



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**SUCCESSION CAUSE NO. 76 OF 2002**

**IN THE MATTER OF THE ESTATE OF HASSANI ALI (DECEASED)**

**SWALLEH HASSAN**

**RUKIYA HASSAN.....APPLICANTS**

**VERSUS**

**MOHAMED HASSAN ALI**

**REHEMA HASSAN ALI.....RESPONDENTS**

**RULING**

1. Before I consider the application herein, I wish to bring out into perspective and proper understanding the background regarding the confusion caused in filing two distinct succession files in respect of two estates sharing common property as the asset left for inheritance. The two estates are in relation to Ali Nguma and Hassan Ali his son who together three other siblings predeceased their father but nevertheless left heirs.

2. Through Succession Cause No. 28 of 1992 lodged on 3<sup>rd</sup> March 1992 at Mombasa high court, Swaleh Hassan and Ali Athman petitioned for a grant of letters of administration intestate in respect of the estate of Ali Bin Nguma their grand- father who died on 27<sup>th</sup> February 1992. According to the petition, the deceased had the following children; Bakari Ali a son who died 1935, Hassan Ali who died 1976, Aziza Ali and Mwangema ali all whom predeceased him. A grant of letters of administration intestate was issued on 4<sup>th</sup> November 1993. From the record, the only asset comprising the estate was plot Number172 section 11

3. On 25<sup>th</sup> August, 1994, the petitioners applied for confirmation of the grant. The same was confirmed on 17<sup>th</sup> October 1994 and estate was to be distributed according to Islamic law. However, vide an application dated 4<sup>th</sup> April 2006 filed by one Reuben Fondo Tsofwa, the grant issued on 4<sup>th</sup> November 1993 was revoked on 18<sup>th</sup> May 2006. Since then, the file has remained dormant with no action taken hence deemed as closed.

4. Subsequently, Vide Succession Case No. 158 of 2007 Mombasa kadhi's court, one Mohamed Ali petitioned the court for determination of heirs and distribution of shares in respect of the estate of Ali Nguma who died intestate. Through its Judgment dated 25<sup>th</sup> November 2008, Sheik Twalib B. Mohamed then the kadhi Mombasa identified the estate of the late Ali Nguma as plot No. 172/II MN and determined his heirs as follows;

- a) Mwanamkuu Mwakiwowo(widow)(deceased)
- b) Hassan Bin Ali (son)(deceased)
- c) Bakari Bin Ali (son) (deceased)
- d) Aziza Binti Ali(daughter)(deceased)
- e) Mwanangema Binti Ali(daughter) (deceased)

5. The court went further to distribute out the share to the deceased widow to her four children with the sons getting twice the share of the

daughters. Accordingly, Hassan Bin Ali got 2/6, Bakari Bin Ali similar share, Aziza and Mwanangema both daughters 1/6 each.

6. The court went further to break down individual share entitlement to the heirs of the four primary or principal beneficiaries. For purposes of this case, the share of Hassan Bin Ali (2/6) was shared to his heirs as follows;

- a) Asha Muzizima Hassan(widow) and Salima Nyasi (Widow) to share 1/8 equally each having  $\frac{1}{4}$
- b) Swaleh Hassan Ali and Mohamed Hassan Ali both sons  $\frac{2}{10}$  each
- c) Rukiya hassan,Amina hassan,Tatu Hassan(deceased), Saumu Hassan(deceased), Rehema Hassan and Fatma Hassan(deceased) all daughters each to get  $\frac{1}{10}$

7. The quarter share of Asha Muzizima Hassan(deceased) to go to her legal heirs namely;

- a) Mohamed hassan Ali(son)  $\frac{2}{6}$
- b) Amina Hassan,Tatu Hassan(deceased), Saumu Hassan(deceased) and Rehema Hassan all daughters each to get  $\frac{1}{6}$  .

8. Further, the  $\frac{1}{10}$  and  $\frac{1}{16}$  of Tatu Hassan(deceased) to go to her legal heirs namely;

- a) Zenaib Mohamed (daughter)- $\frac{1}{2}$
- b) Mohamed Hassan Ali (F/brother)
- c) Rehema Hassan Ali (f/Sister)
- d) Amina Hassan (full sister) - all the four to share the residue $\frac{1}{2}$  share of which the full brothers were to get (2) shares and each full sister (1)

9. The court went further to declare that  $\frac{1}{10}$  and  $\frac{1}{16}$  share of Saumu Hassan Ali(deceased) to go to her legal heirs namely;

- a) Ibrahim Mtwana Uledi (husband/widower $\frac{1}{4}$ ( $\frac{3}{12}$ ))
- b) Tatu Ibrahim(daughter)
- c) Umi Ibrahim (daughter)-to share  $\frac{2}{3}$  equally which is  $\frac{8}{12}$

10. The court further ordered that the residue $\frac{1}{12}$  to be distributed to the deceased's full brothers and full sisters of which brothers were to get twice the share of each daughter as follows;

- a) Mohamed Hassan Ali (full brother) $\frac{2}{5}$  residue share
- b) Rehema Hassan Ali, Amina Hassan and Tatu Hassani all full sisters each to get $\frac{1}{5}$  residue share.

