



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
SUCCESSION NO. 194 OF 2008

IN THE MATTER OF THE ESTATE OF ABDULHUSSEIN NOORBHAI (DECEASED)

FATIMABAI TAIBALI ABDULHUSSEIN NOORBHAI.....APPLICANT

VERSUS

KHADIJA ABDALLA FIDALIRESPONDENT

RULING

1. The deceased herein Abdulhussein Noorbhai died way back in 1934 in Takaungu. A grant of letters of administration (the Grant) was on 8.6.09 issued to Khadija Abdalla Fidali (the Respondent) in her capacity as granddaughter of the deceased. The Respondent in her application for the Grant stated that the deceased was survived by the following:

Batuli Yusuf Fidali Abdulhussein Noorbhai	granddaughter
Fidali Fidali Abdulhussein Noorbhai	grandson
Khadija Abdalla Fidali	granddaughter
Fakru Abdalla Fidali Abdulhussein Noorbhai	grandson
Fatma Abdalla Fidali Abdulhussein Noorbhai	grandson
Ismail Abdulhussein Noorbhai	son (deceased)
Fakru Abdulhussein Noorbhai	son (deceased)
Taibali Abdulhussein Noorbhai	son (deceased)
Ibrahim Abdulhussein Noorbhai	son (deceased)

2. The estate of the deceased comprised of Plots Nos. 38, 41, 42, 1513/397, 1513/369 and 1513/401, all in Takaungu in the then Malindi District.

3. On 10.12.12, the Applicant Fatimabai Taibali Abdulhussein Noorbhai, a granddaughter of the deceased filed a summons for revocation of the Grant of even date. The grounds are that the Grant was obtained fraudulently by concealment from Court of facts which are material to the case. The Grant was obtained by means of an untrue allegation of facts essential in point of law to justify the same and further that the estate of the deceased has been administered and there cannot be a second administration of the estate.

4. In her affidavit in support of her application sworn on 10.12.12, the Applicant averred that a grant in respect of the estate of the deceased was issued to his son Taibali Abdulhussein Noorbhai on 30.10.34. At the time of his demise, the deceased was survived by Taibali Abdulhussein Noorbhai, Ibrahim Abdulhussein Noorbhai, Ismail Abdulhussein Noorbhai, Fakru Abdulhussein Noorbhai, Gulamhussein Abdulhussein Noorbhai and Fidali Abdulhussein Noorbhai. Taibali Abdulhussein Noorbhai proceeded to administer the estate and distributed the same to the aforesaid beneficiaries. According to the Applicant, the Respondent is a granddaughter of Fidali Abdulhussein Noorbhai who died on 15.7.57. His estate was distributed by Esmail Abdulhussein Noorbhai to whom a grant was issued on 7.4.61. The Applicant alleges that Esmail sold all the assets of the estate of Fidali to settle his liabilities which were more than the assets. As a result,

nothing was left for his heirs Yusuf, Mohamed and Abdalla, the Respondent's father.

5. The Applicant further claims that the estates of the other beneficiaries of the deceased namely Fakruddin Abdulhussein Noorbhai, Gulam Abdulhussein Noorbhai and Esmail Abdulhussein Noorbhai have been administered. The Applicant is the administrator of the estates of Esmail Abdulhussein Noorbhai and Shabbithussein Taibali Abdulhussein Noorbhai.

6. The Applicant further claims that in her application for the Grant, the Respondent concealed from the Court that the estate of the deceased was administered over 2 decades ago. The Respondent has used the Grant to lodge assents at the lands registry over a number of properties of the deceased which she did not disclose in her application for Grant. The Respondent has been sued in Malindi HCCC No. 33 of 2012 by one Nahla Fadhil for placing beacons on Plot No. 15 of Group I Takaungu with the intention to sell. If the Grant is not revoked, the Respondent will continue to use the same to enter into transactions of land belonging to second and third generation beneficiaries of the deceased. The Applicant annexed various documents to support her claims.

7. The Respondent opposed the application by way of grounds of opposition dated 12.3.13 and her replying affidavit sworn on even date. The Respondent avers that she is the daughter of Abdalla Fidali Abdulhussein Noorbhai son of Fidali Abdulhussein Noorbhai son of the deceased. The Applicant is daughter of Taibali Abdulhussein Noorbhai son of the deceased. She denies that she obtained the Grant fraudulently by concealing facts material to the case. She however concedes that she was described as a granddaughter in the application for grant whereas she and the other beneficiaries are great grandchildren of the deceased. She blames the error on her then advocates. She denies that the estate of the deceased has been administered.

8. The Respondent alleges that the grant issued to Taibali Abdulhussein Noorbhai is a forgery. The Applicant has through her deceased brother and deceased father used the said grant to fraudulently transfer all the deceased's properties and those of his sons and now claims that the deceased's estate has been administered and distributed. According to her, it was the deceased's other son Ebrahim Taibali Abdulhussein Noorbhai who applied for a grant in respect of his estate. She annexed a copy of a gazette notice in respect of the application. The Respondent further claims that the Applicant's supporting affidavit ought to be struck out as it is defective having been commissioned by a non-existent commissioner for oaths.

9. In her testimony, the Applicant reiterated the averments in her affidavit. In particular, she stated that the deceased died in 1934 and was survived by 6 sons. A grant of representation was on 30.10.34 issued to his son Taibali and Ebrahim in Succession Cause No. 30 of 1934. Following the death of Taibali, Ebrahim took over the administration. The deceased's children are all dead and their estates administered.

