



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO.279 OF 1978**

**IN THE MATTER OF THE ESTATE OF FATUMA MODHARI MOHAMMED HABIB alias  
FATIMA BINTI MODHARI (DECEASED)**

**ABDULKADIR ABUBAKAR.....ADMINISTRATOR/RESPONDENT**

**VERSUS**

**IMU MOHAMMED ABUBAKAR....1<sup>ST</sup> OBJECTOR/APPLICANT**

**HUSSEIN ABUBAKAR.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**AHMED ABUBAKAR.....3<sup>RD</sup> OBJECTOR/APPLICANT**

**RULING**

1. Fatuma Modhari Mohammed Habib died intestate on 19<sup>th</sup> May 1975. She was survived by 7 children being: Hussein Abubakar (2<sup>nd</sup> applicant), Abdulkadir Abubakar (respondent), Imu Mohammed Abubakar (1<sup>st</sup> applicant), Madina Abubakar, Rukiya Abubakar, Zahara Abubakar (who has since died) and Ahmed Abubakar. The 1<sup>st</sup> applicant petitioned for grant of letters of administration intestate which was issued on 5<sup>th</sup> October 1978. The same has never been confirmed. The respondent filed summons dated 8<sup>th</sup> July 2010 seeking the revocation the grant issued to the 1<sup>st</sup> applicant on the grounds that the 1<sup>st</sup> applicant had failed to apply for confirmation within 6 months from the date of grant; he had failed to diligently proceed with the administration of the estate; and failed to produce to court such inventory and accounts of administration as required under **section 83(e) and (g)**. The said summons for revocation were allowed with the court revoking grant issued to the 1<sup>st</sup> applicant and issuing a fresh grant dated 10<sup>th</sup> December 2013 to the respondent. The respondent subsequently filed summons dated 20<sup>th</sup> January 2014 seeking the confirmation of the grant issued to him on 10<sup>th</sup> December 2013. The summons are yet to be heard and determined.
2. The applicants filed the current summons dated 31<sup>st</sup> January 2014 under certificate of urgency seeking the revocation of the grant issued to the respondent on 10<sup>th</sup> December 2013. They also asked that the 1<sup>st</sup> applicant/objector be reinstated and/or appointed the administrator of the estate and that any act or process initiated or undertaken on the strength of the grant issued on 10<sup>th</sup>

December 2013 be declared invalid and of no consequence. Lastly, they prayed that the respondent be ordered to surrender the grant issued on 10<sup>th</sup> December 2013 in court for safe custody pending the hearing and determination of their summons. Their application was premised on grounds that, apart from the 1st applicant, the other beneficiaries of the estate were never served with the respondent's summons for revocation and thus were never heard as required in law. It was their case that the grant issued to the respondent was issued irregularly as there was no consent from the other beneficiaries apart from Hussein Abubakar (2<sup>nd</sup> applicant) neither was such consent dispensed with, as the respondents and other beneficiaries rank in equal priority to the respondent. It was also stated that the respondent in seeking the revocation of grant had concealed material facts. The facts were that the Kadhi's court had previously ruled on matters raised in his summons and that the respondent also failed to inform the court that it had been resolved in a family meeting that the estate properties be sold and proceeds shared amongst all the beneficiaries. Lastly, it was stated that the applicants had failed to appear in court due to their advocates failure to inform them of the summons. It was prayed that the said advocate's mistake should not be visited upon them.

