sold to 3rd parties. To prove his allegation, he attached copies of title deeds showing the entries marked AEA-6. He further stated that plot no.6747 has also been subdivided and issuance of titles is awaiting registration. That the wakf was cancelled vide a court order and not through the will of Mishi Bin Mwalimu as claimed by the applicant.
 13. He denied inheriting the entire estate of Mishi binti mwalimu as he only inherited the share of the deceased through a will and Rukiya binti abdulali as the grandson. That the family of kirimji Abdulali got their share of the estate of Mishi Binti Mwalimu through Abdalla Karimji father to the applicant therein and Bebi Karimji hence the applicant is already a beneficiary through her father.
 14. He further averred that the moment the wakf was dissolved, the estate reverted to the estate of Mishi Binti Mwalimu and thereafter to her heirs under the Islamic law.
 15. When the matter came up for directions, the court directed parties to file witness statements and documentary exhibits and the matter to proceed by way of *viva-voce* evidence.
 16. During the hearing, the applicant (pw2) adopted the content of her affidavit in support of the application and documents attached thereof. On cross examination, she admitted that she was claiming a share of the estate of Mishi Binti mwalimu her great grand-mother. She also admitted that Kibibi the deceased herein did not have a child and that her property was to be inherited by children to her brothers and sisters.
 17. She further admitted that she was not a direct descendant to the deceased. She went further to state that she was challenging the nullification of mishi Binti Mwalimu's wakf. She further admitted on cross examination that she was aware that the deceased left a will but failed to provide for her father who did not challenge the same despite being aware of these proceedings.
 18. Pw2 Rehema Shebani widow to Abdalla Karimjee and a mother to the applicant adopted the content of her witness statement recorded on 19th November 2022 thus stating that the deceased was over 80years old when the alleged will was made and that the suit should be referred to the kadhi for determination. On cross examination, she admitted that her husband did benefit from the estate of Mishi Binti Mwalimu through the public trustee case. She further stated that Bebi Karimji sister to her husband also did get a share from the estate of mishi Binti Mwalimu. That she wants all the properties to revert back to the estate of Mishi Binti mwalimu's estate and then to the wakf.
 19. Pw3 mishi mwalimu who claimed to have been an aunt to the deceased also adopted the content of her witness statement dated 19th November 2021. She basically supported the testimony of pw2. On cross examination, she admitted that the estate of Mishi Binti Mwalimu was shared out and the deceased got her share. She further admitted that the applicant is occupying a share of the property obtained from the estate of mishi Binti Mwalimu.
 20. On his part, the respondent adopted the content contained in her replying affidavit and a list of documents attached thereof. He stated that he was a grand -nephew to the deceased and that the will was genuine. He contended that the wakf was properly dissolved by the court and thereafter the estate of Mishi Biti mwalimu distributed through the public trustee before the Kadhi's court in civil case no.57 of 1982 through which the applicant 's father was given his share. He further stated that an



- objection challenging the will in question by Bebi (baby) and the applicant's father was resolved by consent and the grant thereafter issued and confirmed.
21. On cross examination, he confirmed that the deceased was a sister to his mother and that she was the one who brought him up. That under Islamic law, he was entitled to a share and that the will was properly executed.
 22. Upon the close of the case, parties agreed to file submissions.
 23. The applicant through the firm of muyala advocates filed her submissions on 6th June 2022 basically reiterating the content in the affidavit in support of the application. Counsel submitted that taking into account that all parties are muslims, the petition should have been filed before the Kadhi's court and not the high court. He contended that the deceased had no capacity to execute a will at 80years old.
 24. That in any event, a muslim cannot dispose more than 1/3 of her or his estate through a will. In that regard, the court was referred to the holding in the case of [*Saifudin mohamedali noorbhai vs Shebnaz abdebusein Adamji*](#) (2011)e KLR.
 25. On their part, the respondent filed his submissions through munyithya and company advocates thus adopting the content in the affidavit in reply to the application. Counsel submitted that the applicant had failed to establish the grounds spelt out under section 76 of the [*law of succession*](#). It was further submitted that the suit is time barred taking into account that a similar objection had been raised by the applicant's father but the same was determined. That to bring up the same issue after 39 years is an act in abuse of the court process.
 26. Regarding the validity of the will, counsel submitted that the same was properly executed in accordance with section 5 of the [*law of succession*](#) and that there was no proof that she was incapacitated. Learned counsel also referred to Saifudean case above quoted to express the position that a muslim was not prohibited from executing a will.