11. The  $\frac{1}{10}$  of Fatma Hassan Ali(deceased) was to go to her heirs who are; Mzee Khamis Mambo (husband /widower- $\frac{1}{4}$  and the residue  $\frac{3}{4}$  to go to her children of which the sons would get twice of the daughter as follows;

- a) Mwinyi Mzee Khamis, Hassan Mzee Khamis, Saidi mzee Khamis, Juma Mzee Khamis,Juma Mzee Khamis all sons each to get  $\frac{2}{9}$  share
- b) Maimuna Mzee khamis (daughter)- $\frac{1}{9}$  residue share

12. Upon Sub-division of the original plot 172/2MN into plot Nos6827 to 6831, Hassani Bin ali was allocated plot No. 6827 which his heirs were to share as per the above distribution order by the Kadhi. Plot no. 6829 was designated as family cemetery. Unfortunately, actual distribution has not been fully realized for the case of Hassan Ali's share out of his late father Ali Nguma due to the existence of multiple applications and counter applications in respect of his estate.

13. Due to endless wrangles in distributing the share of Hassan Ali who died on 17<sup>th</sup> March 1976, Mohamed Hassan Ali and Rehema Hassan Ali his children, filed citation No. 2 of 1999 citing their siblings Swaleh Hassan and Rukiya to show cause why they could not petition for a grant of representation in respect of the estate of their late father. In response, the citees filed a replying affidavit sworn on 15<sup>th</sup> February 2000 opposing the application on grounds that they had already petitioned and obtained a grant as administrators under file No. 28 of 1992 (estate of Ali Nguma).

14. However, the citation was compromised my consent on 10<sup>th</sup> July 2000, with the order that the objector was to be joined as co-administrator in representing the estate of Hassan Ali. For some reason, the citation was dismissed on 12<sup>th</sup> December 2018 for want of

prosecution on the court's own motion. The file was effectively closed. Consequently, on 11<sup>th</sup> March 2002, Mohamed Hassan Ali and Rehema Hassan Ali petitioned for a grant of representation in respect of the estate of Hassan Ali vide Succession Cause No. 76 of 2002. A grant of letters of administration was issued on 20<sup>th</sup> February 2004 to the two petitioners jointly. From the petition, the asset comprising the estate was not specified nor were the liabilities indicated although from subsequent pleadings the estate in question is reflected as plot No. 6827/II/MN(Original 172/2).

15. On 13<sup>th</sup> April 2016, Swaleh Hassan, filed summons for revocation of the grant claiming that the certificate of death used to petition for the grant was forged as it purported to show that the deceased died on 17<sup>th</sup> March 1976 instead of 28<sup>th</sup> March 1976 which is the correct position. He further prayed for orders that; the petitioners had continued to enrich themselves out of plot No.6827/II/MN (original No.172/2); the grant be revoked and a fresh one to be issued to Swaleh Hassan and the 1<sup>st</sup> respondent in that application one Mohamed Hassan; the respondents to account for the proceeds obtained from buyers who bought some portions of land out of the said land.

16. Before the revocation application could be heard, Swaleh Hassan and Rukiya Hassan lodged a notice of motion dated 23<sup>rd</sup> May 2016 and filed on 18<sup>th</sup> June 2016 seeking a permanent injunction against the respondents (Mohamed Hassan and Rehema Hassan) restraining them from selling or in any other way dealing with the said plot. The respondents filed a replying affidavit on 30<sup>th</sup> June 2016 challenging the application. During the pendency of the two applications, Swaleh Hassan and Rukiya Hassan again filed a notice of motion dated 17<sup>th</sup> June 2020 seeking similar orders as sought in the application of 23<sup>rd</sup> May 2016.

17. After canvassing the application dated 17<sup>th</sup> June 2020 before Judge Musyoka, the learned Judge had his ruling dated 28<sup>th</sup> September 2020 delivered on 15<sup>th</sup> October 2020 wherein he declined to grant an injunction but ordered the administrators to account for the estate since their appointment as administrators on 18<sup>th</sup> February 2004. The court further directed files no.28/1992 and Mombasa HCS (Citation) No. 2 of 1999 to be put together for purposes of consolidation. The learned Judge made serious observations in his ruling among them; the petition herein ought not to have been filed in view of the existence of file no 28/ 1992; that the deceased Hassan Ali had not acquired ownership of any property from his late father Ali Nguma hence no asset capable of distribution.

