



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 842 OF 2012

IN THE MATTER OF THE ESTATE TIMORO ABDI ADAD ELMI

OMAR HASSAN AHMED.....1ST APPLICANT

MOHAMED ABDI HABEY.....2ND APPLICANT

-VERSUS-

ISMAIL MOHAMED.....RESPONDENT

RULING

Introduction

This Ruling relates to the Application by way of Summons for Revocation of Grant dated 4th day of December 2020 filed under a Certificate of Urgency of the same date. The Application is brought by Omar Hassan Ahmed, 1st Applicant, and Mohamed Abdi Habey, 2nd Applicant. They are seeking the following orders:

- 1. THAT the application be heard ex parte in the first instance due to the reasons of urgency***
- 2. THAT pending the hearing and determination of this application this Honourable Court be pleased to stay the Grant issued on the 19th February 2013***
- 3. THAT pending hearing and determination of this application the Grant of letters of administration herein together with any act or process initiated or undertaken on the basis or through the said Grant be declared ineffective and/or of no consequence***
- 4. THAT Grant of Letters of Administration on the estate of the late Timiro Abdi Elmi who died on the 29th of April be revoked***
- 5. THAT letters of administration be issued to Hassan Omar Ahmed and Mohamed Abdi Habey as Joint administrators to the Estate***

The application is supported by the affidavits sworn by Omar Hassan Ahmed and Mohamed Abdi Habey, both sworn on the 4th day of December 2020. The application is opposed by the Respondent who filed his Grounds of Opposition dated the 26th day of April 2021 together with his Replying Affidavit sworn on the 17th day of May 2021. In compliance with the directions of this court that the application be disposed of by way of written submissions, the Applicants filed their joint written submissions dated the 7th day of June 2021 together with their list of Authorities of the same date. The Respondent on the other hand filed his written submissions dated 24th day of June 2021.

Applicants' Case

The Applicants' case is that they are beneficiaries of the estate of the deceased who passed away on the 29th day of April 1985. The 1st Applicant depones in his Affidavit dated the 4th day of December 2020 that he is a grandson to the deceased and one of the joint administrators of the subject estate with Asha Elmi (now deceased) and Ismail Mohamed (Respondent herein). He states that the Grant of Letters of Administration in the estate of Timiro Abdi Adad Elmi was issued to the three administrators on the 19th day of February 2013 and

that the same is yet to be confirmed.

The Applicants contend that the deceased left behind 26 beneficiaries including the two of them. It is their contention that the Petition for Grant of Letters of Administration left out some of the beneficiaries out of the 26 and that, according to them, this exclusion renders the Grant defective. Further, it is the Applicants' case that Asha Elmi, one of the Administrators, has since passed on and as such the existing Grant of Letters of Administration is inoperative. The Applicants are using this development in furtherance of their resolve to have the Grant revoked. The aforesaid notwithstanding, the Applicants are of the view that Mohamed Abdi Habey, the 2nd Applicant herein, be appointed as one of the administrators in the place of Asha Elmi. In holding the above view, the Applicants aver that the appointment of the 2nd Applicant as one of the administrators in the estate of the deceased was proposed, discussed, and agreed upon by all the beneficiaries of the subject estate following a meeting that was held on the 22nd day of April 2017 at Fatuma Yusuf's house (one of the granddaughters of the deceased).

It is the Applicants' case that the Respondent has been denying some of the beneficiaries their shares of the rental incomes deposited in Account No. 0210xxxxx Gulf African Bank (Eastleigh Branch) as directed by the Kadhi's court vide the judgement rendered on the 19th day of April 2017. It is the foregoing, according to the Applicants, that informed the beneficiaries to resolve to open a new account and remove the Respondent as a signatory thereto.

Further, it is the Applicants' case as deponed under Paragraph 9 of the Supplementary Affidavit sworn by the 2nd Applicant on 7th day of May 2021 that the Respondent is frustrating a proposed development on Plot No. 36/VII/200 Eastleigh, Kirongothi Street which development has stalled and/or is in danger of being rendered non-viable hence the urgency to dispose of the matter so as not to scare away the investors.

Respondent's case

It is the Respondent's case that he, together with Hassan Omar Ahmed (the 1st Applicant) and Asha Elmi (now deceased) were appointed as joint administrators of the estate of Timiro Abdi Adad Elmi on the 19th day of February 2013. According to the Respondent, the Grant cannot be deemed to be inoperative as no concealment of material fact has been made. It is the Respondent's view that no beneficiary has been left out of the estate of the deceased and that they have all been receiving their shares from the rental incomes according to their percentage(s) as ordered by the Kadhi's court in direct adherence to Sheria Laws. The Respondent is contending that there have never been any complaints from the beneficiaries and that the Applicants convened a secret meeting with the sole purpose of ousting him as one of the administrators of the estate of the deceased.

