



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 21 OF 1962

IN THE MATTER OF THE ESTATE OF NATHU KHAN..... DECEASED

RULING

1. This ruling is in respect of the application dated 20/4/2016 in which Mohammed Sadique Khan seeks orders;
 1. Spent.
 2. **THAT the respondent Mohammed Sadique Khan herein do produce to the court a full and accurate account of all dealings in respect of the estate to date.**
 3. **THAT the Court, being satisfied with the accounts rendered by the respondent, do proceed to dissolve the trust and distribute the remainder of the estate to the surviving beneficiaries.**
 4. **THAT the Court be pleased to distribute Nakuru Block 4/92 to the Applicant herein.**
 5. **THAT the costs of this application be provided for.**
2. The application is supported by the applicant's affidavit and on grounds that;
 - a) That the applicant is a beneficiary of the estate of the deceased herein.
 - b) That the respondent herein is the executor of the will of the deceased herein.
 - c) The executor has not filed any accounts of the estate and it is necessary that he proceeds to do so.
3. It is the applicant's case that the respondent is the executor of the will of his (applicant's) father who passed away on 24/10/1962. He annexes the said will to his affidavit. The executors of the said will were Gulam Fatma, Bashir Ahmed and Mohammed Nazir. Bashir Ahmed is said to have left the country in 1968 and settled in the United States of America and Gulam Fatma is deceased.
4. The applicant avers that he believes Bashir Ahmed is not interested in the management of the trust created under the will as he does not reside in Kenya.
5. The applicant states that the circumstances of his father's estate do not make it any longer tenable to retain the trust and the same should be dissolved and the remaining assets be distributed to the beneficiaries together with the proceeds of the income from the assets held by the executors.
6. The respondent should be ordered to render a full inventory of all the moveable and immovable assets and accounts for the examination of beneficiaries before the trust is dissolved. The applicant seeks that property Nakuru Municipality Block 4/92 which belongs to the estate be transferred to him, the respondent having abandoned the property which is currently occupied by one of his workers.
7. The application is opposed and Mohamed Nazir Khan (the respondent) has sworn a replying affidavit and he dismisses the application as incompetent, bad in law, self serving, strange and should be struck out *in limine*.
8. It is the respondent's case that even if this matter was still alive, the same is not justiciable before the High Court when it is titled and headed "In Her Majesty's Supreme Court." There is no law by dint of which these proceedings can be held or deemed to lie before the High Court.

9. The respondent believes that an application to transfer the matter to the High Court should have been filed to enable the court assume jurisdiction.

10. The application cannot lie against one trustee and the same should be brought against all the trustees.

11. The application is attacked on grounds that the applicant has stayed satisfied for more than fifty (50) years. He was in a better position to know what became of the estate for he was older than the respondent who was only seventeen (17) when their deceased father died. The respondent suspects that these proceedings have been brought solely in respect to property Nakuru Municipality Block 4/92 which the applicant imagines should just be handed to him.

12. The respondent avers that at the time that the family assets were disposed off to meet the education expenses of all his siblings both in Kenya and the United Kingdom, he did not even have an identity card and therefore he could not have been expected or had capacity to execute any document for purposes of dealing with the estate.

13. To his knowledge, the deceased owned 3 small flats in Nakuru South which were sold by their mother to meet school expenses in Kenya and in the United Kingdom.

14. It is urged that it is inconceivable and oppressive to wait for 50 years to ask for documentation and records of accounts when the law put no such burden.

15. It is added that it is clear from the will that the deceased granted the executors the discretion to deal with the estate as thought by them, wisely, after educating all the children of the deceased and after the upkeep of the deceased's widow.

16. The residue of the estate lasted for just a few years and it is the respondent's brother Mohammed Rafiq Khan and himself who took up the responsibilities of the upkeep of their mother with their own resources until her death.

17. The respondent maintains that he holds property Nakuru Municipality Block 4/92 in trust as a joint executor of the will. There is no justification given why the applicant prefers to have the property transferred to him yet there are other, indeed more deserving beneficiaries. The will does not provide for the disposal of the property sought by the applicant.

18. The applicant in rejoinder filed a further affidavit in which he avers that for practical purposes the respondent is the executor of the deceased's will and he is accountable to this court.

19. He lists assets of the deceased as;

- a) Residential house Nakuru Municipality Block 2/389 in the name of Gulam Fatma.
- b) 3 blocks of flats consisting of 2 x 2 bedroom flats.
- c) Commercial property Nakuru Municipality Block 4/92.
- d) Second hand motor spare shop in Nakuru known as Nathu Khan.
- e) Several motor vehicles.

The 4 flats were rented with income of 900/= per month.

20. The applicant asserts that all decisions were taken by the respondent with the blessings of Gulam Fatma.

21. The delay alleged is explained in that the applicant could not raise any issue during the lifetime of Gulam Fatma as per the will.

