



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION NO. 1 OF 1965

IN THE MATTER OF THE ESTATE OF RAHEMTULLA ALI BUX (DECEASED)

MOHAMED ASIF YUSUF RAHEMTULLA.....APPLICANT

VERSUS

REHMAT ALI BUX

MOHAMED YUNAS RAHEMTULLA ALI BUX....RESPONDENTS

RULING

1. The matter before me is extremely old. It relates to the estate of Rahemtulla Ali Bux the deceased herein, who died way back on 21.12.64. The record shows that a grant of probate was on 23.11.67 issued to his wife Jenab Bibi, daughter of Mohamed Nathu, and sons Mohamed Rahemtulla and Mohamed Yusuf Rahemtulla, the executors named in the will of the deceased. Thereafter Jenab Bibi died on 28.8.97, Mohamed Hanif Rahemtulla died on 5.1.03 while Mohamed Yusuf Rahemtulla died on 23.11.1997 leaving part of the estate unadministered. The estate comprised on Plot Nos. Mombasa/Block XIII/66 & 67.

2. Following the death of the executors, the Respondents Rehmat Ali Rahemtulla Ali Bux and Yunas Ali Bux also known as Mohamed Yunas Rahemtulla Ali Bux, the surviving sons of the deceased filed a petition dated 28.2.08, for a *grant de bonis non* for unadministered assets. On 17.11.08 a grant (the Grant) was issued to the Respondents. The Court notes that it was a full grant that was issued and not a limited grant. The Grant was confirmed on 12.2.10 and certificate of confirmation of grant was issued on 24.2.10.

3. By a Summons dated 15.6.16, Mohamed **Asif Yusuf Rahemtulla, the Applicant, seeks the revocation of the Grant on grounds that the same was obtained fraudulently by the making of false statements and the concealment of material facts from the Court. The Applicant is a son of** Mohamed Yusuf Rahemtulla, one of the executors, and a grandson of the deceased. The Applicant states that the entitlement of each of the heirs of the deceased had been determined in Kadhi Succession Cause No. 7 of 1999. His father's estate is entitled to 2/16 share of the estate of the deceased and his name is on the title in respect of Plot No. Mombasa/Block XIII/67.

4. The Applicant's complaint is that the Respondents filed CMCC No. 1849 of 2014 (the CMCC suit) against him and 2 others seeking vacant possession of the properties of the deceased's estate on ground that the Applicant and others are not entitled to the same.

5. The Applicant states that when the Respondents applied for the Grant, they did not involve all beneficiaries. And the certificate of confirmation of grant does not state how the estate is to be divided. The Respondents did not disclose to the Court that the apportionment of the estate was done by the Kadhi's Court. He thus accused the Respondents of obtaining the Grant fraudulently by making false statements and concealing material facts. As a result, the Applicant and other beneficiaries are threatened with being evicted and disinherited.

6. In his replying affidavit sworn on 19.8.16 on behalf of both Respondents, the 1st Respondent avers that the Applicant filed the cause in the Kadhi's Court against Mohamed Hanif Rahemtulla, the surviving executor. In the judgment by consent, valuation of the estate of the deceased was to be done, for distribution according to Islamic law. The executor however died before this was done. The 1st Respondent further states that the Applicant was aware of the issuance of the Grant to the Respondents. He further asserts that as sons of the deceased the Respondents had a higher priority to apply for the Grant and there was no opposition to the same. Nothing was concealed from the Court and the Grant was issued with no procedural improprieties.

7. The 1st Respondent concedes that the Applicant's late father was a beneficiary of the estate and his name is on the title deed. The title deed reflects the distribution of the estate. Valuation was done but actual distribution of the property has not been done. The 1st Respondent accused the Applicant, Anwar Karim Rahemtullah and Arshad Ali Yusuf Rahemtulla of benefiting from the property to the exclusion of other beneficiaries. They are occupying and renting out the property, making it impossible for the same to be distributed and thereby denying

the others their inheritance. This is the reason why the CMCC suit was filed seeking vacant possession of the property to facilitate sale of the same and distribution of the proceeds to all beneficiaries, which has been frustrated by the Applicant. The Respondents are willing to sell the property and distribute the proceeds to the beneficiaries. The Applicant may also purchase the same and the proceeds distributed. The Respondents urged the Court to dismiss the Application and make orders for the swift completion of the distribution of the estate.

8. In his further affidavit sworn on 4.11.16, the Applicant accused the Respondents of bad faith in seeking to have the Applicant and other beneficiaries evicted from the property. As administrator of his father's estate, he has a duty to protect his share in the estate of the deceased. He stated that he collects rent from one of the tenants in the property while other beneficiaries occupy and collect rent from other premises. He further stated that the Respondents reside out of the Country and he had to take up the maintenance of the property and has been paying rates since 2014. He accuses the Respondents of seeking to disinherit him.

9. Parties filed submissions which I have considered together with the authorities cited.

10. The Applicant's main contention is that the Respondents obtained the Grant without seeking his consent or renunciation or that of other heirs. The Applicant further submitted that at confirmation, the Respondents did not disclose to the Court that Plot No. Mombasa/Block XIII/67 had already been distributed to the rightful heirs, including the Applicant's father. According to the Applicant, this is a clear violation of the Respondents' duties under Section 83(f) and (g). The Applicant accuses the Respondents of misusing the Grant by instituting suits in the lower courts seeking to evict the Applicant and other bona fide heirs instead of raising the issue in this cause. The Applicant relied on the cases of HCSC No. 720 of 2013 In the matter of the estate of Julius Ndubi Javan (deceased) and HCSC No. 14 of 2015 In the matter of the estate of Oiesesoi Tipango (deceased). However, with no copies supplied to the Court and without demonstrating the relevance of the cases to the present matter, the Court is unable to make any finding on the same.

