



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION NO. 41 OF 2012

IN THE MATTER OF THE ESTATE OF NURTO ALI SHEIKH (DECEASED)

SWALEH AWESO PETITIONER

VERSUS

RAO ALI SHEIKH1ST OBJECTOR

ADAN IBRAHIM HILOLE.....2ND OBJECTOR

CORAM: Hon. Justice R. Nyakundi

Richard O Advocate for the Petitioner

Miller George & Gekonde Advocates for the 1st Objector

Lucy Wangari Mwangi Associates for the 2nd Objector

J U D G M E N T

By way of Summons for Revocation of grant of Letters of Administration dated 14.10.2019, one **Adan Ibrahim Hilole** moved this Court to revoke the aforesaid Letters of Grant made on 31.5.2018 in favour of the Estate of the deceased **Nurto Ali Sheikh** be revoked.

The grounds on which the orders are sought are that:

- (1). That the petitioner has never appeared in Court save for the representation by his legal counsel.
- (2). That the 1st objector testified in Court and died thereafter hence the matter is still pending before this Honourable Court.
- (3). That I am a disabled 67 year old man, living on the disputed premises for decades and the petitioner has now attempted to forcefully remove me from the property and he has been harassing and bullying me to the extent of disconnecting the water and electricity meters so that I shall suffer and move from the said premises, which premises I have lived on for decades.
- (4). That in light of the petitioner's/respondent's bullying nature and blatant disrespect of my rights to the property and the persistent interference, I am apprehensive that my rights to the said property shall be undermined further, hence the urgency of this application and the prayer for an injunction against the petitioner/respondent his servants, employees and/or agents, or any other party from otherwise removing me from the property and an order that he has no right to disconnect the essential services and or supply.
- (5). That due to the foregoing, I remain aggrieved by the petitioner's/respondents actions and I stand to suffer further and incur hefty costs as I have been forced to seek this Court's redress.
- (6). That I swear this affidavit in support of the application hereto for an order of an interlocutory injunction to issue restraining the petitioner/respondent his servants, employees and/or agents, or any other party from otherwise removing me

from the property and an order that he has no right to disconnect the essential services and or supply.

(7). That I shall be aggrieved if the orders sought are not granted since this is our right in the suit property and prejudice shall befall me.

(8). That I believe in the rule of law hence I have come to this Court with clean hand and the advocate on record informs me that equity aids those who come to equity with clean hands.

The summons is made pursuant to Section 76 of the Law of Succession which permits a party to apply to the Court for an order to revoke or annul the Grant of Letters of Administration.

The respondent, **Swaleh Haji Aweso** is opposed to the Summons for revocation on the basis that the applicant lacks *locus standi* and therefore renders the claim unmeritorious. This is exemplified by the petitioners averments in his replying affidavit filed in Court on 20.5.2019 in which he stated as follows:

(1). That I know of my own knowledge that the 2nd objector/applicant was once living with the deceased first like a house boy before they started having some love affairs which created something like an implied marriage.

(2). That the said arrangement did not go far since the 2nd objector later on met a younger lady whom he married and with whom he lives with to date.

(3). That the deceased Nurto Ali Sheikh kicked out of the suit premises the 2nd objector together with his said wife.

(4). That it is at that point that the 2nd objector appeared before the Kadhi and swore an affidavit stating that he had divorced the deceased.

(5). That 2nd objector/applicant kept on moving from one house to another due to difficulties in raising rent since he was under great financial constrain.

(6). That upon the demise of Nurto Ali Sheikh who died in my hands with instructions to have all her belongings on earth handed over to mosque for religious purpose.

(7). That while in the process of handing over the deceased's assets including the house herein to the mosque, the 1st objector (now deceased) sued me in Mombasa being case Number 101 of 2007.

(8). That while the case in Mombasa was taking long, the 2nd objector/applicant approached me and requested for a temporary accommodation.

(9). That I accommodated the 2nd objector/applicant in one room within the suit premises on a condition that he looks for an alternative arrangements since the property in question is meant to be handed to the mosque as wakf.

(10). That the 2nd objector/applicant was one of my witnesses in the Mombasa case.

Background

It is undisputed that Rao Ali Sheikh petitioned for grant of Letters of Administration on 6.6.2007 in the matter of the **Estate of Nurto Ali Sheikh** against **Swaleh Haji Aweso** in **Succession Cause No. 101 of 2007** later transferred to Kilifi Kadhis Court referred as **Cause 20 of 2017**. It is also not disputed that the Kadhis Court in Kilifi presided over by Hon. Sheikh Twalib B. Mohammed upon hearing both parties on matters of intestate Estate of the deceased pronounced itself as follows on 17.12.2018. Upon perusal of the pleadings and in consideration of the claim; the honourable Court hereby confirms the sole heir of the deceased is his widower one **Rao Ali Sheikh** who gets a half share of the estate as far as Islamic Law of Inheritance is concerned. That the other ½ (half) share goes to Muslim Charity since there is no other legible relatives identified to have the same.