22. The Respondent is accused of selling properties of the deceased and buying in cahoots with his mother Gulam Fatma and brother Rafique Khan the following properties;

- (a) Nakuru Municipality Block 10/112 Residential on 29th September, 1966 of Kshs. 49,000/= (Gulam Fatma).
- (b) Nakuru Municipality Block 4/86 Commercial property on 2nd November, 1967 for Kshs. 9,000/= (Mohammed Nazir Khan).
- (c) Nakuru Municipality Block 4/5 Industrial/Commercial in 1969 for Kshs. 130,000/= (Mohammed Rafique and Nazir Khan).
- (d) Nakuru Municipality Block 4/87 bought in 1970 Commercial property for Kshs. 60,000/= (Mohammed Rafique Khan).

23. The respondent and his brother Rafique Khan are accused of buying new vehicles and making frequent trips to the United Kingdom for personal business and pleasure spending estate funds which did not benefit the family.

24. The respondent avers that he did not benefit from the estate of his father and he is therefore lawfully entitled to the only asset left by the

trustees.

25. The application was disposed of by way of written submissions.

26. I have considered the application, the supporting, replying and further affidavits as well as learned submissions by counsel.

27. Of determination are the following issues;

1. Whether this Court has jurisdiction to entertain the current application.
2. Whether the application is bad in law, incompetent and incurably defective.
3. Whether the respondent should render accounts related to dealing in the estate.
4. Whether property LR No. Nakuru Municipality Block/4/92 should be transferred to the respondent.

28. I start with the issue of jurisdiction as the same is central to all other issues herein as without jurisdiction, the Court must down its tools.

29. The challenge on jurisdiction is pegged on the premise that the application is brought before the wrong court since the initial litigation was before the "Colony and protectorate of Kenya in Her Majesty's Supreme Court at Nakuru District Registry Probate and Administration."

30. The Constitution of the Republic of Kenya, 1963 established the High Court of Kenya under Chapter IV Section 60. This is the court that succeeded Her Majesty's Supreme Court.

31. **Legal Notice No. 718 of 10/12/1963** which provides for the transitory provisions as the country ushered in the **Constitution of the Republic of Kenya 1963** provided under **Section 16(1)** and **2** that;

"16 (1) All proceedings that, immediately before the commencement of this Order, are pending before any court established by or under the existing Orders (or deemed to have been so established) or before the Court of Appeal for Eastern Africa may be continued and concluded after the commencement of this Order before the corresponding court established by or under the Constitution (or deemed to have been so established) or, as the case may be, before the Court of Appeal for Eastern Africa.

(2) Any decision given before the commencement of this Order by any such court as aforesaid shall, for the purpose of its enforcement or for the purpose of any appeal therefrom, have effect after corresponding court established by or under the Constitution (or by the Court of Appeal for Eastern Africa, as if it were a decision given by that court in exercise of the jurisdiction conferred on it under this Order."

32. In light of the above provisions, the application before Court is before the right Court and the Court thus has the requisite jurisdiction to entertain it.

33. As to whether the respondent should render account, **Section 83** of the **Law of Succession Act** enjoins an administrator(s) to;

"83. Personal representatives shall have the following duties -

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, 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;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration."

34. Thus the administrators herein are no exception and they ought to have complied with the legal requirement.

35. But the applicants' application is selective and unsupported by Law. **Section 81** of the **Law of Succession Act** provides;

"S. 81. Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court

has made a further grant to one or more persons jointly with him.”

36. In our instant suit only one executor Gulam Fatma has died and therefore all the powers and duties of the executors are now vested on Bashir Ahmed and Mohamed Nazir.

37. It is not enough for the applicant to depose that Bashir Ahmed left the country in 1968 and settled in the United States. There is no concrete evidence that that is so and even if it were so departure from the country does not absolve an executor from his duty. If any accounts were to be rendered, that would have to be by the 2 surviving executors. Can the executor within the jurisdiction of the court be expected to answer for the one out of jurisdiction?

38. Notably, there exists elaborate mechanism for the service of process beyond borders. The executor out of this country is no less accountable than the executor within.

39. For failure to enjoin all the surviving executors, the application for accounts must come a cropper.

40. On the question whether the property described as LR No. Nakuru Municipality Block 4/92 should be transferred to the applicant, I find this prayer preposterous, bad in law and completely without a sound basis.

41. The estate herein was to administered by the appointed executors within the terms of the will. I find no justification for the applicant to claim this property exclusively for himself to the exclusion of all other beneficiaries.

42. Finally, I need to comment on the timing of the application before Court. Quite clearly the applicant's claim is caught up by Laches. There has been an unreasonable delay in pursuit of the right or claim herein. He has surely slept on his rights.

43. That said, however, and noting that these are succession proceedings and that the executors are by law expected to finalise the administration of the estate, my view is that the applicant is not gagged by estoppel by Laches and if he followed the correct procedure and sues the correct parties he could still go ahead to hold the executors accountable in so far as the administration of the estate is concerned.

44. With the result that the application as presented is completely without merit. I dismiss the same. Each party to bear its own costs.

Dated and Signed at Nakuru this 26th day of September, 2018.

A. K. NDUNG'U

JUDGE