11. For the Respondents, it was submitted that they followed due process in obtaining the Grant. All beneficiaries of the estate of the deceased were listed in the certificate of confirmation of grant. The Applicant was also party to the Kadhi's Court case. In spite of the Applicant being entitled to 2/16 of the property herein being his father's share, he and others have occupied the entire property, which is prejudicial to the other beneficiaries of the estate. As a result, the Respondents are unable to administer the estate of the deceased. To the Respondents, revocation of the Grant will not further the interests of the estate. The Respondents prayed for orders that the property be valued and sold and the proceeds be distributed to the beneficiaries. They relied on the case of Zeinab Khalifa Khator & 4 others v Abdulrazak Khalifa Salim & another [2017] eKLR.

12. The Law of Succession Act confers upon this Court the jurisdiction to revoke and annul grants of representation. The grounds upon which a grant may be revoked are set out in Section 76 of the Act as follows:

76 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.

13.. The grounds upon which the Applicant seeks revocation of the Grant are that the Grant was obtained fraudulently by failing to involve or to obtain the consent of the Applicant in the process of obtaining the Grant.

14. The Applicant is a grandson of the deceased while the Respondents are sons of the deceased. Was it necessary for the Respondents to inform the Applicant that they had applied for the Grant and further obtain his consent? Rule 26 of the Probate and Administration Rules provides:

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person

shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

15. Section 66 as read with Section 38 of the Act places the Respondents' entitlement to the Grant, as sons of the deceased in a degree higher than that of the Applicant, a grandson. Rule 26 requires that an applicant for a grant of representation must give notice of the same to all persons entitled in same or higher degree than such applicant. Accordingly, the Respondents were under no legal obligation to give notice to or obtain the consent of the Applicants in their application for the Grant.

16. The Court notes that the certificate of confirmation of grant issued on 24.2.10 does not indicate how the estate of the deceased was to be distributed to his heirs. A mode of distribution of the estate of the deceased is however contained in the Kadhi's Court order dated 13.5.99. This distribution is also reflected on the exhibited title of Plot No. Mombasa/Block XIII/67. The Applicant's father's share is clearly indicated thereon. This fortifies the position that the Applicant's interest in the estate is secure.

17. The Respondents have stated that the possession and occupation by the Applicant and other beneficiaries have hindered the distribution of the property to the heirs of the deceased. They are benefitting from the property to the exclusion of other heirs. The Applicant has conceded that he and other heirs are in possession and occupation of the premises. The Applicant has benefitted from the *status quo* for a considerable period of time and it is in his interest that the *status quo* persists indefinitely. This Application must be viewed in this light. In the case of Zeinab Khalifa Khator & 4 others v Abdulrazak Khalifa Salim & another [2017] eKLR, the Court of Appeal had this to say about a beneficiary who had for long enjoyed the estate to the disadvantage of other beneficiaries:

Also there was no contention before the learned Judge regarding the identities of the beneficiaries and shares of each beneficiary; indeed the grant was confirmed and no one challenged the confirmed grant, it was only the mode of disposal of the estate property that became contentious and that was because Omar remains in occupation to the exclusion of the other beneficiaries and wants to remain that way at his own convenience and terms to the disadvantage of the other beneficiaries... We think we have said enough to demonstrate that this appeal partially succeeds and we partly interfere with order Nos. 1 and 2 by substituting thereto that the suit property being plot No. 1497 Sec. XVII Mombasa together with the developments thereon, be sold in the open market to the highest bidder and the proceeds thereto be shared among the beneficiaries in accordance to the Islamic law.

18. The distribution of the estate is long overdue. It must however be noted that due to the nature and size of the property and the number of persons entitled thereto, it is not possible for the same to be divided amongst them all. The property measures 0.1009 ha. The exhibited valuation report indicates that the development thereon comprises of an old double storey building with 2 shops, 2 flats, toilets, stores and extensions of residential rooms. The only means by which the 13 beneficiaries listed on the title to the property can benefit is through sale of the same and distribution of the proceeds thereof. This being the case it is necessary that vacant possession of the premises be handed over to the Respondents as administrators to pave way for the sale and distribution of the property.

19. In the end the Court finds that the statutory grounds for revocation of the Grant have been not been established and makes the following orders as are necessary for the ends of justice:

- i. The application dated 15.6.16 is hereby dismissed.
- ii. The Respondents shall appoint a valuer to undertake valuation of Plot No. Mombasa/Block XIII/67.
- iii. The Respondents shall thereafter sell Plot No. Mombasa/Block XIII/67 at market value.
- iv. The Respondents shall distribute the proceeds of sale of the property to the registered owners thereof in accordance with their shares.
- v. To facilitate the aforesaid valuation and sale, the Applicant and any other beneficiary in possession of the property, shall vacate the property on or before 31.3.2020.
- vi. All rents from the property shall with effect from 1.2.2020 be deposited in Court.
- vii. Valuation fees shall be paid from the rent proceeds.
- viii. This being a family matter each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of January 2020

M. THANDE

JUDGE

In the presence of: -

.....for the Applicant

.....for the Respondents

.....Court Assistant