



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 85 OF 1997

IN THE MATTER OF THE ESTATE OF GULAM MOHAMED-DECEASED

BHADUR NOOR MOHAMMED GULAM.....APPLICANT

VERSUS

GULAM MOHAMMED NOOR..... RESPONDENT

RULING

1. The court is called upon to determine three applications each filed by either party. The first application of the three is a chamber summons brought under certificate of urgency dated 1/10/2020 pursuant to Sections 76, 83 & 95 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules, and other enabling provisions of the law. In it, the applicant seeks inter alia stay of the orders issued on 28/9/2020 and 29/9/2020; setting aside of the proceedings of 28/9/2020 and 29/9/2020 and the consequential orders of reinstatement of Bhadur Noor Mohamed Gulam as the lawful administrator of the estate of the deceased herein. It further prays that the applicant's application dated 27/11/2019 seeking a raft of orders including accounts for income from **Meru town/Block II/107** be rendered by way of audit commissioned by the two administrators, discharge of 2nd administrator from his duties as such administrator on account of commission of an offence under section 95 of the act and that the file be heard on priority.

2. The grounds upon which the application dated 01/10/2021 is premised are set out in the face thereof and in the supporting affidavit of Bhadur Noor Mohamed Gulam, the applicant, sworn on 1/10/2020. The contention is that pursuant to the decision of the court made on 29/9/2019, the beneficiaries agreed to sell the estate property and share the proceeds equally. The respondent, who was collecting rent from the estate property, is accused of failing to account for the rental arrears since 29/9/2011. He laments that the reason why he was removed as an administrator, is because of a mistake of his counsel, which he beseeches this court not to visit upon him. He is fearful that the respondent will continue to plunder the estate unless the orders he seeks are granted.

3. The respondent filed grounds of opposition on 7/5/2021, in which he terms the application dated 1/10/2020 as a ploy to delay completion of the administration of the estate of the deceased herein. He views the application as an afterthought, bad in law, fatally defective and an abuse of the court process, which has obviously been overtaken by events since the applicant is non-existent.

4. **The second application** is still by the applicant, brought under certificate of urgency dated 16/10/2020 pursuant to Order 9 Rules 9 & 10, Order 45 Rule 1 of the Civil Procedure Act, Rule 63 of the Probate and administration Rules together with all other enabling provisions of the law. In it, the applicant seeks leave to be granted to the firm of **P.S Kisaka & Company Advocates** to come on record on his behalf; stay of implementation and/or execution of its orders issued on 29/9/2020 pending the hearing and determination of the application and the setting aside and/or review of the orders issued on 29/9/2020 removing the applicant as an administrator of the estate.

5. The grounds upon which the application is premised are again set out in the body of the application and echoed in supporting affidavit of the applicant, sworn on 16/10/2020. He contends that his application dated 27/11/2019 ought to be heard so that a full account of the all rent collected by the respondent can be rendered. He wishes to be reinstated as an administrator of the estate of the deceased. The only opposition to be filed to that application is the Grounds of Opposition by the 2nd administrator in which it is alleged that the applicant is non-existent and that is a ploy to delay the conclusion of administration and otherwise an abuse of the court process.

6. Up to this juncture, it must be born in mind that the 1st administrator/applicant has three applications pending determination. While the very first of the three applications appear to ground the rest, the next two merely seek to fast track that preceding each but the substantive target is that the orders of 29th September 2019, be stayed pending being set aside and reviewed so that the removal of 1st administrator is rescinded

7. The **third application** is dated 13/1/2021 by a beneficiary namely Amir Jan Begum, brought pursuant to Rules 49 & 73 of the Probate and Administration Rules. She seeks the signing of the certificate of confirmation of grant as per the court orders of 29/9/2020, to enable timeous distribution of the estate.

8. The application is premised on the grounds set out in the body of the application and her supporting affidavit sworn on 13/1/2021 which describes the applicant as an octogenarian, who wishes that the estate is distributed speedily so that she can enjoy her share during her lifetime. She contends that the issues raised by the applicant, who has since passed on, were extensively dealt with by the court on 3/12/2019, and as such, his applications have been overtaken by events. By the time the matter came up for arguments, no opposition had been filed against that last application.

9. The court on 14/7/2021 heard oral submissions from the counsels for the parties herein. Mr. Kaumbi for the respondent prayed for the application dated 13/1/2021 to be allowed as prayed. Miss Akech for a beneficiary associated herself with Mr. Ndubi's grounds of opposition and intimated to court that she was not opposed to the application dated 13/1/2021. She contended that her client, who was a student, had to defer her studies due to lack of funds. Mr. Otieno for the applicant submitted that the money which ought to have been paid to his client was instead paid to an advocate and therefore not received by him as his share of the estate.

