



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**MISC APPLICATION NO. E011 OF 2020**

**IN THE MATTER OF THE ESTATE OF ALIHADI DAFILLA ALI (DECEASED)**

**MERCY NJOKI aka**

**FATUMA MERCY NJOKI.....PETITIONER/APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT**

**RULING**

(1) Before this Court is the summons dated **8<sup>th</sup> July 2020** by which the Petitioner/applicant **MERCY NJOKI aka FATUMA MERCY NJOKI** seeks the following orders:-

**“1. Spent.**

**2. THAT the Respondent be and hereby ordered to allow the Petitioner immediate access to the deceased’s Estate bank account No. 110xxxxxxx as per the orders of the Succession Court issued on 5<sup>th</sup> March 2019 and the certificate of confirmation of grant issued on 13<sup>th</sup> March 2019 by the Kadhi’s Court in Lamu Succession Cause No. 8 of 2019.**

**3. That there be an order allowing the Petition to withdraw funds from the deceased’s estate account No. 110xxxxxxx as a beneficiary and heir of the deceased’s estate.**

**4. That the Respondent be and is hereby ordered to avail to the Petitioner the current statement of accounts of the Deceased’s estates account No. 110xxxxxxx.**

**5. That the Honourable Court be at liberty to issue further directions in this matter as it deems fit and necessary.**

**6. That costs of this Application be provided for.”**

(2) The summons was premised upon **section 35 (1) (a) & (b) and section 47** of the **law of Succession Act, Cap 160, Laws of Kenya** and **Rule 73 of the Probate & Administration Rules** and all other enabling provisions of law, and was supported by the Affidavit of even date and the supplementary affidavit dated **3/11/2020** Sworn by the Applicant.

(3) The Respondent opposed the summons through their Replying Affidavit dated **10<sup>th</sup> February 2021**, sworn by **ANNE WAIRIMU THAIRU – NJUA** the Centre Manager Advantage Banking at **Kenya Commercial Bank**. The summons was canvassed by way of written submissions. The Applicant filed the written submissions dated **12<sup>th</sup> July 2021**. The Respondents relied upon their written submissions dated **21<sup>st</sup> July 2021** whilst the Applicant filed submissions dated **11<sup>th</sup> August 2021** in response to the Respondents submissions.

**BACKGROUND**

4. This matter concerns the estate of one **ALIHADI DAFILLA ALI** (hereinafter ‘the Deceased) who is said to have passed away at

**Kenyatta National Hospital** on **17<sup>th</sup> January 2017**. The Applicant avers that she got married to the Deceased in **Nakuru** on **4<sup>th</sup> February 2010**, having converted to Islam on **8<sup>th</sup> December 2009**. The Applicants position is that she, as the only widow of the Deceased and the minor **AZD** are they only survivors of the Deceased.

5. The Applicant averred that following the demise of the Deceased she applied for and obtained letters of Administration intestate on **5<sup>th</sup> March 2019** from the Kadhi's Court in **Lamu** vide Succession Cause **No 8 of 2019**. The said letters of Administration were duly confirmed on **13<sup>th</sup> March 2019**.

6. The Applicant contends that on the basis of the confirmed Grant she proceeded to the **Kenya Commercial Bank**, seeking to be granted access to the Deceased's Bank Account. That the Respondent denied her access to said account and instead caused her to be arrested by the **Banking Fraud Unit** alleging that the documents presented to the Bank staff specifically the Death Certificate in respect of the Deceased were fraudulently obtained. Thereafter on **15<sup>th</sup> March 2019** the Applicant was charged with a criminal offence of forgery and uttering false documents at the Milimani Chief Magistrate's court vide **CMCC No. 473 of 2019**.

7. The Applicant pleads that she is in dire need of the funds held in the Deceased's account to enable her cater for the needs of herself and the minor, who are the heirs of the estate of the Deceased. She submits that the Grant issued to her by the **Kadhi Court** in **Lamu** has never been challenged and/or revoked. That there is no dispute that the money held in the account belongs to the Deceased. Finally, the Applicant argues that if the Respondent's Bank is permitted to persist in denying her access to the said account then she and the minor will be prejudiced as they will be denied benefits rightfully bestowed upon them by a competent court.