18. Subsequently, the administrators were directed to submit the accounts which they did on 15<sup>th</sup> July 2021. Prior to the filing of the said statement of accounts, Swaleh Hassan, and Rukiya Hassan filed an application dated 1<sup>st</sup> July 2021 now the subject of this ruling seeking the court to distribute the estate in accordance with the certificate of confirmation (unspecified). The application is anchored on grounds that the estate of Ali Nguma having been shared out and Hassan Ali the deceased's heirs given their share, the respondents have failed to distribute the estate and instead have engaged in disposing some of the portions of land without the consent of other beneficiaries hence the need to account for the assets and distribution of the estate.

19. In response, Mohamed Hassan swore a replying affidavit on 16<sup>th</sup> July 2021 stating that the issue of distribution of the estate of the late Hassan was determined in kadhi's succession case no.158 of 2007 in the estate of Ali Nguma hence nothing to distribute under this file.

20. They further stated that they have fully complied with the orders of the Kadhi in succession cause number 158/2007 and the compromise orders made by the kadhi on 24<sup>th</sup> April 2014 wherein Mohamed Hassan and Rehema Hassan, Ali Khamis, Jumaa Abdallah and Suleiman Ali were appointed as trustees to represent the four primary heirs to the estate of Ali Nguma.

21. That the applicants refused to co-operate in contributing funds for sub-division of the share allocated to Hassan Ali their father. That despite the applicants' refusal to participate in the process, they (respondents) went ahead and subdivided the land and had the respondents get their share being plot number MN/11/15211 on deed no.413875. He averred that over 100 beneficiaries are in agreement with the distribution save for the applicants. That the Kadhi's Judgment has never been challenged on appeal nor review hence binding on all parties.

22. When the parties came to court, they agreed to canvass the application through written submissions. However, the applicants did not file any submissions. Mr. Kitonga orally submitted by reiterating the averments contained in the affidavit in support of the application. On behalf of the respondent, Mr. Wafula filed his submissions on 3<sup>rd</sup> November 2021 which is a replica of the content contained in the replying affidavit.

23. Learned counsel contended that litigation must come to an end and that the applicants should take their share. That the applicants should file a response to the statement of accounts before court instead of approaching the court to disturb distribution already done and titles issued to beneficiaries.

### **Analysis and determination**

24. I have considered the application herein, response thereto and both oral and written submissions by counsel. I have deliberately endeavoured to bring a detailed factual background surrounding the acrimonious distribution of the estates of Ali Nguma and that of his son Hassan Ali. The two estates have been mixed up to the extent that even parties and their advocates do not actually know at what point to isolate and differentiate the two estates. In fact, my brother Musyoka who did not have the benefit of perusing file no.28 of 1992 and citation no 2 of 1999 was misled to believing that file no.28 of 1992 was in respect of the estate of Hassan Ali when actually it is in respect of Ali Nguma.

25. In file no. 28 of 1992 the grant was confirmed and estate shared out according to Mohamedan law. That distribution was eventually effected in Mombasa Kadhi's court succession no. 158 of 2007. The hon. Kadhi wrote an elaborate and detailed judgment dated 25<sup>th</sup> November 2008. Subsequently further orders on execution of that judgment followed among them the order of 24<sup>th</sup> April 2014 where trustees were appointed to represent each of the four primary heirs of Ali Nguma among them Hassan Ali represented by the respondents herein. The Kadhi's judgment and subsequent execution has never been challenged. It is still binding by all parties as it implemented the distribution process as confirmed by the high court in file no.28 of 1992.

26. For this court to be asked to distribute the estate under file no 76 of 2002 where even there is no application for confirmation of the grant is untenable hence the prayer sought in the application dated 1<sup>st</sup> July 2021 seeking an order of distribution of the estate is not applicable. Regarding the second prayer on filing of statement of accounts, the same is resjudicata as the issue in controversy is similar, adjudicated upon and determined by judge Musyoka in his ruling of 28<sup>th</sup> September 2020. In fact, the filing of the said statement of accounts was pending by the time the instant application was filed and indeed filed on 15<sup>th</sup> July 2021. The filing of the application of 1<sup>st</sup> July 2021 was unnecessary and an abuse of the court process.

27. From the conduct of the parties, it appears to me that, the more they cause confusion, the better for them. I do agree with the respondents that litigation must come to an end. There is only one judgment which has to be executed. That judgment is the Kadhi's court Judgment which is lawful and cannot be ignored by all means. Any statement of accounts due and pending must be based on what was given to the heirs of Hassan Ali in respect of the estate of his father Ali Nguma. We cannot afford to cause more confusion by having multiple suits in respect of the same estate.

28. For the above reasons stated, it is my finding that the application of 1<sup>st</sup> July 2021 is incompetent and frivolous hence dismissed with costs to the respondents. The applicants if still interested with accounts, they should file a response to the already filed statement of accounts with 30 days.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17<sup>TH</sup> DAY OF DECEMBER, 2021**

**J.N.ONYIEGO**

**JUDGE**