Accordingly, the respondent (**see Swaleh Aweso**) be and is hereby ordered to release the deceased estate properties with him to the petitioner (**see Rao Sheikh**) with immediate effect. The respondent to pay the petitioner costs of the case amounting to Kshs.300,000/=. Those are the orders of the Court.

Apparently, there is no evidence that the said Ruling was appealed against by the respondent. From the record Succession Cause No. 101 of 2007 Mombasa, was later to be transferred by High Court to Kilifi – Principal Magistrate Court referenced as Succession Cause No. 26 of 2017, determined the claim on matters arising out of intestate estate of the deceased as between **Rao Sheikh** and **Swaleh Haji Aweso**. It is also not in issue that in **Succession Cause No. 49 of 2018 Adan Ibrahim Hilole** petitioned Malindi Kadhis Court seeking the following declarations against the respondent:

(a). Determination of the heirs of the estate of the deceased.

(b). Rightful heirs in accordance with Islamic Law.

(c). **Distribution of the estate to the rightful heirs of the deceased.**

(d). **Any other relief that this Honourable Court will deem just that by the last order of the Court, its clear the claim is yet to be heard and determined on the merits.**

It is perhaps useful at this stage to also bring to the attention of the parties that a subsequent petition for grant of Letters of Administration in the matter of the **Estate of Nurto Ali Sheikh** was lodged at the High Court Registry Malindi in Succession Cause No. 41 of 2012. The intestate estate was issued with grant of Letters of Administration to **Swaleh Aweso Omar** on 31.5.2018. It is this grant of Letters to the appointed administrator which became a subject of revocation proceedings by **Adan Ibrahim Hilole**.

Determination

Issues

There are two ultimate issues to be decided by this Court. First whether the Judgment in Kilifi Kadhis Court pursuant to proceedings in Suit No. 26 of 2017 and pronounced on 17.12.2018 as between **Rao Ali Sheikh** and **Swaleh Haji Aweso** rendered subsequent proceedings Res judicata.

Second, whether the affidavit and evidence in support discloses any plausible grounds under Section 76 of the Law of Succession Act to revoke the impugned grant made on 31.5.2018.

Issue No. 1 On Res Judicata

The Law on res judicata is a principle clearly engrained under Section 7 of the Civil Procedure Act. The provisions describes a number of different legal principles that estop parties from re-opening claims or disputes that are already heard and determined on the merits by a competent judicial forum.

The rationale is succinctly stated by the **Learned Authors of Halsbury's Laws of England {2015} Vol. 12A** in which they recognized the following as the purpose of res judicata

“so support the good administration of justice in the interests of the public and the parties by preventing abusive and duplicative litigation, and its twin principles that the Courts should not be clogged by re-determinations of the same disputes and private interest that it is unjust for a man, to be vexed twice with litigation on the same subject matter. The Law discourages re-litigation of the same issues except by means of an appeal. It is not in the interests of justice that there should be re-trial of a case which has already been decided by another Court, leading to the possibility of conflicting judicial decisions or that there should be collateral challenges to judicial decisions, there is a danger not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute.”

In the Judgment of the Court by the **House of Lords** in **Arthur J. S. Hall & Co. v Simons Et al {2000} 3 ALL ER 673** Lord Hostman stated inter alia that:

“The Law discourages relitigation of the same issues except by means of an appeal. The latin maxims often quoted are memo debet bis vexari pro una et causa and interest rei publicae ut Finis sit Litium. They are usually mentioned in tandem, but it is important to notice that the policies they state are not quite the same the first is concerned with the interests of the dependent.”

A person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same, autrefois acquit, res judicata and issue estoppel. The second policy is wider, it is concerned with the interests of the state, there is a general public interest in the same issue being litigated over again.

In the case of **Lilieth Turn Quest v Henhin Gibson Henhin (and Calvin Green {2014} JMCA CIV. 38** the Court expounded further that:

“It has long been recognized that there ought to be finality to legal proceedings. Re-litigation of matters is an abuse of the process of the Court – except of course, where there has been a judicial order for a re-hearing, it is certainly a very prominent and important feature of Section 7 of the Civil Procedure Act that ultimately once the factual requirements are litigated on the merits and with finality, the wholly unfettered discretion of the Court is not available to re-open the proceedings.”

