



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 64 of 2017

IN THE MATTER OF THE ESTATE OF TAHIR SHEIKH SAID AHMED (DECEASED)

NIC BANK KENYA PLC.....PETITIONER

VERSUS

OSMAN TAHIR SHEIKH SAID

AMINA TAHIR SHEIKH SAID

SAID AHMED TAHIR SHEIKH SAID.....EXECUTORS/OBJECTORS

RULING

1. Tahir Sheikh Said Ahmed (the Deceased) died on 10.1.17 in Mombasa. A Petition for a Grant of Letters of Administration *ad litem* in respect of the estate of the Deceased was filed on 1.12.17 by NIC Bank Kenya Plc (“the Petitioner”) in its capacity as creditor. The Petitioner seeks a grant limited for the purpose of continuing with O.S. No. 22 of 2016 Umi Rishard Omari v Tahir Sheikh Said Ahmed and NIC Bank Limited and further for the purpose of filing suit to enforce against the estate of the Deceased personal guarantees issued by the Deceased in favour of the Petitioner to secure a loan facilities granted to the Deceased’s companies and with no power of distribution.

2. The Petitioner advanced the sums of US\$ 18,000,000 and Kshs. 100,000,000 to Juja Coffee Exporters Limited secured by the Deceased’s properties known as Mombasa/Block XXXII/10, 11, 12, 16 & 19 and the Deceased’s personal guarantee dated 12.3.15. The Petitioner further advanced the sums of US\$ 16,200,000 and Kshs. 700,000,000 to Tahir Sheikh Said Grain Millers Limited secured *inter alia* by the Deceased’s personal guarantee dated 22.8.14. It is the Petitioner’s prayer that the Grant limited as aforesaid be issued to Mohamed Tahir Sheikh Said.

3. The Petition is supported by the Affidavit of Waweru Mathenge the Deputy Company of the Petitioner. It is averred that O.S. No. 22 of 2016 is yet to be heard and determined as the Deceased who died on 10.1.17 is yet to be substituted with a legal representative of his estate. It is therefore necessary that a grant of representation be issued to enable the Petitioner file suit and continue with O.S. No. 22 of 2016. The Petitioner filed Citation No. 9 of 2017 against the beneficiaries of the Deceased who despite being given an opportunity to petition the Court for a grant of representation are yet to do so. The sum owing to the Petitioner as at 29.11.17 stands at Kshs. 1,194,802,890.92 and US\$ 37,396,062.04.

4. Osman Tahir Sheikh Said, Amina Tahir Sheikh Said and Said Ahmed Tahir Sheikh Said the Executors/Objectors opposed the Petition in their notice of objection to making a grant dated 23.1.18. They contend that the Deceased left a valid written will in which they were appointed executors which was unsuccessfully challenged in Kadhi’s Court Case No. 78 of 2017. As such it is only the Executors/Objectors who are authorised by Section 80(1) of the Law of Succession Act to represent the estate of the Deceased from the date of his death. Further, there is no evidence of the Executors/Objectors’ unwillingness and inability to act to justify their being bypassed or excluded in the management and administration of the affairs of the estate of the Deceased. Further no justification has been given for the selection of Mohamed Tahir Sheikh Said in priority and in exclusion of all other dependants of the deceased and especially after he challenged the validity of the will.

5. In submissions on behalf of the Petitioner counsel submitted that in Citation No. 9 of 2017 the beneficiaries of the estate of the deceased including the Executors/Objectors were given an opportunity to petition for a grant. None of the beneficiaries took out a grant. The Court then allowed the Petitioner to file a petition. Counsel submitted that the amount owing to the Petitioner stood at over Kshs. 1,000,000,000 and US\$ 37,000,000. The Petitioner has been greatly prejudiced by failure of the beneficiaries of the estate to take out a grant of representation.

6. For the Executors/Objectors, it was submitted that the Petitioner has not demonstrated that the Executors/Objectors are unable or unwilling to act. Failure to petition for a grant is not unwillingness to act in the suit. The Executors/Objectors have in fact demonstrated willingness to defend the suit against the estate. Counsel contended that under Section 80(1) of the Act, a suit by or against executors can be commenced

without them obtaining a grant. All a party needs is to be aware that there is a will that has appointed executors. It was further submitted that the ruling in KCC No. 78 of 2017 was annexed in the affidavit of Sabir Tahir Sheikh Said in which executorship was well demonstrated. It was further argued that the proposed administrator being a mere beneficiary should not be hoisted above the Executors/Objectors yet he challenged the will in the Kadhi's Court. Counsel urged the Court to uphold Section 80(1) of the Act and allow the Executors/Objectors do their work and dismiss the Application.

7. In addition to the Petition, the Petitioner filed a chamber summons application dated 29.11.17 seeking issuance of a grant *ad litem*. Rule 12 of the Probate and Administration Rules provides:

12. Application for limited grant under Fifth Schedule to the Act

An application for a grant of representation to be limited in any of the several respects described in the Fifth Schedule to the Act shall be by petition in the appropriate Form and shall be supported by such evidence by affidavit in Form 19 as is required by these Rules including such evidence as is sufficient to establish the existence of the facts and circumstances relative to the particular respect in which the grant is to be limited.