3. The summons were opposed by the respondent through his grounds of opposition dated 6<sup>th</sup> February 2014 in which he stated that the applicant failed to explain why he or his advocate failed to attend court despite being duly served. He stated that the 1st applicant has not explained to court why he never sought the confirmation of grant of letters of administration intestate issued to him on 5<sup>th</sup> October 1978 nor proceeded with the completion of distribution of the estate. It was the respondent's case that there were no legal grounds upon which the grant issued to him could be revoked or the 1st applicant re-instated as administrator in view of his conduct as administrator for 36 years.
4. Parties filed written submissions in support of their cases. The submissions have been duly considered. The applicants' case is that, except for the 1<sup>st</sup> applicant, they were not served with notice for the hearing of the respondent's summons for revocation and, as such, they were not able to oppose the same before the revocation. They pleaded that the mistake of his advocate M/s Mohammed Lithome should not be visited upon them. The respondent on the other hand argued that the 1<sup>st</sup> applicant does not deserve the orders sought in his application due to his behaviour as administrator of the estate for the past 36 years, during which he never sought confirmation of the grant issued to him nor filed estate accounts in court of the assets of the estate. His case was that the 1<sup>st</sup> applicant was served with the summons; and that there was no need to serve the other beneficiaries.
5. It is clear that the grant herein was revoked and a fresh grant issued to the respondent on the basis that the summons for revocation was unopposed. The 1<sup>st</sup> applicant was served with the summons through his advocate on record. However, the other beneficiaries were not served to participate in the hearing of the summons. **Section 76 of the Law of Succession Act (Cap 160)** provides for grounds on which a grant may be revoked and/or annulled. One of the grounds (**under section 76(a)**) is that the proceedings to obtain the grant were defective in substance. The application related the estate of the deceased who had beneficiaries, including the respondent. These beneficiaries were going to be affected by the decision regarding who was going to administer this estate in which they had a stake. Each of these beneficiaries was entitled to apply for letters of the administration in equality with the respondent. Under **Rule 26(2) of the Probate and Administration Rules** their consent and/or participation was necessary. Mr Keyonzo for the respondent sought to make a distinction between **sections 67 and 76 of the Act**, to say that once the beneficiaries had given their consent to the initial grant they were not required to provide any further consent. The simple answer is that, beneficiaries have to be given an opportunity to agree or not to agree on who will administer the estate to which they are entitled. This is not a unilateral position. They had been called upon to consent to the 1<sup>st</sup> applicant being the administrator. They were equally entitled to be called upon to agree or not agree on the respondent being the next administrator, now that their choice was being revoked (even without reference). There cannot be a fair hearing under **Article 50 of the Constitution of Kenya 2010** if a party going to be affected by a decision is not given an opportunity to participate in the hearing leading to the decision.

6. The powers of the administrator of an estate under **sections 79, 82 and 83** are quite wide as regards the management of the estate; and this is another reason why a decision to appoint such administrator cannot be taken lightly.
7. After discussing the ground above, I do not consider dealing with the other grounds raised by the applicants would serve any useful purpose. Consequently, I find that the failure to serve all the beneficiaries with the summons that led to the revocation of the grant to the 1<sup>st</sup> applicant, and the appointment of the respondent as the administrator made the process defective in substance. I allow the application dated 31<sup>st</sup> January 2014, set aside the orders revoking the grant issued to the 1<sup>st</sup> applicant and revoke the grant issued to the respondent on 10<sup>th</sup> December 2013. The 1<sup>st</sup> applicant shall continue to be the administrator of the estate. A new grant will be issued to him.
8. I appreciate the anxiety on the part of the respondent that the 1<sup>st</sup> applicant was not able to have the grant issued to him to be confirmed for many years, and that he has not been able to account for how he has so far administered the estate. Because of this, I make the following orders;-
  - a. within 60 days from today the 1<sup>st</sup> applicant shall file application for the confirmation of the grant which he will serve to all beneficiaries;
  - b. within 30 days from today the 1<sup>st</sup> applicant shall file and serve an affidavit of full and accurate account of the status of the estate of the deceased since the grant was issued; and
  - c. the 1<sup>st</sup> applicant shall pay the costs of this application.

**DATED and SIGNED at NAIROBI this 13<sup>th</sup> day of JUNE 2016.**

**A.O. MUCHELULE**

**JUDGE**

**DELIVERED AND SIGNED this 20<sup>th</sup> day of JUNE 2016.**

**W. MUSYOKA**

**JUDGE**