



**In re Estate of Abdalla Nooman Ahmed (Deceased) (Civil Case
24 of 2015) [2022] KEHC 14502 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 14502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 24 OF 2015
JN ONYIEGO, J
SEPTEMBER 23, 2022
IN THE ESTATE OF THE LATE ABDALLA NOOMAN AHMED (DECEAED)**

BETWEEN

ZAINAB ABDALLA NOOMAN 1ST PLAINTIFF

NAAMAN ABDALLA NOOMAN 2ND PLAINTIFF

AND

THE PUBLIC TRUSTEE DEFENDANT

JUDGMENT

1. Through an Originating Summons dated August 22, 2015, Zainab Abdalla Nooman (hereafter the 1st plaintiff) and Naaman Abdalla Nooman (hereafter the 2nd plaintiff) moved this court pursuant to Order 37 rule 1 (a), (c) (e) 1 (g) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya ,the Public Trustee Act rule 3 and 11 of the Public trustee Act seeking orders that;
 - a. The public trustee be ordered to remit full accounts of the estate of the late Abdalla Nooman Ahmed;
 - b. The public trustee be ordered to distribute the estate of the late Abdalla Nooman Ahmed to all his legal heirs who survived him;
 - c. Any other orders as this honorable court deems fit to grant;
 - d. Costs of this application be provided for.
2. The summons is supported by an affidavit sworn on August 12, 2015 by the 1st plaintiff one Zainab Abdalla Nooman who averred that the deceased herein in respect of whom these proceedings relate died sometime on April 3, 1971 leaving behind 5 legal heirs namely;



- a. Fatuma Mohamed Muyahid Mohamed (son)
 - b. Thureya Abdalla Nooman (daughter)
 - c. Farida Abdalla Nooman (daughter) and the plaintiffs
3. She stated that, prior to his death, the deceased had purchased a piece of land titled as CR No 4755/4 Witu, vide sale agreement dated May 14, 1946 from Mbarak Bin Hassan (see annexure AZAN.1). That subsequently, the property was registered in the deceased's name. She further stated that none of the heirs to the deceased was aware of the existence of that plot.
 4. That after the deceased's death, his family (heirs) moved to Yemen where they stayed until recently when they returned back to Kenya. That upon their return, they got information that their father's estate was put under the administration of the public trustee. That every effort to contact the public trustee to account for the property was futile. They therefore demanded for the public trustee to give a full account of the estate and hand over the same to the legal heirs.
 5. On their part, the public trustee (hereafter the defendant) filed a notice of motion dated August 20, 2015 seeking to strike out the originating summons on grounds that it was incompetent as they lacked locus standii to be sued in that capacity as they had not been instructed to administer the estate nor had a grant of letters of administration been obtained by them.
 6. After hearing the application, the court dismissed the same on February 10 2016 thus urging the summons to proceed to full hearing and determination on merit.
 7. In response to the summons, the defendant filed a replying affidavit sworn on August 2, 2015 by Jafred Erima Maliro the assistant public trustee thus opposing the summons on grounds that ; the application lacks merit; it is misplaced; it is premature and amounts to an abuse of the court process; from their office records , the estate of Abdalla Nooman Ahmed has never been reported for administration purposes hence not obligated to render an account of the estate and distribute the same; the public trustee lacks *locus standii* to be sued as such since their office is not an appointed administrator; orders sought cannot apply as there is no grant nor certificate of confirmation to facilitate distribution and that the suit is a non-starter as there was no proof that the deceased owned the property in question.
 8. He went further to state that, the deceased's death certificate having been issued on May 21, 2015 there was no way the estate would have been reported for administration before the date of issue. In his view, the order sought if granted will highly prejudice the defendant herein as the public trustee had neither been appointed as an administrator nor dealt with the estate of the deceased.
 9. When the matter came up for hearing, Nooman Abdalla (1st plaintiff) reiterated the content contained in the affidavit in support of the originating summons in which they (plaintiffs) averred that a search in the land registry at Kilifi had revealed that the subject plot had been transferred to the deceased and later an entry made in favor of the public trustee vide cause No 7 /1981 and subsequently transferred to one Abdalla Suleiman.
 10. He produced a sale agreement (p.ex -1) reflecting the sale transaction between the deceased and the seller one Barak Bin Hassan. He further identified a copy of title deed reflecting an entry where the public trustee is indicated and later transfer done in favour of Abdalla Suleiman on March 16, 1982 at a consideration of kshs3,000. According to him, the subject land is in the name of the public trustee. He denied selling the said property to Abdalla Suleiman.
 11. Pw2 Zainab Abdalla (1st plaintiff) also adopted the averments contained in her affidavit in support of the summons. She corroborated the testimony of the 1st plaintiff.