Analysis and determination

27. I have considered the application herein, response thereof and rival submissions by both counsel. Issues that emerge for determination are;
 - a. Whether this court has jurisdiction to hear this matter
 - b. Whether this court can set aside the order nullifying the wakf established by Mishi Binti Mwalimu and reinstate the same
 - c. Whether the suit (application) is time barred
 - d. Whether the will in question was valid
 - e. Whether the applicant has established the grounds set out under section 76 of the [*law of succession Act*](#) to warrant revocation of the grant.
28. The applicant in her evidence urged the court to revoke the grant and refer the matter to the Kadhi's court. Counsel for the applicant submitted that this court has no jurisdiction to hear a succession matter where both parties profess Islamic religion. There is no dispute that the kadhi's court is empowered under Article 170(5) of the [*constitution*](#) to determine questions of muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess islamic religion and submit to the jurisdiction of the kadhi's court.



29. A clear reading of the wording of the above provision leads to the inescapable conclusion that a party though a muslim cannot be forced to submit to the kadhi's court. In other words, a party who is a muslim can choose to submit to the kadhi's court or the high court which under Article 163(5) has unlimited jurisdiction over civil or criminal matters. See Saifudean Mohamedali Noorbhai (*supra*) above quoted where the court of appeal held that
- “Kenyan courts have held in past judgments that every litigant, of whatever religious persuasion, has the option of going directly to the high court, and a muslim is not necessarily restricted to the jurisdiction of the kadhi's court...”
30. In view of the above holding, I have no doubt the high court is properly seized of this matter.
31. Regarding the question whether this court can set aside the court order in high court civil case number 52(OS) of 1982 in the matter of the estate of Mishi Binti Mwalimu where the subject wakf was dissolved, these proceedings are not the correct forum to challenge such order for nullification of the wakf. The applicant's father was alive at that time hence had the opportunity to challenge it on appeal. The order sought cannot issue under this file.
32. As to whether the suit is time barred, the respondent is of the opinion that the applicant's father and his sister Baby did challenge the will and by extension the entire suit. However, that objection was abandoned. For the applicant to revive what her father challenged and conceded to will amount to abuse of the court process. It amounts to re-litigating over the same subject. Although succession matters are not expressly subject to limitation of time under the *Limitation of Actions Act*, at times, substantive justice will demand that such abnormal unreasonable delay be found to be injurious to the administration of justice a miscarriage of justice.
33. In the case of *In the estate of Josephine Magdalene (deceased)* (2016) eKLR the a court had this to say:
- “my reading of this is that an application founded in Section 76 of the *Law of Succession Act* can be made at any time. There is no limitation set to the provision for the making of the application. The provision is open ended. Of course there is need for bringing in the test of reasonableness to play. That, however consent does not introduce time limitation. It merely requires the court to bring in to bear reasonableness in its exercise of discretion as whether or not to revoke a grant.”
34. In the instant case, the grant herein was confirmed the year 1983. An objection challenging the grant on grounds that the will was not valid was resolved in favour of the executor. Since then, the subject properties have undergone numerous sub-division and transfers over a period of 39 years. To re-open the suit at this state will amount to a miscarriage of justice. Where has the applicant been for all these years. In any event, the applicant is seeking to inherit the estate of her great grand -mother who was an aunt to her grandfather who was given his share through the high court succession case no 57 of 1982 in respect of the estate of Mishi Binti Mwalimu.
35. The applicant and her mother admitted that fact in their testimony through cross examination. If there is any claim over inheritance of Mishi Binti Mwalimu, the applicant should have challenged the distribution under that file through which her father is a beneficiary and the subject land is where they are currently residing. The applicant could only claim a share of the estate of the great grand-mother or grand- mother through her father and not directly. The father having gotten his share out of Mishi Binti Mwalimu's estate just as kibibi the deceased herein did, the applicant cannot cunningly through the backdoor demand another share from Kibibi's estate.