8. The Respondent Bank opposed the application. It was averred for the Respondent that upon presentation of the court orders issued by the Kadhi Court in **Lamu** together with a copy of the Death Certificate of the Deceased the Bank as was required conducted due diligence to determine the authenticity of the documents presented to it.

9. The Respondent confirmed that the Deceased did indeed hold an account with their **[Particulars Withheld] Branch**. However, although the Deceased is alleged to have died in **January 2017** according to the Bank, the Deceased's account had continued to be operational upto **December 2020**. That the said account was still being operated by a person purporting to be **Alihadi Dafilla Ali** (the Deceased herein). Therefore the Respondents suspected that the Deceased was still alive, and that a fraud was being perpetrated against the account in question.

10. The Respondent immediately reported the matter to the **Banking Fraud Unit** to investigate. Upon conclusion of investigations by police the Applicant was arrested and was charged with forgery and uttering false documents. The criminal trial is still ongoing.

11. The Respondent submits that given the above circumstances they were justified in denying the Applicant the Deceased's account. They submit that the present application is defective, bad in law and is frivolous, vexatious and an abuse of court process. They urge the court to dismiss the application in its entirety.

### Analysis and determination

12. I have carefully considered the application before this court, the Replying Affidavit in response thereto as well as the written submissions filed by both parties. The only issue for determination is whether the Respondent bank should be ordered to provide the Applicant with immediate access to the account in question and allow her to withdraw funds from the said account.

13. The fact of the existence of an account **No. 110xxxxxxx** in the name **Alihadi Dafilla Ali** exists at **Kenya Commercial Bank**, (hereinafter the 'Subject Account') is not in any dispute. The Respondent bank concedes that the Subject account exists.

14. The Applicant avers that she professes the **Islam faith** having converted to Islam on **8<sup>th</sup> December 2009**. Annexed to the Supporting Affidavit dated **8<sup>th</sup> July 2020** is her certificate of conversion to Islam (annexture '**MN-1**'). The Applicant further avers that she got married to the Deceased under Islamic Law on **4<sup>th</sup> February 2010**. She has annexed to the same Supporting Affidavit a copy of her certificate of marriage (Annexture '**MN-2**'). That the union was blessed with one child a daughter named **AZD** (hereinafter 'the minor')

15. The Applicant stated that the Deceased passed away on **17<sup>th</sup> January 2017** and was survived by herself and the minor. She has annexed to her Supporting Affidavit a copy of the Death Certificate ('**MN-3**'). On the basis of this Death Certificate the Applicant filed succession proceedings at the Kadhi's Court in **Lamu** and obtained letters of Administration issued in her favour on **5<sup>th</sup> March 2019**. Based on the certificate of confirmed Grant dated **13<sup>th</sup> March 2019** (Annexture '**MN-5**'), the Applicant claims the right to access and withdraw funds held in the Deceased account at the Respondent Bank.

16. The Respondent on the other hand queries the fact of Death of the Deceased. They aver that though **Alihadi Dafilla** is said to have died in **January 2017** the accounts in his name has continued to be operated by a person(s) claiming to be the Deceased from **January 2017** to **December 2020**. For this reason, the bank involved the **Banking Fraud Unit** who upon investigating caused the arrest and charging of the Applicant for the offence of fraud.

17. It is not the duty of this court to determine the validity or otherwise of the criminal charges laid against the Applicant. That is a matter to be determined solely by the trial court. However, there are certain anomalies which arise in the matter to which this court cannot just turn a blind eye.

18. Firstly the court questions the validity of the Death Certificate which the Applicant seeks to rely on as proof of the Death of her husband. In the Kadhi's Court in **Lamu** the applicant presented as proof of death a certificate serial number **654623** (Annexture '**MN-3**') which Death Certificate indicates that the Deceased died at the **Kenyatta National Hospital** on **17<sup>th</sup> January 2018**. This Death Certificate indicates that

the Deceased died in January of **2018** whilst in her supporting Affidavit the Applicant has averred that her husband passed away on January of **2017** - which is the correct position?

