



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 311 OF 2013

(IN THE MATTER OF THE ESTATE OF ADAM KHALIFA (DECEASED))

IBRAHIM AHMED.....APPLICANT

VERSUS

HANTER AHMED ADAM (Sued as the Administrator of the Estate of the Deceased AHMED ADAM)

RULING

1. The Applicant IBRAHIM AHMED (hereafter referred to as the Applicant) a summons for revocation of grant dated 31.10.2017 issued to the Respondent AHMED ADAM (hereafter referred to as the Respondent) on 12.9.2013 and confirmed on 24.9.2014.
2. The estate of the deceased herein ADAM KHALIFA (Deceased) devolved upon AHMED ADAM as the sole heir of the estate. The said property comprises LR No. 1043/111/24 situated at Mazeras Kilifi measuring 3 Acres (hereafter referred to as the suit property)
3. The Applicant in his Affidavits, in his oral evidence in court and in submissions filed herein stated that ADAM KHALIFA (deceased) was one of the Sudanese Pensioners who were settled by the colonialists in various parts of the country after World War II and he was allocated the suit property.
4. The Deceased had 3 children who are now deceased who were as follows:
 - (i) **FATUMA ADAM**
 - (ii) **ALI ADAM**
 - (iii) **HABIBA ADAM**
5. The Applicant further stated that the deceased died intestate sometimes in 1940's and his daughter FATUMA ADAM Pawned the Suit Property to a certain family at "Warabai" or Rabai on 5.4.1950.
6. The Applicant alleged that Habiba was married to one ABEDI SALIM and she changed her name to HABIBA ABEDI SALIM. Further, that the said HABIBA ABED SALIM died on 4.3.2007 leaving no child behind.
7. The Applicant's evidence is that HABIBA ABEDI SALIM had no relationship with HABIBA HASSAN who was granddaughter of Faraj Abdalla and a daughter of Hassan Ahmed and they had no relationship with Adam Khalifa (the deceased herein)
8. The Applicant's evidence was that Family tree chart of Adam Khalifa (deceased) was prepared by the Nubian Council which had the history of its members.
9. The Applicant said that the family of Adam Khalifa shows that he was a cousin to Ahmed Mohamed who was the father of Ibrahim Ahmed (the Applicant).
10. The Applicant also stated that the family tree chart of Adam El Hashima shows that Adam El Hashima had twelve children and that the Respondent was one of them and it therefore follows that the Respondent herein is not the only surviving relative of Adam Khalifa (the deceased herein) as he describes himself and further, it is the Applicant's evidence that the family of Adam El Hashim had no blood relation with Adam Khalifa.

11. The Applicant urged the court to find that the Respondent Ahmed Adam obtained the grant herein fraudulently by making false statements and by concealment of material facts from the Court and to revoke the same and to find that the Respondent did not have title in the suit property to pass to the buyer Greenbelt Warehouse Limited who purportedly bought the suit property for Ksh.20, 000,000/- from the Respondent.

12. The Respondent's case was that Adam El Hashim's father (Adam El Hashim Omar) Amina Hassan's father (Faraj Abdalla) and Adam Khalifa's father (Adam Khalifa Adam) were all blood brothers and therefore Adam Khalifa, Amina Hassan Faraj and Adam El Hashim were paternal cousins.

13. The Respondent on his part gave evidence that Mohamed Felicit had no blood relations with Adam Khalifa.

14. Further, it was the Respondent's evidence that Mohamed Felicit and Ahmed Mohamed Noor were two separate individuals and that Mohamed Felicit took Ahmed Mohamed Noor as an adopted son hence the name Mohamed and according to him Ahmed Noor was of Somali descent while Mohamed Felicit was a Nubian.

15. The testimony of the Respondent was not at one time Mohamed Felicit and Adan el Hashim were neighbours but there was no blood relationship.

16. The Respondent said the pawn letter could not vest ownership or disentitle Habiba Adam who was alive and who lived on the property until 1996.

17. The Respondent disputed the family tree chart prepared by the Nubian Council of Elders as the same was prepared without consultation with his family.

18. I have considered the evidence adduced by both parties in this case. I have also considered the rival submissions. I find that the applicant is seeking to have the grant of letters of administration issued herein together with the certificate of confirmation annulled for non-disclosure of material facts.

19. The issues for determination are as follows:

(i) Whether the grant of letters of Administration should be revoked and Certificate of Confirmation herein annulled.

(ii) Whether the Applicant is the rightful owner of the suit property LR. No. 1043/111/24 situated at Mazeras in Kilifi County (the suit property)

(iii) Who pays the costs of this application?

20. On the issue as to whether the grant of letters of administration and certificate of confirmation issued to the Respondent should be revoked and annulled, the grounds for revocation of grant are stated in **Section 76** of the Law of Succession Act as follows;

'76. Revocation or annulment of grant 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.'

21. In the current case, I find that the Applicant is alleging that he is entitled to the property by virtue of a family tree chart whose makers were not called to testify in this case.

22. The Applicant is also relying on a pawn letter which was purportedly entered into on 5.4.1950 to assert ownership of the suit property. The said agreement which is disputed cannot be enforced now since it is barred by limitations of action Act. Equity does not assist the

indolent but it helps the vigilant.

23. I find that the said pawn letter is contested and the applicant did not established the validity of the alleged agreement in a Civil Suit.

24. The jurisdiction of the probate court is limited to transmission of estates and not to prove of ownership.

25. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why **rule 41(3) of the Probate and Administration Rules** was enacted so that claims which prima facie valid should be determined before confirmation. See rule 41 below:-

‘41. Hearing of application for confirmation

(1)

(2)

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.

(4) In proceedings under sub rule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.

(5)

(6)

(7)

(8)

(9)

26. In the case of **Pricilla Ndubi and Zipporah Mutiga vs. Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013**, the court was facing a more or less similar question for determination. It was held that *“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation”*.

27. I find that there is no evidence that the Respondent knew the applicant at the time he petitioned the estate of the deceased herein and therefore he cannot be accused of non-disclosure of material facts.

28. There is also evidence that the suit property has since passed to a 3rd party who was not enjoined to these proceedings and whose rights would be affected if the grant herein is revoked.

29. I find that the Applicant has not established that he is entitled to inherit the suit property. The doctrine of latches has caught up with the Applicant. This is a court of Equity which does not assist the indolent but only comes to the aid of the vigilant.

30. I accordingly find that the summons for revocation dated 30.10.2017 lacks in merit and I accordingly dismiss the same with no orders as to costs.

31. I find that the grant of letters issued to the Respondent on 12.9.2013 and confirmed on 24.9.2014 are valid.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 21ST DAY OF FEBRUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.