



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1942 OF 2011

IN THE MATTER OF THE ESTATE OF KURBANALI SHAMASDIN JALALDIN (DECEASED)

RULING

1. Abdulkarim K. Shamasdin hereinafter referred to as the applicant has filed a Notice of Motion dated 19th of February 2016 brought under Section 62 of Law of Succession Act, Cap 160, Probate and Administration Rules 22, 26 and 73 and Section 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya seeking the following orders;

i. Spent

ii. **That the administrator of the Estate of Aziz Kurbanali Shamasdin be ordered to execute the vesting assent in respect of properties flat no. 74 situated on L.R. No. 209/5558, Ngara Road, Platinum Housing Cooperative Society Limited Nairobi to enable transmission of the flat to the beneficiary as per the deceased Will dated 16th May 2007.**

iii. **That should the said Administrator of the Estate of Aziz Kurbanali Shamasdin namely Arif Aziz Shamasdin decline to sign the vesting assent this Honourable Court to order property Flat no.74 situated on L.R. No. 209/55558, Ngara Road, Platinum Housing Co-operative Society Limited to be registered in the name of Abdulkarim K Shamasdin and Arif Aziz Shamasdin as the administrator of Estate of Aziz Kurbanali Shamasdin.**

2. The applicant filed an affidavit dated 19th February 2016 in support of his application and depones as follows; he is the only surviving Executor in respect of the estate of **Kurbanali Shamasdin Jalaldin** as donated in the resealing of the grant on 21st May 2012. That his co-executor and beneficiary **Aziz Kurbanali Shamasdin** passed on and the grant in respect of his estate was issued on the 16th December 2013 and confirmed on the 26th of March 2014. That the administrator and / or beneficiary of the estate of Aziz Kurbanali Shamasdin despite being provided with the vesting assent for execution have declined, refused and or failed to execute the documents to enable transmission of the deceased only asset being property flat no. 74 situated on L.R. No. 209/5558, Ngara Road, Platinum Housing Cooperative Society Limited Nairobi. That the beneficiaries are entitled to 0.50 share of the deceased property as per the deceased last Will dated 16th May 2007. He therefore seeks the orders in the interest of safe guarding and ensuring distribution is effected in respect of the deceased estate.

3. By an application dated 14th April 2016 **Mr. Arif Aziz Shamasdin** sought to be enjoined as an interested party/objector. The application was allowed by consent on the 6th of February 2017.

4. In an affidavit dated 6th July 2017 **Arif Aziz Shamasdin** depones, that he is aware of the proceedings that relate to his grandfather **Kurbanali Shamasdin Jalaldin** (deceased). That the applicant is the only

surviving executor of his grandfather estate, as the other executor who was his father the late Aziz Kurbanali Shamasdin is now deceased. That he is not aware of the content of the resealed grant referred to by the applicant and that the grant and certificate of confirmation in respect of the estate of Aziz Kurbanali Shamasdin has since been withdrawn. That the vesting assent sent to him for execution was not necessary as the only asset that the estate is a share held with Platinum Housing Co-operative Society Limited and that the said share has been transferred to him by the applicant. That when the matter was filed his father instructed the firm of Mohamed Madhani & Co. Advocates to take care of his interest in the Estate and the firm also drafted the purported Will and therefore it would be unethical for the said firm to turn around and represent the applicant.

5. In response to the said affidavit the applicant filed the affidavit dated 7th July 2017 and depones that it is only when he applied to revoke the grant in P & A No. 2066 of 2013 that the respondent chose to withdraw the matter. That the share certificate which forms the title to Flat No. 74 premised on L.R. No. 209/5558, Ngara Road, Platinum Housing Cooperative Society Limited, Nairobi is yet to be transferred to the respondent's name. That the transfer of stock dated 29th November 2012 was executed through misrepresentation on the part of the respondent as he fraudulently wished to acquire the entire Flat No.74 for himself contrary to the express provisions of the deceased's Will. That he had no intentions of gifting his 50% share in Flat no. 74 to the Respondent at nil consideration. That after his advocates wrote to Platinum Housing Co-operative Society Limited, the said society declined to transfer share certificate to the respondent's name and on the 24th October 2016 the society wrote to the respondent returning Kshs. 50,000/= being the transfer fee. The Flat or share certificate is yet to be transferred into anyone's name and still remains in the deceased name.