The Respondent is alleging that he has dealt with all the affairs of the estate of the deceased fairly and responsibly *albeit* the Applicants have made attempts to frustrate his conduct with respect to the administration of the estate including denying him and his siblings their shares of the rental incomes from Eastleigh properties totaling to Kshs. 2,128,294/-.

The Respondent further avers that the 1st Applicant is desirous of hastily getting into joint venture agreements with properties forming part of the estate of the deceased void of the Court's sanction. As per the Respondent, the 1st Applicant withdrew Kshs 1,300,000/- from their joint account No. 0210xxxxx Gulf African Bank (Eastleigh Branch) without the consent and/or participation by the Respondent – as the joint administrator thereto.

Analysis and determination

I have considered this matter and I fully understand the case for each party. What strikes me is the attitude of the 1st Applicant who seems to have removed himself from his duties as an administrator. He seems to blame the Respondent in all things pertaining to the administration of the estate. It also seems to me that there are certain orders in respect of this estate that the Kadhi had issued and which orders have been guiding the administrators in dealing with the estate.

Has the Grant of Letters of Administration issued on 19th February become inoperative, ineffective and of no consequence? The Applicants are contending that this is the case. The Applicants cited **Andrea Ruithibu R.Kanyiri -Vs- Teresia Njoki Mbugu [2016] eKLR** in support of their submissions on this issue. The court in that case declared the grant in that estate ineffective following the death of a co-administrator.

The Respondent on the other hand argued that Asha Elmi (deceased) was not the only administrator and as such the Grant cannot be inoperative and of no consequence given the existence of the other administrators. The Respondent in his submission also challenges the Applicants' case that the death certificate annexed to the application refers to Asha Mein as the deceased, which according to the Respondent is a stranger to these proceedings. I have noted that the Respondent did not raise this issue in his Replying Affidavit dated the 17th day of May 2021. On the contrary the Respondent appears to acknowledged the death of Asha Elmi in paragraph 5 of the Replying Affidavit. To me this is a non-issue and an afterthought on the part of the Respondent.

What is the effect of the death of Asha Elmi, one of the administrators of this estate, in relation to the administration of the estate of the deceased herein? I note that the court in **Andrea Ruithibu R.Kanyiri -Vs- Teresia Njoki Mbugu (supra)** relied on the decision of the court in **In the Matter of the Estate of Edward Kanyiri Kuniya [2013] Eklr** found the grant inoperative by reason of death of one of the administrators. I take a different view. My reasoning is based on Section 81 of the Law of Succession Act which prescribes what follows upon the death of one of the administrators where there are more than one. This section provides that:

"Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivor or survivors of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving

administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”

It is not contested that one of the administrators, Asha Elmi, passed away. She was one of the three administrators in this estate. In the foregoing and since the passing of Asha Elmi, the estate of Timiro Abdi Elmi Ada has been under the administration of the 1st Applicant and the Respondent as the remaining administrators. No evidence has been availed by the Applicants to demonstrate that the remaining administrators are unable or unwilling to administer the estate of the deceased. It is evident from the above provision that death of one of the administrators where there are many, as is the case herein, does not necessarily render the Grant inoperative unless there is in existence a continuing trust.

It is therefore my humble view in the circumstances of this case that this court should not give credence to the Applicants' prayer of declaring the Grant issued on the 19th day of February 2021 ineffective and/or of no consequence by virtue of the death of Asha Elmi. It is however not lost to me that the two remaining administrators are not working in harmony in respect of the administration of the estate. They seem to be sabotaging each other for their own reasons. However the reasons relied on to seek the orders of the court to declare the grant inoperative and ineffective is not that the two remaining administrators cannot work together as administrators but because one of them, Asha Elmi, has died.

Should the Grant of Letters of Administration dated the 19th day of February 2013 be revoked?

The application before this court has been brought pursuant to **Section 76 of the Act** and **Rule 44(1)** of the Probate and Administration Rules. Two reasons are given by the Applicants for seeking revocation of the grant. The first reason relates to the death of one of the administrators and this issue has been discussed and settled above. The second reason is that the administrators left out some beneficiaries effectively concealing to the court their existence with intentions of disinheriting them.

Section 76 of the Law of Succession Act is specific on the grounds for revocation. It 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 order or allow; 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.

In going through the evidence on record, I noted that the petition for letters of administration, its supporting affidavit and the chief's letter annexed thereto, all refer to 6 beneficiaries of the estate. Further, it is the Applicants' contention that the Respondent denied some beneficiaries their share of the rental incomes deposited in account number 0210xxxxx, Gulf African Bank (Eastleigh Branch). But the Respondent disputes the exclusion of any of the beneficiaries from the estate of the deceased.