10. The Applicant stated that the copy of assent dated 25.7.12 that she obtained from the Lands Office indicated that the deceased died on 4.8.96 at Aga Khan Hospital, Mombasa which is not true as he died in 1934. The assent also describes the Respondent as administrator of the deceased. There is a cancellation of the name of Shabir and the name of the deceased Abdulhussein is overwritten thereon. The Applicant stated that the assent is in respect of the estate of Shabir and not of the deceased.

11. During cross examination, the Applicant stated that the deceased's estate comprised of a house on Plot No. 1513/397 in Takaungu. When the deceased died, the house went to Taibali her father, Ibrahim and Ismail. Her father bought out Fidali, Fakruddin and Gulamhussein. When asked about the grant issued to her father, she stated that it did not contain the seal of the Court. After her father's death, his brother Ibrahim was given the grant. The Applicant stated that the Respondent's grandfather Fidali's property was sold to settle his debts. She however stated that he is entitled to inherit from the estate of his father, the deceased, under Islamic law. The children of Abdalla including the Respondent are also entitled to a share in the estate of the deceased.

12. On her part, the Respondent in addition to conforming her averments in her affidavit stated that the deceased had 6 sons and 2 daughters. 2 of his sons got married while 4 had no wives. Her grandfather Fidali got married to a Mijikenda woman Mwanaisha binti Salim Anzwani. She denies concealing any facts from the Court in her application for the Grant. She further denies that the estate of the deceased had been administered. As proof, she exhibited a letter dated 14.11.98 from the ministry of lands office in respect of Plot 1513/400 was addressed to the deceased. Had the estate been distributed, the letter together with another dated 9.4.03 in respect of the said property would not have been written. Further titles to the properties are in the names of Abdulhussein Noorbhai and Fidali Abdulhusein.

13. Parties filed submissions which I have considered. It is the Applicant's case that the Respondent failed to disclose to the Court of the concluded succession proceedings in Succession Cause No. 30 of 1934 where 2 administrators had been appointed and the estate administered. The Applicant contends that had the distribution not been concluded and the Respondent sought to conclude the same, she ought to have filed an application in the said succession cause. Further, the Respondent failed to disclose that the deceased was survived by other beneficiaries like the Applicant, whose consent ought to have been obtained.

14. For the Respondent, it was submitted that no evidence had been adduced to show that the estate of the deceased had been distributed while the Applicant had exhibited documents to show that a substantial portion of the estate is still intact and had not been distributed. The grant exhibited by the Applicant issued by the Supreme Court of Kenya did not have the seal of the Court nor the signature of the Judge and appears to have been tampered with. Further that there was no untrue allegation of fact as claimed by the Applicant. The Reference by the Respondent to herself as a granddaughter and not great granddaughter of the deceased was an error that she readily agreed.

15. The law relating to revocation of grants is found in Section 76 of the Law of Succession Act (the Act) which 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. 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.

16. One of the grounds upon which the Applicant seeks revocation of the grant is that the estate of the deceased had been administered. She exhibited a copy of a grant issued to Taibali Abdulhussein Noorbhai on 30.10.34 by the Supreme Court of Kenya. The said grant however lacks the seal of the Court, does not have the signature of the Judge and the word "Judge" is superimposed by hand. The authenticity of the grant is doubtful and the Court rejects it. Further, no certificate of confirmation of grant was exhibited and the Applicant does not know exactly how the estate was distributed. Indeed some of the assets of the estate are still in the name of the deceased. In the circumstances, I am not persuaded that the estate of the deceased had been distributed.

17. I now turn to the grounds of concealment from the Court of facts material to the case and untrue allegations of facts. The Respondent is a great granddaughter of the deceased while the Applicant is a granddaughter, a fact that is not disputed. It did also come out in evidence that there were other grandchildren of the deceased who were not indicated in the Respondent's application for grant. The existence of the Applicant and the other grandchildren of the deceased was concealed from the Court. The Respondent also made a false statement that the deceased was only survived by the beneficiaries listed in her application yet there were others.

18. Section 51(2) of the Act stipulates the information that shall be included in an application for a grant as follows:

(2) Every application shall include information as to—

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed

19. It would appear therefore that the Respondent did not comply with the provisions of Section 51(2) (g) of the Act and went ahead and made a false statement *to wit* that the deceased was only survived by the persons listed in her application for grant yet there were other beneficiaries. To the extent that the Respondent did not disclose to the Court and in fact concealed from the Court the existence of all the other beneficiaries other than those indicated in her application for grant, the Court finds 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. Had the Court been made aware that there were other beneficiaries including the Applicant who in fact ranked in higher priority to the Respondent, the Grant would not have been issued to the Respondent.

20. The Respondent is a great-grandchild while the Applicant is a grandchild of the deceased. By dint of Section 66 of the Act, the Respondent's entitlement to the Grant was in a degree lower than the Applicant. The Respondent was therefore obligated to obtain the consent of the Applicant under Rule 26(2) of the Probate and Administration Rules which provides:

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.

21. The Respondent's failure to obtain the consent or renunciation of the Applicant who was entitled to the Grant in a degree higher than herself rendered the Application for the Grant defective in substance.

22. In the result, I find that the statutory grounds for revocation of grant have been established. The Application dated **10.12.12** is merited. The Court makes the following orders:

i. The Grant of letters of administration issued to Khadija Abdalla Fidali by this Court on 8.6.09 is hereby revoked.

ii. All transactions made pursuant to the said grant are hereby nullified.

iii. This being a family matter, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 20th day of September 2019

M. THANDE

JUDGE

In the presence of: -

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

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

.....**Court Assistant**