



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO.7 OF 1997

IN THE MATTER OF THE ESTATE OF ADAM HAJI ALI TALIB (DECEASED)

RULING

1. The deceased herein Adam Haji Talib died intestate on 31.12.93. According to form P & A 5, the deceased was survived by a widow by the name of Sakinabai Adam Haji Ali (widow) and five children namely: Bilkish Adam (daughter) Najma Adam (daughter), Tazim Nizan Y. Sidik (daughter), Mohamed Adam (son) and Mustafa Adam (son).

2. Among the assets listed as comprising the estate was:

- a) Plot No.1 M.N./815 Mkomani with building thereon worth 2 million***
- b) Savings Bank Account with Standard Chartered Bank – Shs.15,000.00; and***
- c) Personal effects.***

3. The grant was on 14.7.97 issued to the widow and then confirmed on 27.4.98 and the estate distributed in accordance with the Islamic sharia law. Daughters got 1/8 share and sons 2/8 share. On 6.3.17, Bilkish Adam Haji, one of the daughters and beneficiary to the estate filed summons dated 3.7.17 seeking revocation of the grant on grounds that; the administratrix had failed after due notice to proceed diligently with the administration of the estate; failed to complete administration of the estate; failed to produce full inventory and accurate accounts of the estate within six months after confirmation of the grant; carrying out a conveyance in respect of the estate contrary to the confirmed grant.

4. After hearing the application, Honourable Justice Thande delivered her Ruling dated 3.5.19 declaring that; the administratrix had failed to diligently administer the estate and that the conveyance made by transferring the subject property (Plot No.815/1/M.N), in favour of the administratrix, M/s Najma Adam Haji Ali and Mustafa Adam Haji Ali to the expense of other beneficiaries was a nullity. The court however did not nullify the grant.

5. In conclusion, the court made the following orders:

- a) The conveyance in respect of Plot No.815/1/MN between Sakinabai Adam Haji Ali, Najma Adam Haji Ali and Mustafa Adam Haji Ali and registered in Volume LT6 Folio 20/10 file 455 is hereby nullified.***
- b) Sakinabhai Adam Haji Ali shall within 30 days that is to say 3.6.19 execute and cause to be registered afresh conveyance/Assent in favour of the beneficiaries of the estate of the deceased in accordance with the certificate of confirmation of grant issued to her on 29/4/98.***
- c) Any beneficiary wishing to renounce their interest in the estate of the deceased may file a renunciation to that effect within 14 days, that is to say by 17.5.2019.***
- d) Sakinabhai Adam Haji shall on or before 3.7.19 produce a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.***
- e) Mention to confirm compliance and for directions on 8.7.2019.***
- f) This being a family matter, there shall be no orders as to costs.***

6. On 17.5.2019, Sakinabhai Adam Haji (administratrix) filed another Notice of Motion seeking stay of execution of the said orders of 3.7.2019 pending hearing and determination of the intended appeal. The application was considered and directions to fix interpartes hearing in the registry made. From the record, a hearing was fixed and the application is still pending. On 20.9.21, Bilkish filed an application also

seeking committal of the administratrix to civil jail for disobedience of the court order.

7. When the file was mentioned on 10.3.20 to confirm compliance with the orders of 3.5.2019, it emerged that there was no compliance. The court then summoned the administratrix to appear on 31.3.20 to show cause why she could not comply with the court orders of 3.5.2019. The court further directed that rental income collections from the affected property be deposited in court with effect from 1.4.2020.

8. Despite several mentions, the administratrix did not turn up in court to show cause why she could not comply with the orders of 3.5.19. Consequently, on 23.11.20, counsel for the administratrix told the court that his client was willing to comply with the orders and that beneficiaries were considering the possibility of selling the property and share out proceeds.

Parties were then given 90 days to look for a buyer in default the deputy registrar to execute transfer forms. By 15.3.21, there was no compliance yet.