6. On the 19th July 2017 Arif Aziz Shamasdin filed a reply to the applicant's affidavit dated 7th July 2017. He depones that he withdrew the grant issued in P & A No. 2066 of 2013 upon advice from his advocate that the grant serves no purpose as the estate of his late father had no asset and the property subject to these proceedings was yet to be transferred to him while he was alive. That the issue is not whether Platinum Society has effected the actual transfer but is as to whether the applicant did execute the instrument of transfer. That the instrument of transfer was prepared by the applicant's advocate then on record for him and he executed the same in his presence and witness by the applicant's advocate one M/s Shabana Osman. That the share certificate which the applicant handed over to him is still in the deceased's name therefore since the same had not been transferred to his father then the grant in P & A 2066/2013 was of no purposes.

7. Counsels canvassed the application by way of oral submissions. Mr. Shah for the Applicant argued that prayer 2 has been overtaken by events as the respondent withdrew High Court Succession Cause No. 2066/13. That the grant was resealed in Kenya and in the Will dated 16th May 2017. The estate was to be split between the applicant and the respondent's father and this is what the applicant seeks since the flat is still in the name of the deceased. The applicant sought to rely on the affidavit of Mrs. Shabana Osman which states that the administrator of the estate of Aziz Kurbanali Shamasdin have declined, refused to sign he vesting assent to enable transmission of property Flat No. 74 situate on L.R. No. 209/5558, Ngara Road, Platinum Housing Cooperative Society Limited Nairobi.

8. Mr. Mugambi for the respondent submitted that at the time the application dated 19th February 2016 was filed on the 22nd February 2016 the respondent was not a part of the proceedings. That the applicant had not applied to enjoin them and they came in as interested parties. That the property in issue had not been transferred to the respondent's father's name before his death. The Respondent urged the court to dismiss the application and to allow the transfer to proceed. In reply Mr. Shah maintained that the applicant did not execute a consent and he was not willing to transfer the flat solely to the brother's name as the as per the will is clear.

9. The applicant seeks to have the administrator of Aziz Kurbanali Shamasdin namely Arif Aziz Shamasdin to execute the vesting assent in respect of properties flat no. 74 situated on L.R. No. 209/5558, Ngara Road, Platinum Housing Cooperative Society Limited Nairobi to enable transmission of the flat to the beneficiary as per the deceased Will dated 16th May 2007. P & A 2066 of 2013 was withdrawn on the

6th February 2017, the said Succession Cause having been withdrawn there is no administrator in the estate of Aziz Kurbanali Shamasdin and therefore the orders sought cannot be granted. The issue of validity of transfer of the 0.5 share of flat No. 74 on L.R. No. 209/5558, Ngara Road, Platinum Housing Cooperative Society Limited Nairobi should be pursued by the applicant in the Commercial Court. The contents of the Will dated 16th of May 2007 which have not been challenged are clear that the deceased nominated his two sons Azizali K S. Jalaldin and Abdulkarim K. Shamasdin as his executors. At paragraph C of the said Will the deceased's residue of the estate was to be divided equally between his two sons. I therefore decline to grant the orders sought having noted that there is no administrator in the estate of the applicant's co-executor. No orders as to costs. It is so ordered.

Dated, signed and delivered this 17th Day of November 2017.

R. E. OUGO

JUDGE

In the Presence of:

Mr. Shah For the Applicant

Mr. Ngala h/b for Mr Mugambi For the Respondent

Ms. Charity Court clerk