



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

SUCCESSION CAUSE NO. 326 OF 2012

IN THE MATTER OF THE ESTATE OF SAID ABDULRAHMAN AHMED HASSAN (DECEASED)

MOHSIN SAID ABDUL-RAHMAN.....ADMINISTRATOR

VERSUS

MAHFUDH ABDULRAHMAN AHMED.....OBJECTOR

RULING

1. Before this Court is a Summons dated 10.8.17 seeking Confirmation of Grant in respect of the estate of Said Abdulrahman Ahmed Hassan (**“the Deceased”**). **The Deceased** died intestate on 29.12.93 at the King Abdul Aziz Hospital, Jeddah, in the Kingdom of Saudi Arabia. He was survived by his father, widow, 2 sons and 5 daughters. The listed assets of the estate are a house on Plot No. Msa/Block XVI/1343 (Plot 1343) and a house on Plot No. Msa/Block XVI/1141 (Plot 1141). A Grant of Letters of Administration (**“the Grant”**) in respect of the estate of the Deceased was issued to **Mohsin Said** Abdul-rahman one of the sons of the Deceased on 18.12.12.

2. In the Affidavit in support of the Summons, the Administrator proposes that the estate be distributed according to Islamic law as follows:

Munira Ali Said	Widow	12.5%
Mohsin Said Abdul-rahman	Son	15.74%
Ahmed Said Abdulrahman	Son	15.74%
Lubna Said Abdulrahman	Daughter	7.87%
Latifa Said Abdulrahman	Daughter	7.87%
Zainab Said Abdulrahman	Daughter	7.87%
Khadija Said	Daughter	7.87%
Fatma Said Abdulrahman	Daughter	7.87%
Abdulrahman Ahmed Hassan	Daughter	16.67%

3. Mahfudh Abdulrahman Ahmed the Objector herein by his Affidavit in Opposition sworn on 19.10.17 opposes the proposed distribution. He claims that he owns the house on Plot 1343 having funded the construction of the same which began in 1993 and was completed in 2 years. The house he built replaced the mud house that was on Plot 1343. He married the widow of the Deceased (Munira) and had her express authority to construct the house. The funds for construction were from the Objector’s earnings while in Saudi Arabia and from his younger brother. He obtained the requisite approvals and has exhibited a building permit. He asserts that the Deceased did not have the resources to build the house. The Objector further states that Plot 1141 is registered in his name. He exhibited a copy of title of the title deed.

4. In his Replying Affidavit sworn on 23.10.17, the Administrator denies the allegations of the Objector. In particular, he denies that the Objector funded the construction of the House; that the Deceased’s widow authorized the construction by the Objector; that the Objector has provided the alleged plan of the house. He contends that Plot 1343 and all the developments thereon are registered in the name of the Deceased. The Deceased obtained all approvals for the construction in his name and began construction prior to his death in 1993. Thereafter

the Deceased's father continued with the construction with the funds left by the Deceased. He Deceased ran a successful meat supply business in Mombasa. The Administrator further denies that Plot 1141 belongs to the Objector. It is registered in the name of M. Abdulrahman Hassan who is not the Objector. According to the Administrator, the Objector has all along tried to spirit away the estate of the Deceased who died when the Administrator and his siblings were very young.

5. There is a Replying Affidavit sworn by one Hassan Kassam Ramzam on 19.10.17 in which he averred that he was contracted by the Objector to supply building material for the house on Plot 1343. He however swore another affidavit on 7.11.17 recanting what he had stated in his earlier affidavit.

6. At the hearing, the Administrator informed the Court that the Deceased died when he was 4 or 5 years old. The Objector who is a brother to the Deceased married his mother for a month and had a daughter together. The Deceased was running 2 successful butcheries Hassan Butchery and Guraya Butchery which the Objector is running to date. The business belonged to the Deceased, his father and his brother Abdalla. The Deceased employed the Objector when he returned from Saudi Arabia with nothing. The Deceased left funds with his father when he went to Saudi Arabia and oversaw the construction of the house. The Deceased's father is now over 94 years and is senile. Plot 1343 belongs to the Deceased and title is in his name. He paid for building permit issued on 28.10.93 which is also in his name. Plot 1343 was purchased by the Deceased and his father and the Deceased paid off his father. The Objector has collected rent from the building for over 20 years. The Administrator confirms that the estate of the Deceased is to be distributed in accordance with Islamic law and the Deceased's father is entitled thereunder.