9. Consequently, Bilkish Haji Ali moved this court on 22.3.21 vide an application (summons) dated 18.3.21 the subject of this Ruling seeking orders as follows:

1) That this Honourable Court be pleased to remove the Respondent Sakinabai Adam Haji forthwith as an administrator of the estate of Adam Haji (deceased).

2) That this Honourable Court be pleased to appoint Bilkish Adam Haji as the administrator of the estate of Adam Haji Talib (deceased)

3) That the Respondent be restrained by herself and/or agents and servants or any person acting under her authority from interfering with the applicant's discharge of her duties under Section 83 of the Law of Succession Act in relation to all the assets of the estate including Plot No.815/1/MN.

4) That the Petitioner/Respondent do provide full inventory and accurate accounts and income collected in relation to the estate from 1993 to date.

5) That the costs of this application be in the cause.

10. The application is anchored on grounds stated on the face of it and further amplified by averments contained in the affidavit in support sworn on 18.3.21 by the Applicant stating that; the administratrix has failed to comply with the orders of 3.5.19, 7.5.18 and 10.3.20 regarding deposition in court of the rent collected from the subject property thus displaying outright defiance and contempt to the court orders.

11. Despite service of the application upon the administratrix/Respondent, no response was filed. The application was fixed for hearing on 10.5.21. on that day, M/S Kithinji holding brief for Mr. Mwangi for the Respondent (administratrix) told the court that Mr. Mwangi had not received instructions from his client. She then prayed for 14 days to have Mr. Mwangi get instructions.

12. The court reluctantly gave Mr. Mwangi 7 days to file the necessary response. Hearing was then fixed for 24.5.21. On that day, there was no appearance on the Respondent's side (administratrix) nor was any response filed. Consequently, the matter proceeded exparte.

13. During the hearing, Mr. Mingo for the Applicant basically adopted the averments contained in the affidavit in support of the application.

14. I have considered the application herein together with the affidavit in support which is not opposed. Although the application is not opposed, the court is duty bound to make due consideration of the prayers sought and arrive at the necessary finding. The fact that an application is not opposed does not mean that it will automatically succeed. See **Supreme Court, Civil Appeal No.26/2018, Gideon Sitelu Konchellah –vs- Julius Lekakeny ole Sunkuli, & 2 Others [2018] eKLR**, where the court held that;

“... the upshot is that as the 2nd and 3rd respondents had stated categorically that they do not oppose the application, the court will be excused for therefore deeming the application as being unopposed entirely.

[10] Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted...”

15. From the history of this matter, this is an extremely old matter having commenced in 1990. The estate was distributed without any protest on 27.7.17 with each beneficiary getting his or her rightful share according to Sharia Law.

16. The only challenge is distribution of the estate in accordance with the court order which gave daughters 1/8 and sons 2/8 share out of the only landed property Plot No.815/1/MN.

17. It is not in dispute that the administratrix has failed to comply with the orders of 3.5.19 aforesaid and those of 10.3.29 directing depositing of rent collected out of the said property in court.

18. As the court properly pointed out in its ruling of 3.5.2019, the administratrix is under obligation under Section 83(f) of the Law of Succession to distribute the estate according to the respective beneficial interests as per the certificate of confirmation of grant. Under

Section 83(g), distribution of the estate ought to have been done within six months. The administratrix did ignore this court order vide the confirmed grant and proceeded to transfer the property to three beneficiaries to the exclusion of the other beneficiaries among them the applicant.

19. The court having found that the conveyance done in transferring the property to a few beneficiaries was null and void, the administratrix has no choice but to comply. Since she has been reluctant and or totally refused to honour the court order, this court has the power to appoint a new administrator even suo motto under Section 66 of the Law of Succession to complete the administration of the estate.

20. In the case of **In re Estate of William Nzioka Mutisya (Deceased) [2018] eKLR the court** the court stated that:

“I however agree with the position adopted by