12. On their part, the public trustee gave their evidence through Daniel Murigi Ngera a senior records management officer at the AG's office in charge of documents. He adopted his witness statement dated August 31, 2017. Briefly, his evidence is to the effect that from their official records in particular probate register commencing from 1981, the estate of Abdalla Nooman Ahmed has never been registered with the public trustee and that the office did not deal with the subject estate.
13. That the public trustee only takes over estates which have been reported and the beneficiary/beneficiaries thereof files the requisite form duly signed and commissioned before the public trustee after presenting the deceased's death certificate.
14. According to him, the issuance of the deceased's death certificate on May 22, 2015 is clear evidence that a report to the public trustee could not have been made the year 1981 minus a death certificate which is a mandatory requirement.
15. That in the absence of any proof that the deceased's estate was reported to the public trustee, the office of the public trustee cannot be made to account for the estate which was never reported nor administered by them.
16. He denied knowledge of the existence of a summary certificate dated July 12, 1982 in cause No 7/1981 and the transfer registered against the said plot L R No 4755/4 entry No 6 and 7 by the land registrar. That the preparation and presentation of the said summary certificate in cause No 7/1981 and the transfer of the plot by Mohamed Omar Dumila purporting to be an agent of the public trustee was not genuine and did not emanate from their office.
17. That the said Mohamed Omar Dumila who purported to have issued the summary certificate upon which the property was transferred to a 3rd party is not known by the defendant's office nor was he acting with authority on behalf of the public trustee. He further stated that mere appearance of the word public trustee does not bind the office of the public trustee and that the registrar of titles should have carried out due diligence before executing the alleged transaction/transfer.
18. The court was further told that according to the summary certificate of Lamu cause No 7 of 1981 purported to have been issued on March 12, 1982 by one Mohamed Omar Dumila as an agent of the public trustee, the deceased indicated is Abdalla Bin Nooman who died in 1955 hence contradicting the name of the deceased herein Abdalla Nooman Ahmed who died in 1971. That it is highly likely that the property in question does not belong to the deceased herein save for the sharing of the name. It is the witness's case that the plaintiffs had failed to prove that the deceased was the registered owner of the subject plot.
19. Despite every effort made to summon the land registrar Kilifi to clear a few outstanding issues on the alleged transfer of the property to a 3rd party on the strength of a summary certificate from the public trustee's office, he did not turn up.
20. Consequently, parties closed their case minus the evidence of the land registrar.

Submissions

21. The plaintiffs who at the final stages of the hearing appeared in person did not file any submissions. However, the defendant did file its submissions on August 3, 2021 thus reiterating the content of the replying affidavit and the testimony of Daniel Mwirigi and a list of documents among them their office register for probate causes for the period 1981 to 1982 which revealed that the deceased's estate was not reported as claimed.



22. Mr Maliro submitted that despite attaching various exhibits to the originating summons, none of them was produced as an exhibit. That plot No 31 (CR4755) belongs to one Abdalla Suleiman and not the deceased. Further, that the said Abdalla Suleiman was not made a 3rd party hence no adverse orders can be made against him.
23. Mr Maliro opined that if there is a dispute over plot No 31 (CR4755), the appropriate court will be in the ELC and not the probate court. That the suit herein is overtaken by events as the property in question is not registered in the name of the deceased Abdalla Nooman Ahmed hence the orders sought can only be issued by an ELC. To buttress that position, the court was referred to the case of *Mathew Kiptoo and another Vs Ronald Chelangat trading as Yatrin investments* (2015) e KLR where the court held that it would be an academic exercise to issue orders where a suit has been overtaken by events by leasing out the subject premises.
24. Learned counsel further submitted that Abdalla Bin Nooman indicated as the registered owner of the said plot is not the same as Abdalla Nooman Ahmed the deceased herein hence there is no proof that the deceased ever owned the subject property.
25. Counsel submitted that the estate could not have been distributed without a grant nor certificate of confirmation of grant. That an agent by the name of Mohamed Omar Dumila is a stranger to the office of the public trustee as there was no such agent appointed by the public trustee.

Determination.