7. The Administrator further stated that Plot 1141 is in the name of M. Abdulrahman Hassan but denies that the same belongs to the Objector whose name is Mafudh Abdulrahman Ahmed. The title was issued on 31.12.93 a day after the death of the Deceased. The Administrator further stated that the Objector married his mother after the period of *eddah* but divorced her after 1 month. The documents relating to business banking and titles are all in the name of the Objector. He also has titles to Plots 1141 and 1343 and has refused to release the same. . Objector

8. The Objector told the Court that he operates Guraya Butchery and Hassan Butchery and has been doing so since 1983. This was family business which was started by his father Abdurahman Ahmed Hassan. Their father is now over 94 and senile and the Objector takes care of him. He and his brothers Abdalla, Said the Deceased, and Mohamed worked under their father and though not paid had all their needs met through the business. The proceeds of the business were deposited in their father's account. He denied that the Deceased had his own business. He further stated that he and his father spent about Kshs. 1 million of the Deceased's hospitalization in Aga Khan Hospital and in Saudi Arabia. The family was united under their father. Upon the demise of the Deceased, the Objector took full responsibility for his family including food, rent, school fees, etc. He married the widow but divorced her after 4 months.

9. The Objector further stated that Plot 1343 was purchased by their father but was given to the Deceased and registered in his name. His father directed him to build the house which he did after getting the drawings approved, all at his own cost. The contractor was Yahya Swaleh who is now paralyzed. Plot. The construction which was done in phases cost the Objector over Kshs. 6 million. The Deceased had no other business or resources to enable him build the house. The family even had to assist in hospital bills. The rental income of the house is about Kshs. 80,000/= which since 2014 has been paid into a joint account of the parties' advocates.

10. The Objector further claims that Plot 1141 belongs to him and the title is in his name. He initially purchased the house without land and thereafter the Government sold the plots to the house owners. He paid Kshs. 30,000/= for the same. Their other brother Abdalla has a property in his name bought for him by their father. The Objector states that all he seeks is to be paid the construction cost of the house and he will let go of the same.

11. The parties filed written submissions which I have considered. The issue for determination are whether the house on Plot 1343 and Plot 1141 form part of the estate of the Deceased. The Administrator listed the houses on both plots as forming the estate of the Deceased. The Objector on the other hand claims that he alone constructed the house on Plot 1343 while Plot 1141 belongs to him and is registered in his name.

Plot No. 1343

12. It is not disputed that the title in respect of Plot 1343 is in the name of Said Abdulrahman, the Deceased. Indeed the title exhibited by the Objector confirms this fact. In the absence of any evidence to the contrary, the Court comes to the conclusion that the Deceased is the proprietor of Plot 1343. This is fortified by Section 26(1) of the Land Registration Act which provides that a certificate of title issued by the Registrar of Lands shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.

13. What is in dispute is the house which the Objector claims he constructed. The building permit in respect of the house was issued in the name of the Deceased on 28.10.93. The Court notes that this was before the demise of the deceased. It is trite law that he who alleges must prove. This is succinctly stated in Sections 107 and 109 of the Evidence Act as follows:

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

14. Other than merely stating that he constructed the house on Plot 1343 over a 2 year period and that he spent over Kshs. 6 million for the

construction, no evidence was produced by the Objector to support this allegation. As the Objector wishes this Court to believe that he built the house on Plot 1343, the burden of proof as to this fact lies squarely on him. However the material placed before the Court by the Objector is insufficient to discharge him from the burden of proof. In the circumstances this claim must fail.

Plot No. 1141

15. The Administrator has included Plot 1141 as part of the assets for distribution to the heirs of the Deceased. The Objector opposes this and claims to own the plot. The exhibited title in respect of Plot 1141 indicates that the registered owner is M. Abdulrahman Hassan. It was argued that the Objector has several names and that the Court should take judicial notice of the fact that there are individuals who have several names. The Administrator claims that the title was obtained fraudulently a day after the demise of the Deceased. Further that the Court should take judicial notice of the fact that titles do not have initials but have full names. I have considered the rival arguments. The onus of proving that Plot 1141 belongs to the Objector lies on him. It was incumbent on him to produce documents or other evidence showing that the names M. Abdulrahman Hassan and **Mahfudh Abdulrahman Ahmed both refer to him. On the other hand, the burden was on the Administrator to lay before the Court material to satisfy the Court that Plot 1141 belongs to the Deceased. All he told the Court is that the Objector obtained the title fraudulently a day after the Deceased died. The deceased's name is Said Abdulrahman Ahmed Hassan and not M. Abdulrahman Hassan.** No document or evidence was produced by the Administrator to persuade the Court that Plot No. 1141 belongs to the Deceased. In the circumstances the Court is unable to make a finding that Plot No. 1141 belongs to either the Deceased or the Objector.

16. Form the foregoing, the Court finds that the estate of the Deceased consists of Plot No. Msa/Block XVI/1343 together with all the buildings and improvements thereon. The Grant of Letters of Administration is hereby confirmed. The estate of the Deceased shall be distributed to the legal heirs of the Deceased in accordance with Islamic law. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 31st day of May 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Administrator**

.....**for the Objector**

.....**Court Assistant**