36. Concerning the question on the validity of the will, the applicant is claiming that the deceased was so old at the time the will was allegedly made hence had no capacity to understand the nature of the will and its consequences.
37. Section 5 of the [law of succession Act](#) is clear on Persons capable of making wills and freedom of testation as follows;
- (1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.
 - (2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.
 - (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.
 - (4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.
38. Section 11 of the [law of succession](#) does provide that –
- Written wills
- No written will shall be valid unless-
- (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
 - (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
 - (c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary”.
39. It is trite law that the burden of proof is on he who alleges that the testator had no capacity to execute a will. see [In re Estate of Wilfred Koinange Gathiomi \(Deceased\)](#) [2020] eKLR

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- “ 17. The onus lay with the objectors to satisfy the court that the deceased at the time of making the will was too ill or affected by medication to know what he was doing. No report by a medical officer or other professional witness on the score was proffered, save for the bare assertions by the objectors who, it seems were even unable to recollect their last encounter with the deceased, beyond asserting that they visited him at home and in hospital during his sickness, an assertion disputed by the Petitioner and a sister Margaret Wanjiku Gathiomi



(Margaret) who admittedly lived in the same homestead with and cared for the deceased in his last days.

18. The Court of Appeal had this to say in *Ngengi Muigai & Another V Peter Nyoike Muigai & 4 Others* In the matter of James Ngengi Muigai (Deceased) [2018] e KLR:-

“In the recent case of *Rosemary B. Koinange (suing as legal representative of the late Dr. Wilfred Koinange and also in her own personal capacity) & 5 Others V Isabella Wanjiku Karanja & 2 Others* [2017] e KLR this court examined the issue of mental capacity (to make a will) and stated as follows:

“The essentials of testamentary capacity were laid out in the case of *Banks V Goodfellow* [1870] LR5QB 549 as cited with approval in the Tanzanian Court of Appeal case of *Vaghella V Vaghella* [1999] EA 351 thus:

“ A testator shall understand the nature of the act and its effects, shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.”

40. In the instant case, the applicant merely asserted that the deceased was of advanced age hence unable to execute a will. It was incumbent upon her to prove that at 80years, the deceased could not comprehend the content of the will or that her mental faculties were impaired so as not to understand what she was doing. In fact, from the correspondences made to the public trustee and copied to the chief kadhi dated 9th August 1982 which was attached as evidence (doc.exh.2) by the respondent, the deceased had written expressing her wishes that the respondent does inherit her property because he had taken care of her, maintained her and had advanced her kshs 140,000 when she was in need of help. This could not have been the conduct of a mentally incapacitated person.
41. It is trite that a court should not unnecessarily interfere with the testamentary free agency of a testator. From the evidence on record and more particularly on cross examination, the applicant and her mother(pw2) did concede that the deceased had executed a will and that their only problem was that they were not included. They however did not claim dependency on the deceased during her lifetime. From the above finding, it is clear that the applicant has not proved that the deceased had not left a valid will. To that extent, that prayer is not sustainable.
42. As to the question of revocation of the grant, Section 76 is clear on the circumstances under which a grant can be revoked. For avoidance of doubt, I wish to reproduce that provision which provides that;
- “ A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
- a. That the proceedings to obtain the grant were defective in substance;
 - b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;



- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either—
- i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - ii. To proceed diligently with the administration of the estate; or
 - iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. That the grant has become useless and inoperative through subsequent circumstances”.
43. Before a grant can be revoked, the applicant must be able to show that the ingredients set out under section 76 of the *law of succession Act* or any of them have or has been established. See *Jesse Karaya Gatimu V Mary Wanjiku Gitbinji* (2014) eKLR and *Matbeka and another vs Matbeka* (2005) KLR 455.
44. In the instant case, there is no proof of any of the ingredients contained in section 76 above quoted. The grant was properly issued to the properly appointed executor. An attempt to challenge issuance of the same through an objection did not see light of the day. Consequently, I do not see any good reason to revoke the grant. The application herein is purely an abuse of the court process. Surely, litigation at some point must come to an end. See *Kenya commercial Bank Limited vs Benjob Amalgamated limited* (2017) e KLR
45. Accordingly, I do not find any merit in the application herein hence the same is hereby dismissed with costs to the respondent

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF JANUARY 2023.

J.N. ONYIEGO

JUDGE