It is trite that excluding any of the beneficiaries from the succession proceedings can amount to material concealment which then forms a basis for the revocation of the resulting Grant under Section 76 of the Act. This was the disposition in **Re The Estate of Waweru Njuuri (Deceased) [2017] eKLR**. The 1st Applicant and the Respondent filed pleadings based on the existence of only 6 beneficiaries but now the Applicants (who include the 1st Applicant) claim that the deceased was survived by a total of 26 beneficiaries at the time of his death. This is a contradiction to say the least. Be that as it may, the Applicants have not given any proof in support of their allegations that the other 20 individuals are actual beneficiaries in the estate. They have not attached any letters from the chiefs nor certificates showing how they are related to the deceased. In my view, the Applicants ought to have brought proof to support their claim especially because of the reason that the 1st Applicant was fully aware at the time of petitioning for a grant and subsequent proceedings including distribution by the Kadhi's court but has failed to raise that issue until now. Furthermore, in the distribution by the Kadhi, I note with concern that some of the alleged beneficiaries who had been left out were provided for to the exclusion of others. This proposed mode of distribution that was agreed upon by the Administrators and adopted by the Deputy Chief Kadhi on the 19th April 2017, has not been challenged nor vacated. It is my view in the foregoing that the allegation of exclusion of some of the beneficiaries is a mere allegation devoid of any proof. The Applicants have failed to discharge their onus as encapsulated in **Section 107 of the Evidence Act**.

It is also not lost to me that the 1st Applicant is the one who stands accused of having unlawfully withdrawn Kshs 1,300,000/- from account no. 0210xxxxx, Gulf African Bank (Eastleigh Branch). The Respondent has attached a copy of the letter of complaint written to the bank in

support of this allegation. This position has not been disputed by the 1st Applicant. As a matter of fact, the 1st Applicant has annexed a copy of the bank statement indicating the said withdrawal. Further, he admits in paragraph 13 of his Affidavit sworn on the 4th day of December 2020 that the family met and unanimously resolved to open another account and remove the Respondent as the signatory.

The 1st Applicant has proceeded to annex a copy of the minutes taken in support of the aforesaid resolution. The 1st Applicant seems unaware that the very act of transferring funds to another account and/or removing the Respondent as the signatory thereto without the order of the court, although with the blessing of the beneficiaries, is illegal and constitutes the offence of intermeddling contrary to Section 45 of the Act. I am not able to ascertain whether that withdrawal was through an order of the Kadhi since parties in this matter seem to shift from High Court to Kadhis Court on certain issues pertaining to the administration of this estate. The administrators of this estate ought to know that they cannot hide behind the veil of administration in support of their illegal acts. The grant has not been confirmed for the distribution of the assets of the estate to be done according to the law. Any acts by anyone including the administrators in respect of the estate of the deceased that is not sanctioned by the law amounts to intermeddling in the estate of the deceased. The only issue here being that there is mention of some orders issued by the Kadhi in respect of upkeep of the beneficiaries. This issue was not clarified and therefore this court sounds a caution to the administrators that they should not do anything in regard to the estate of the deceased without being so authorized by the court.

Given the reasoning above, it is my considered view that the Applicants have not satisfied this court that the grant issued herein should be revoked. The issue of concealment of material facts has not been proved by evidence. There is nothing provided to persuade this court that the persons named in this application are beneficiaries given that not all of them were included when the Petition was filed.

On whether the Applicants should be appointed as joint administrators of the estate of the deceased herein, I wish to state that there is no justification of such a prayer. I have indicated in this ruling that there is no vacuum in the administration of the estate given that there are two administrators remaining who, according to the law, are capable of finalizing the administration of the estate. Secondly, there is no evidence provided to persuade this court that the grant issued herein is inoperative and ineffective and therefore this court declines to revoke the grant as sought in this application.

I have noted the Applicant's contention that the Respondent has failed to administer the estate of the deceased. It is their averment that the administrators have neglected to have the Grant confirmed since the issuance on the 19th day of February 2013. They further hold the position that the beneficiaries have lost confidence in the Respondent as the co-administrator. It is their case that they wish to be appointed as the joint administrators of the estate of the deceased. has been offered why consents of the remaining beneficiaries have not been obtained.

The Respondent in response argues that he fixed the matter for confirmation on two occasions both of which were turned down by the 1st Applicant. He is therefore laying blame on the 1st Applicant for the delay in having the grant confirmed. There is however no evidence on record of the alleged hearing dates for purposes of confirmation neither is there any evidence of service of the hearing dates, if at all.

Having failed to demonstrate why the said Grant should be revoked and given that there already exists 2 administrators including the 1st Applicant, it is my view in the circumstances that there is no justification to appoint any other administrator unless the two remaining administrators become non-functional in terms of administration of the estate. If this were to become true, then any party is at liberty to move the court in an appropriate manner.

The upshot of this ruling is that none of the prayers sought in this application should issue. This application, therefore, must fail. It is hereby dismissed. Costs shall be in the cause. Orders shall issue accordingly.

Dated, signed and delivered this 22nd day of November 2021.

S. N. MUTUKU

JUDGE