



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**SUCCESSION CAUSE NO. 234 OF 2013**

**IN THE MATTER OF THE ESTATE OF AHMEDALI ABDULHUSSEIN MAMUJEE (DECEASED)**

**MAZHER AHMEDALI MAMUJEE.....APPLICANT**

**VERSUS**

**MURTAZA AHMEDALI ABDULHUSSEIN MAMUJEE....RESPONDENT**

**RULING**

1. Before me for consideration is a summons dated 10.9.18 by Mazher Ahmedali Mamujee, the Applicant seeking the revocation of grant of probate of written will (the Grant) of Ahmedali Abdulhussein Mamujee (the deceased), issued to Murtaza Ahmedali Abdulhussein Mamujee, the Respondent. The Applicant further seeks that the Respondent be ordered to provide a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

2. Following the demise of the deceased on 7.12.10, the Respondent did on 25.7.13, petition this Court for the Grant which was issued to him on 6.2.14. He claimed that the deceased was survived by his 2 sons, the Applicant and the Respondent as well as a daughter Masuma H Mohamedali (Masuma). In the will dated 8.5.81 presented to this Court, the deceased had appointed his wife Shirin Ahmed Mamujee (Shirin) and the Respondent as executors. Given that Shirin died on 8.10.84, predeceasing the deceased, the Respondent sought the Grant as the sole surviving executor.

3. The Applicant alleges that the Grant was obtained fraudulently by concealment to the Court of something material to the case and by untrue allegation of a fact essential in point of law to justify the Grant. In his affidavit sworn on 3.7.18, the Applicant averred that he and Masuma reside in Canada while the Respondent resides in Kenya. The Applicant further averred that prior to his demise, the deceased had sent to the Applicant, his original will dated 17.3.99, in which he had appointed the Applicant and the Respondent as executors. The Applicant accused the Respondent of obtaining the Grant by means of the untrue allegation, *to wit*, that the former will was the deceased's last will and fraudulently concealing from the Court the existence of the latter will, of which he was aware. The Applicant further accused the Respondent of co-mingling his assets and those of the deceased and further failing to provide any information on the administration of the estate of the deceased. He asked that the Grant be revoked and that the Respondent give account of the assets and liabilities of the estate and his dealings with the estate.

4. The Application is further supported by the affidavit of Masuma sworn on 11.4.18, in which she reiterated what the Applicant had stated. In particular, she stated that in February 2014, she came across the gazette notice containing the Respondent's application for the Grant. She further averred that the Respondent has refused to give her any information regarding the application for probate in respect of the deceased's estate despite repeated requests. She also made requests for her share of the rent he had collected from the property of the estate. She asked that the Grant be revoked and that the Respondent give account of the assets and liabilities of the estate and his dealings therewith.

5. The Respondent did not file any response to the Application in spite of being granted an opportunity to do so.

6. The Law of Succession Act (the Act) provides that a grant obtained fraudulently is liable for revocation. Section 76 of the Act provides:

**“ 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. ...

7. Although the Application is unopposed, the Applicant must nevertheless satisfy the Court that the statutory grounds for revocation of grant have been established. In this regard, I am guided by the Supreme Court in the case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR, where it was stated:

**Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter.**

8. The Applicant filed submissions which I have considered. The gravamen of the Applicant's application is that the Respondent obtained the Grant fraudulently by means of the untrue that the former will was the deceased's last will and by fraudulently concealing from the Court the existence of the latter will, of which he was aware. Without any response to the Application, these claims remain uncontroverted. The Court notes that in the former will, the deceased had appointed Shirin and the Respondent as executors. That will further made provision for Shirin, the Applicant, the Respondent and Masuma. It would appear that following the demise of Shirin, a need arose for the deceased to make another will, given the change of circumstances. The deceased therefore executed the latter will in which he appointed the Applicant and the Respondent as executors and made provision only for his 3 children. Despite being aware of the existence of the latter will, the Respondent fraudulently obtained the Grant by concealing to the Court, the existence of the same, which was material to the case. He further made an untrue allegation that the former will was the last will of the deceased, a fact essential in point of law to justify the grant. Had the Court been aware that the deceased had made the latter will, the Grant would not have been made to the Respondent. The Court is therefore satisfied that the statutory requirements for revocation of grant have been met.

9. The Applicant has also prayed that the Respondent be ordered to provide a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account. The production of an inventory of the estate and accounts is one of the duties of imposed on a personal representative upon appointment as such by the Court. Under Section 83 of the Act therefore, the Respondent had a duty to, *inter alia*:

**(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;**

10. The Grant was issued to the Respondent on 6.2.14. The record shows that since the Grant was issued to him, the Respondent has not produced to the Court any inventory or accounts relating to his dealings with the estate of the deceased.

11. After carefully considering the matter herein, I find that the Application dated 10.9.18 has merit and I make the following orders:

- a. The Grant of Probate of Written Will issued to Murtaza Ahmedali Abdulhussein Mamujee on 6.2.14 be and is hereby revoked.
- b. Murtaza Ahmedali Abdulhussein Mamujee do produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account, within 90 days of the date hereof.
- c. Mention on 29.9.2020 for further directions.

**DATED, SIGNED and DELIVERED in MOMBASA this 19<sup>th</sup> day of June, 2020**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**