As indicated in **Henderson v Henderson {1843} 3 Hare 100 (ALL ER REP 378)**; The Court observed that:

“In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except) under special circumstances permit the same parties to open the same subject litigation in respect of matter which might have been brought forward as part of the subject in content, but which was not brought forward, only because they have, from negligence, in a deterrence, or even accident, omitted part of their case.” (See also **John Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport and Infrastructure & 3 others {2015} eKLR, Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others {2017} eKLR.)**

In the case at bar its acknowledged that pursuant to Section 7 of the Civil Procedure Act. The Kadhis Court at Kilifi in Succession Cause No. 26 of 2017 heard the parties and determined the distribution of the intestate Estate on 17.12.2018. The said Parcel of Land **LR546/21 Maweni** subject matter of the Succession was distributed in the model of ½ share to **Rao Ali Sheikh** and the other ½ donated to charity in accordance to Islamic Law. The exercise of the Courts power to distribute the estate was justly confined between the parties who profess Islamic Faith what is clear from the record therefore, is that whatever grievances that may have resulted the underlying order was for one to prefer an appeal. A fitting examination of the proceedings before the Kadhis Court and the High Court helpfully shows no evidence of an appeal by **Swaleh Haji Aweso**. In such a case the Judgment by the Kadhis Court at Kilifi on identification of the asset survived of the deceased **Nurto Ali Sheikh** and subsequent distribution of it to the beneficiaries in absence of an appeal remained absolute. In relation to the power decided by that Court. For the purposes of that Judgment. The decision emanated from a judicial decision by a competent Court. The decision was final in character and the decision was in respect of the same subject matter it was not competent for **Swaleh Aweso** to petition for grant of Letters intestate on the same question arising between the same parties before the High Court on 20.4.2012 without a review or an appeal of the previous decision/order. That order on distribution of the estate by the Kadhis Court ought to have been appealed in due time. The High Court in subsequent proceedings between the same estate and parties formed the opinion that the cause of action was capable of being litigated to which grant of Letters of Administration intestate were issued to **Swaleh Aweso** as an administrator of the estate of **Nurto Ali Sheikh**.

In my opinion, the decision by **Swaleh** of obtaining another Judgment before the High Court upon a different assumption of fact was erroneous. The issues set to be determined by the High Court had been truly settled in the Kadhi's Court Judgment of 17.12.2018. The question's of Law and fact were determined in the earlier Judgment. It was not open to **Swaleh Aweso** to re-open fresh proceedings before the High Court. It is seen from the record that the circumstances surrounding or attendant on the proceedings at Kilifi Kadhis Court were never brought to the attention of the High Court. Therefore, the validity of the grant of Letters of Administration as a separate and distinct order directly, collaterally and by necessary implication was on point with the earlier cause of action. To go even further, the first forum of conveniens on intestate matters for parties who profess Islamic Faith is and remains the Kadhis Court.

In my view, I dare say that the aftermath proceedings based upon the cause of action are bad in Law for reason of res judicata. Justice demands that **Swaleh Aweso** should have been estopped from initiating a first cause of action before the High Court.

Issue No. 2

On what must be necessarily and complete precision of the facts as elucidated to invoke Section 76 of the Law of Succession. It is clear from the proceedings in **Kadhis Court No. 26 of 2017** the summons for revocation before this Court raises serious allegations of deception, non-disclosure, misrepresentation, concealment of relevant material by the respondent concerning the matter as initiated before the High Court in **Succession Cause No. 41 of 2012** in which he obtained the grant of Letters of Administration in the deceased estate.

It is undisputed that the respondent applied for and was granted Letters of administration in the estate of the deceased on oath, the respondent swore to administer the estate of the deceased justly and faithfully. That there has been no further distribution of the estate following the demise of the deceased. It is my view that from the affidavit and evidence presented by the applicant, the procedure in the High Court was irregular, since the respondent was in breach of Section 76 of the Law of Succession Act. It is inevitably brought to focus the *Locus Standi* of the respondent to petition for grant of Letters of Administration. It is uncontroverted that the evidence before the Kadhis Court runs contrary to what was pleaded before the High Court. It is proved that the Letters of Grant of Administration obtained by the respondent was substantially defective and fraudulently presented in making a false statement to the High Court. The allegation made on oath that the estate was free for distribution by concealing from the Court something material to the case impacted on the integrity and sanctity of the entire proceedings. That grant for all intents and purposes is useless and inoperative given the circumstances that on 17.12.2018 in accordance to Islamic Law, distribution was undertaken and concluded.

The respondent did not deserve to be granted Letters of Administration to the **Estate of Nurto Ali Sheikh**; contrary to the affidavits sworn to petition for appointment as an administrator. So what is the best method of seeking to achieve a generally accepted standard of fairness? On the premises the application by the applicant succeeds and I therefore make the following orders:

- (a). The letters of grant of administration vide Succession Cause No. 41 of 2012 to one Swaleh Aweso are hereby revoked.**
- (b). Let the beneficiaries abide with the Judgment in Kilifi Kadhis Court No. 26 of 2017 unless and until the order has been set aside.**
- (c). I make no orders as to costs.**

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF DECEMBER, 2021

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R. NYAKUNDI

JUDGE

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In the presence of:

1.