8. It is clear from the foregoing that an application for a limited grant such as the present application shall be by way of petition. It is not clear to the Court why the Petitioner deemed it necessary to file the chamber summons application in addition to the Petition seeking the very same orders. The said application being unprocedural is hereby struck out.

9. I now turn to the Petition, the Objection and submissions by counsel. I do note that none of the beneficiaries of the estate including the Executors/Objectors in spite of being duly served applied for a grant of representation in respect of the estate of the Deceased. Indeed it would appear that there was a concerted effort by the beneficiaries of the estate to avoid taking out letters of administration thereby prejudicing the Petitioner. The Executors/Objectors submitted that since they were executors of the will of the deceased they did not need to take out a grant of representation. They relied on Section 80(1) of the Law of Succession Act which provides:

“A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.”

10. The foregoing provision makes it clear that an executor derives title and authority from the will of the testator and not from any grant of probate. The executor steps into the testator's shoes from the date of the testator's demise. This was the holding in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR. The Court of Appeal observed:

“In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death”

11. Again in Sakina Sote Kaitany & another v Mary Wamaita [1995]eKLR, Lakha, JA had this to say:

“Accordingly, in my judgment, the respondent answers the description of an executor she having been appointed by the deceased as such in his will. But two objections are raised. First, it is submitted that the respondent has not yet obtained a grant of probate. That, I think, is quite untenable. The two provisions above referred to make it quite clear that that is not necessary. So does the case of Kothari v. Qureshi 1967 EA 564 wherein at P. 566 it is stated:-

“Where a person dies leaving a will appointing an executor, the person so appointed as executor represents the estate of the deceased testator as from the date of the death of the testator, unless the executor renounces the executorship, and if he had intermeddled in the estate he cannot renounce executorship.” (emphasis supplied)it is elementary law that an executor's title dates from the death of the deceased and springs from the will not from the grant of probate.”

12. If it is in fact true that the Executors/Objectors were appointed executors of the Deceased's will, their authority to represent the estate of the Deceased springs from the will and not from any grant of representation. A grant will only establish the will and render valid all intermediate acts of the Executors/Objectors. This being the legal position, the Executors/Objectors ought to have represented the estate of the Deceased as from 10.1.17 the date of his demise. The fact that Citation No. 9 of 2017 and this Petition had to be filed by the Petitioner points to a failure on the part of the Executors/Objectors to perform their duties of representing the estate of the Deceased.

13. Paragraph 14 of the Fifth Schedule provides:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

14. Although it was submitted that the Executors/Objectors have been willing to act and to defend the existing suit, nothing has been placed before me to demonstrate such willingness. The Petitioner was not a party in the suit before the Kadhi. The Executors/Objectors ought to have brought to the attention of the Petitioner and this Court that the Deceased had made a will in which he appointed them executors and

that they were willing to act. Indeed they ought to have done this upon service of the Citation upon them. This they did not do and as a result precious time of all concerned, judicial time has been expended in the Citation and in this matter. Even more telling is that the alleged will has not been produced before this Court. The ruling referred to by counsel for the Executors/Objectors as sufficient notice of the will relates to a preliminary objection challenging the jurisdiction of the Kadhi's Court which the Hon. Kadhi upheld. The only logical inference that can be drawn by any reasonable person is that the Executors/Objectors were unwilling to act.

15. Section 66 of the Law of Succession Act

“66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference...”

16. The foregoing provision gives this Court final discretion to determine to whom a grant of letters of administration shall be made. In the present case, although the Court has not seen the alleged will of the deceased, the Executors/Objectors have expressed a willingness to act in the management and administration of the affairs of the estate of the Deceased and in particular to defend the existing suit. Further the Petitioner has not stated why it singled out Mohamed Tahir Sheikh Said out of all the children of the Deceased.

17. Having taken all factors into account therefore, the Court finds and holds that the Petition herein has merit. In exercise of the discretion granted to this Court by Section 66 of the Law of Succession Act I do make the following orders which are necessary for the ends of justice:

a) Grant of Letters of Administration *ad litem* be and is hereby made to Osman Tahir Sheikh Said, Amina Tahir Sheikh Said and Said Ahmed Tahir Sheikh Said, limited only for the purpose of continuing with O.S. No. 22 of 2016 Umi Rishard Omari v Tahir Sheikh Said Ahmed and NIC Bank Limited and further for the purpose of defending any suit that may be filed by the Petitioner to enforce against the estate of the Deceased, the personal guarantees issued by the Deceased in favour of the Petitioner, to secure loan facilities granted to the Deceased's companies Juja Coffee Exporters Limited and Tahir Sheikh Said Grain Millers Limited, with no power of distribution.

b) The Petitioner shall have costs which shall be borne by the estate of the Deceased.

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

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the Executors/Objectors**

..... **Court Assistant**