Analysis and determination

10. The applicant, it is accepted by all, died on 5/11/2020, and his daughter made an application dated 17/12/2020 to be substituted in his place. I find merit in that application and accordingly substitute the deceased applicant with Zulekhar Bahadar (**hereinafter referred to as the applicant**), only to the extent of prosecuting the two applications on behalf of the deceased applicant. Now that the deceased applicant has been substituted, I will consider the three applications on merit.

11. I view the three identified applications by the deceased petitioner and that one by the administrator to be two opposite sides of the same coin. If I accede to that by the petitioner, that by the administrator must fail and vice versa. I say so because the central consideration here must remain whether the orders recorded by consent on the 29/09/2020 deserves being set aside and reviewed or the same ought to be enforced towards having the administration concluded and file closed.

12. I have carefully perused the record and noted with concern that the applicant has cast himself out as a problematic administrator. He had at some point improperly obtained title to the estate property in his name. The court in its decision dated 19/1/2017, observed **"the conduct of the 1st respondent would even warrant removal as administrator but I will not order so since that request was not put to the court."**

13. I have further noted that the applicant was removed as an administrator of the deceased estate following an oral application on 29/9/2020. Mr. Kaumbi who was representing 4 beneficiaries told court that the applicant/1st administrator was acting strange and they needed him removed as an administrator. Those sentiments were echoed by Shenaz Noor and Zantum Noor, who equally wanted the applicant removed as administrator for being problematic. The court rendered itself thus, **"that in view of the conduct of the 1st administrator, he is hereby removed as an administrator of the estate. There shall now be one sole administrator of the estate. A fresh grant shall be issued to him. As a consequence, GULAM MOHAMED NOOR is the sole administrator and signatory of the estate account herein held in Diamond Trust Bank and shall solely effect this order of the court."**

14. The applicant is thereby being less than candid to the court when he alludes to having been unaware and/or absent when the said orders were made. I find that he was in deed represented by counsel and it is indeed his counsel Mr Otieno who addressed the court on the agreement between the beneficiaries. The assertion that he was not part of the proceedings that day can therefore never be true. If not true it cannot be the basis of setting aside a consent order. I find no merit in the application for setting aside or review and dismiss the application dated 27/11/2021.

15. Mr. Otieno's submissions that the money was paid to an advocate instead of his client, are misleading and quite misplaced. I have critically analyzed the consent order of the court on 29/9/2020. The court stated, **"That the 1st administrator who is also a beneficiary has already received a sum of Ksh.5,500,000 from the proceeds in (a) above through his advocates M/S ABDULLAHI & CO. ADVOCATES. Therefore he is now entitled to a further sum of Ksh.750,000 from the estate account as per (c) above. This latter sum is subject to clause (d) above and he shall receive a sum of Ksh.500,000 from the estate account leaving a sum of Ksh.220,000 in the estate as per(d) above. The advocates to file their bills for consideration by the court."**

16. It is overly clear that the decision of the court sought to be set aside was made in the presence of the counsel for the applicant. It is equally clear that the removal of the applicant as an administrator was supported by 6 out of the 8 beneficiaries. A consent being a contract can only be set aside by another consent or where vitiating facts are demonstrated. It is now settled law that a consent judgment or order has contractual effect and can only be set side on grounds which would justify setting a contract aside. In **Flora N. Wasike v Destimo Wamboko[1988] eKLR** the court of Appeal reiterated the law in this area in the following words: -

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside"

17. Here I find no vitiating factor that would support setting aside of the contract made before the court on the 29/09/2020. I find and hold that it is time this matter is expedited to finalization. It is not in doubt that the beneficiaries herein have continuously been held at ransom by the deceased administrator. After he died and even after he was substituted the daughter substituting him must be viewed as a grandchild who stands in a lower priority to the administrator. In my discretion, I see no benefit to be served by any of the orders sought by the application dated the application dated 27/11/2019

18. For the ends of justice to be met, it is incumbent that the inherent powers of this court are invoked, in accordance with the provisions of Section 47 of the Law of Succession Act as well as Rule73 of the Probate and Administration Rules. The resultant effect is that the applications dated 27/11/2021, 1/10/2020 and 16/10/2020 are dismissed with the consequence that that dated 13/01/2021 is allowed as prayed. The certificate of confirmation shall be issued and signed in terms of the decision by Gikonyo J dated the 29/09/2020.

DATED SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF JULY, 2021.

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Kaumbi for the 4th beneficiary

Miss Akech for a beneficiary

No appearance for Ndubi for the administrator

No appearance for Mr. Otieno C

Patrick J.O Otieno

Judge