26. I have considered the summons herein, evidence and submission by the defendant. Issues for determination are;
 - a. Whether the public trustee did administer the estate of the deceased
 - b. Whether this court has jurisdiction to hear this case.
27. According to the plaintiffs, their father died in 1971. That prior to his death, he had bought a plot No 31 CR No 4755/3 from Mbarak Bin Hassan. A sale agreement dated May 14, 1946 was attached and marked as P.exhibit No. 1
28. That they later discovered that the said property had been transferred by the public trustee to a 3rd party known as Abdalla Suleiman after administering the estate through cause No 7/1981.
29. On the other hand, the defendant vehemently denied ever administering the estate of the deceased. Section 6 of the *public trustee Act* provides as follows ;

“Where a report of action taken under section 46 of the *Law of Succession Act* (Cap. 160) has been made to the Public Trustee, or where the Public Trustee has been informed of the death of any person in Kenya and has been requested to take action in respect of the deceased’s estate by any person appearing to have a legitimate interest in the succession to, or administration of, the estate, the Public Trustee shall cause further inquiries to be made as to the estate of the deceased.
30. The public trustee denied ever receiving any report regarding the death of the deceased. A documentation register for the period 1981 -1982 was produced as proof that no such report was ever made. It was incumbent upon the plaintiff to prove that the public trustee had information regarding the death of the deceased and that they took action by administering the estate. It is trite law that he who alleges must prove the facts relied on to establish an alleged fact. See Section 107 of the *Evidence Act* and *Muriungi Kanoru Jeremiah vs Stephen Ungu M’wirabua* (2015) e KLR.



31. The plaintiffs claimed that there was an endorsement of a summary certificate in cause No 7.1981 and later a transfer of the subject plot to Abdalla Suleiman on the register of title. A careful perusal of the extract of the attached register reveals that the summary certificate in cause No 7 /1981 was in respect of the estate of Adalla Bin Nooman and not Abdalla Nooman Ahmed the deceased herein. It would appear like the two names do not refer to the same person. Secondly, there is no proof that the death of the deceased herein was made to the public trustee by any particular person. Further, there is no claim that Abdalla Nooman Ahmed and Adalla Bin Nooman refer to one and same person.
32. On the other hand, there was no attempt made to prove that the public trustee did administer the estate. No court proceedings in respect to Lamu cause No 7/981 were ever produced. It was not proved who the said Mohamed Omar Dumila the alleged agent of the public trustee was and he acted in what official capacity. There was no proof either that the said Mohamed Omar was an employee or agent of the public trustee. The court cannot assume that Mohamed was authorized to act for the public trustee yet no evidence was tendered. I do agree with Mr. Maliro that his office cannot shoulder a burden it did not manufacture. To that extent the public trustee cannot be directed to distribute or account for what they did not administer or obtain grant over nor certificate of confirmation.
33. Regarding the question of lack of jurisdiction, the court is fully aware that jurisdiction is a creature of the constitution or statute and that it cannot arrogate to itself jurisdiction where there is none through judicial craft or innovation. This position was succinctly expressed in the case of Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited and 2 others SC Appl No 2/2011.
34. In the instant case, the property in question is plot No 31(CR No. 4755) which is currently in the name of Abdalla Suleiman the same having been previously owned by Abdalla Bin Nooman and not Abdalla Nooman Ahmed the deceased herein. The current owner Abdalla Suleiman was not enjoined in the proceedings as an interested party. It is trite law that no person should be condemned unheard hence a basic tenet on the principle of fair hearing which is a critical element of natural justice. See Evans Odhiambo Kidero and 4 others vs Ferdinand Ndungu Waititu and 4 others petition No. 18 of 2014 as consolidated with petition No 20 of 2014 (2014) e KLR.
35. Having considered circumstances surrounding these proceedings, the only inescapable conclusion to make is that, there is obvious discrepancy on the registration of title of the subject property. That the current owner must be made aware of the claim. That the plaintiffs must obtain a grant whether limited or full in respect of their late father's estate to be able to follow their claim against those involved in illegally transferring what they claim is their inheritance to one Abdalla Suleiman.
36. This process has a forum under Article 162 of the Constitution which provides for the environment and land court to handle disputes over title, occupation or land use. In the circumstances, I do agree with Mr. Maliro that this court has no jurisdiction to handle the claim in the manner presented. Accordingly, the application is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Mombasa this 23rd day of September, 2022

J N.ONYIEGO

JUDGE

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