19. When the Applicant appeared before the Bank officers at the **[Particulars Withheld] Branch** she presented a different death certificate being Serial Number **436630** indicating the date of death as **17<sup>th</sup> January 2018**. The question that immediately springs to mind is why do there exist two different death certificates for the same person. Secondly, why did the Applicant present the death certificate Serial No. **654623** before the Kadhi Court in **Lamu** yet she presented a totally different Certificate being serial number **436630** in her attempt to gain access to the Subject account.

20. The Applicant attempted to explain this anomaly by stating that following the demise of her husband she requested an agent to assist in acquiring the Death Certificate, which Death Certificate Serial No. **654623** was used to obtain the Grant from the Kadhi Court in **Lamu**. That it was only after her arrest that the Applicant realized that the Death Certificate given to her by said agent was a forgery and had **not** been issued by the Registrar of Births and Deaths.

21. The Applicant then went about obtaining the second death Certificate being serial No. **4366303** which she presented to the Respondent Bank demanding access to the account of her late husband.

22. This explanation far from being satisfactory only serves to raise further questions. It is manifest that the Grant issued to the Applicant by the Kadhi court in **Lamu** was by the Applicants own admission issued on the basis of a **forged death certificate**. How then can that Grant be said to be valid and enforceable. I have no doubt that had it been disclosed to the **Hon Kadhi** that the Death Certificate which had been presented to him was a forgery then the Kadhi would not have issued the Grant to the Applicant.

23. The Applicant cannot simply discard the forged Death Certificate, substitute it with another Death Certificate and then proceed to the Bank demanding that she be allowed access to the account. The fact of the matter is that the Grant issued to the Applicant in **Lamu** was premised on a forged Death Certificate. As such said Grant is invalid and cannot be enforced. The proper procedure would be for the Applicant to seek a fresh Grant on the basis of the new Death Certificate that she has now obtained. She cannot be allowed just to substitute a Death Certificate and purport that it is genuine without necessary enquiry being conducted. Accordingly, the Grant issued to the Applicant in **Lamu** which by the admission by the Applicant herself, was obtained on the premise of a forged Death Certificate, is null and void and therefore unenforceable.

24. It is trite law that court orders must be obeyed. In the ordinary course of events a valid Grant issued to the Applicant would have been enforceable as against the Respondent bank. However the validity of the Grant issued to the Applicant has been put in serious question through the admission by the Applicant herself that said Grant was issued on the basis of a forged Death Certificate.

25. **Section 76** of the **Law of Succession Act Cap 160 Laws of Kenya** provides for the circumstances under which a grant may be revoked by the court. **Section 76** provides as follows:-

**“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application or by an 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 justice the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

**(d) .....” (own emphasis)**

26. It is manifestly clear that the Grant issued to the applicant by the Hon Kadhi in **Lamu** was obtained by the making of a false statement. As such, the proceedings before the **Hon Kadhi** were defective in nature. This court will not enforce the Grant given the circumstances under which said Grant was obtained.

27. This court also cannot ignore the fact that the Applicant is currently facing criminal charges in respect to the said forged death certificate. The Applicant has conceded that she is facing charges vide **Milimani CMCC No. 473 of 2019**.

28. In her supplementary Affidavit dated **3<sup>rd</sup> November 2020** the Applicant at **paragraph 9** depones as follows –

**“THAT I was not privy to nor did I take part in any acts of forging, uttering the deceased’s death certificate or the birth certificate for my daughter and I will prove during the hearing of the criminal matter that I am innocent of all the charged levelled against me”**

It is clear that the question of whether or not the Applicant was involved in the forgery of documents used to obtain the Grant issued by the Kadhi court in **Lamu** is one which is yet to be determined in the criminal trial.

29. In the circumstances acting *suo moto* this court hereby revokes the letters of Administration issued to the Applicant on **5<sup>th</sup> March 2019**

in respect to the estate of **ALIHADI DAFILLA ALI**. The certificate of confirmed Grant dated **13<sup>th</sup> March 2019** is similarly revoked. The summons dated **8<sup>th</sup> July 2020** is dismissed in its entirety. Each party to bear its own costs.

**DATED IN NAIROBI THIS 15TH DAY OF OCTOBER, 2021.**

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**MAUREEN A. ODERO**

**JUDGE**