



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION NO. 297 of 2005**

**IN THE MATTER OF THE ESTATE OF ALI BAKARI MWADZINYETO ALI BAKARI  
HARRY (DECEASED)**

**RULING**

1. The deceased to whose estate the proceedings herein relate is Ali Bakari Mwadziyeto Ali Bakari Harry, who died intestate on 27.4.63 at Waa. A Petition for a Grant of Letters of Administration was filed on 5.7.05 by Ali Juma Gangu a grandson of the deceased.
2. According to the Affidavit in Support of the Petition, the only asset of the deceased is Plot No. Kwale/Waa/79. After the Petition was gazetted on 14.10.05, Mwalimu Rahid Jepher, Rashid Juma Mwakulonda and Hassan Omari Hamisi filed a Notice of Objection on 1.11.05. They claim that as grandchildren of the deceased, they were excluded in the Petition and their consent was not sought or given. They further alleged that they would lose their ancestral land and be rendered homeless should the Grant be issued to the Petitioner.
3. In their Answer to Petition filed on 24.2.06, the Objectors state that the Petition should be dismissed for the reason that the Objectors and other heirs named in the Cross Petition are the true beneficiaries of one of the said Plot No. Kwale/Waa/79 indicated in the Petition and that they had been excluded in the Petition. A perusal of the record does not yield a cross petition. What is attached to the Answer to Petition is a Petition by Mwalimu Rashidi Jepher one of the Objectors herein in Cause No. 297 of 2006 relating not to the estate of the deceased person herein but to the estates of Ndugu Mwanguzo Gwaya aka Meswalehe Mwanguzo and Omari Mwanguzo Gwaya. Plot No. Kwale/Waa/79 is listed as one of the assets of both deceased persons.
4. At the hearing of the objection proceedings, Mwalimu Rashid Jepher, PW1 produced search certificates for Plot Numbers Kwale/Waa/78 and Kwale/Waa/79. Pexb 1(a) is a search certificate that shows that the registered owners of Kwale/Waa/79 are Omari Mwanguzo and Meswalleh Mwanguzo. Pexb 2(a) is a search certificate that shows that the registered owners of Kwale/Waa/78 are Fatuma Ali Kidzunga, Mohamed Ali Mwabuga, Bakari Ali Mwadziyeto, Mwanaidi Ali Gambene and Mwanakombo Ali Hari.
5. The substantive law on objections is contained in Sections 68 and 69 of the Law of Succession Act, while the procedure is found in Rule 17 of the Probate and Administration Rules. Section 68 provides:-

***“68 (1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow.***

***(2) Where notice of objection has been lodged under subsection (1) the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.”***

**“69 (1) Where a notice of objection has been lodged under subsection (1) of Section 68, but no answer or cross-application has been filed as required under subsection (2) of that Section, a grant may be made in accordance with the original application.**

**(2) Where an answer and cross application have been filed under subsection (2) of Section 68, the court shall proceed to determine the dispute.”**

6. It is clear from the above provisions that after having filed a notice of objection, the Objector is required to file an answer to application for grant and a cross application.

7. In Re Estate of Amar Kaur Matharu- (Deceased) [2014] eKLR, Musyoka, J opined

***I reiterate that the Notice of Objection is not a pleading. It is not a reply to the petition for grant. It is the answer to the petition and the petition by way of cross-application which reply to the petition for grant. It is these two twin processes that make up the objection. These two are pleadings. Technically, therefore, there is no objection on record.***

8. Likewise, in the instant case, there is no objection on record. Initially, the Objectors did file an Answer to Petition dated on 24.6.06. However they did not file a cross application. Thereafter, the Objectors filed an amended Notice of Objection dated 15.4.13. However, no amended answer to the petition and petition by way of cross-application was filed. What therefore remains on record is a hanging and unsupported amended Notice of Objection. There is thus no hindrance to the Petition for grant of representation.

9. Having made such determination ought the Court therefore issue a Grant of representation to the Petitioner? I think not. It is evident that the only asset listed in the Affidavit in support of the Petition is the disputed Plot No. Kwale/Waa/79. As stated above, from the documentary evidence adduced at the hearing herein, this property does not belong to the estate of the deceased. The Court cannot therefore issue a grant of letters of administration to the Petitioner to administer a property that does not belong to the estate of the deceased. It is also not for this Court to determine an ownership dispute between the estate and third parties.

10. Under Section 47 of the Act this Court has jurisdiction to pronounce such decrees and make such orders as may be expedient. Consequently, I make the following orders:

a) The Objection is hereby dismissed.

b) The asset listed in the Affidavit in support of the Petition herein, that is to say Plot No. Kwale/Waa/79 does not form part of the estate of the deceased herein and is hereby removed from the said list of assets.

c) The Petitioner is at liberty to file an amended Affidavit in Support of the Petition listing the correct asset of the estate.

d) There shall be no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 21<sup>st</sup> day of April, 2016.**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Objectors**

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

..... **Court Assistant**