



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS- FAMILY DIVISION**

**IN THE MATTER OF THE ESTATE OF HASSANALI ALIBHAI LALJI NOORANI  
(DECEASED)**

**SUCCESSION CAUSE NO. 1793 OF 2000**

**AND**

**IN THE MATTER OF THE ESTATE OF ZULFIKAR HASSANALI ALIBHAI (DECEASED)**

**SUCCESSION CAUSE 2660 OF 2013**

**BETWEEN**

**YASMIN ALIBHAI DENNIG.....APPLICANT**

**AND**

**SHAHIRA LALANI ALIBHAI.....RESPONDENT**

**RULING**

**INTRODUCTION**

The deceased, Hassanali Alibhai Lalji, died on 28<sup>th</sup> February 2000. His son, Zulfikar Alibhai and his daughter, Yasmin Dennig, survived the deceased.

The deceased died leaving a written Will in which he appointed his son, Zulfikar Alibhai, as the Executor of his Will. Zulfikar Alibhai applied for grant of probate for the deceased's estate and the grant was issued to him.

Unfortunately, on 13<sup>th</sup> October 2012, the Zulfikar Alibhai died before he obtained Confirmation of Grant to the father's estate. Hence the administrations of the father's estate and deceased's Estate have been left in limbo. The foregoing prompted Yasmin (hereafter 'the Applicant'), the deceased daughter, to file the present Chamber Summons Application dated 30<sup>th</sup> January 2015, which is the subject of this Ruling, and she seeks the following orders:

**(1) ...**

**(2) *The grant of probate together with the confirmation made in respect of the above cause be rectified in the name of Zulfikar Hassanali Alibhai and be substituted with the name of Yasmin***

**Alibhai Dennig.**

**(3) That both the grant of probate and Certificate of Confirmation be issued to Yasmin Alibhai Dennig.**

**(4) That any previous orders granted by this Honourable Court be stayed and/or set aside pending the determination of this Application.**

**(5) That the assets referred to in the Applicant, Yasmin Alibhai Dennig's Affidavit, herewith attached, be preserved and not wasted, damaged or alienated by any Party pending the determination of this Application.**

**(6) That proceeds from the deceased's Estate, more specifically rental income from the Mamlaka Road Apartments and dividend income from the stock portfolio be directed to an account administered by the Mediators in the matter at hand, pending the determination of this Application.**

**(7) That proceedings in Succession Cause No. 2660 of 2013, the Estate of Zulfikar Hassanali Alibhai, be stayed pending the determination of this suit.**

**(8) That the mediation process between the Applicant herein, and Shahira Lalani Alibhai do proceed, with orders preserving the deceased's assets pending the said mediation and with a spirit of utmost faith adopted by the Parties concerned.**

**(9) That the documents of ownership relating to the deceased, referred to in the said Yasmin Dennig's Affidavit, be produced to this Honourable Court by Shahira Lalani Alibhai, wife of the late Executor.**

**(10) That the Applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem fit and just to grant.**

**(11) That the costs of this Application be in the cause.**

### **THE APPLICANT'S CASE**

The Applicant filed two sets of Affidavits in support of the Application sworn on 30<sup>th</sup> January 2015, and 11<sup>th</sup> July 2015 respectively. She deposed that she is the only surviving child of the late Hassanali Alibhai Lalji Noorani. The Executor of their father's estate according to the Will, Zulfikar Hassanali Alibhai, his brother, passed on and hence, it is imperative for a substitute to be appointed in that regard.

The Applicant stated that the Schedule of Assets filed in **Succession Cause No. 2660 of 2013** omitted some key items for instance, property identified as L.R. No. Nairobi/Block/94/148 and the stocks also itemised therein, were never manifested in the present proceedings. In that regard, it was her argument that it is necessary for the Court to direct that a comprehensive audit of the said assets and in the interim, an order for the preservation of the same to be issued.

It was the Applicant's other contention that it would be in the interest of justice to compute incomes that have accrued from the Estate, more so, rental payments from the property designated as Mamlaka Road Apartments and dividends from the deceased's stocks.

The Applicant stated that she had discussed with her deceased's brother about their parents' estate. In recent times before his death, her brother sent her money and promised to send her some funds. Unfortunately he did not send and he passed on. After his funeral she approached the widow who did not cooperate on the issues regarding the assets of her late father's estate. She also declined to pay any debts her brother owed her. She was of the view that she was not involved in the deceased's parents' affairs. The Applicant has on several occasions disagreed with Shahira Lalani Alibhai, Zulfikar Hassanali

Alibhai's wife, over the administration of the Estate and the matter has been referred to mediation by elders of the Ismaili community, to whom they both belong, however, she is apprehensive of the slow pace of the process due to delaying tactics by the said Shahira and also by the fact that he is currently domiciled in the United States of America.

The Applicant finally deposed that there is a dispute in regard to the ownership of the parcel of land, L.R No. Nairobi/Block/94/148, whose ownership, she alleged, Shahira has declined to disclose despite his repeated requests.

It was her other deposition that the deceased's Estate has lost a significant portion of its assets, having been misappropriated and mismanaged by Zulfikar. She stated that the loss has persisted because the Shahira, has defiantly and repeatedly refused to direct the rental and dividend incomes to a Trust account, including a Trust account maintained by the firm of Oraro and Co. Company. That Shahira has included significant assets belonging to the father's Estate and that she further fails to mention her as the largest creditor to Zulfikar Estate.

The Applicant objected to having Shahira appointed an Executor as she is not an heir to the deceased father's estate and her refusal to allow the rental income and dividend income from the deceased's Estate to accumulate in a Trust account, has every intention to continue the non-accountability displayed by Zulfikar.

The Applicant claimed 20,000 dollars from her deceased's brother, share portfolio held by their father, the properties in Nyari estate and Mamlaka flats part of their father's estate and now part of her late brother's estate. As administrator of their late father's estate and heir she would pursue the said assets. She stated that the laws of Kenya do not preclude a non-resident heir, such as her, from acting as an Executor and that in any event, her attempts to re-establish residency in Kenya have been thwarted by Shahira's refusal to turn over the deceased's passport and Kenya identity card to her.

The Applicant finally contended that Shahira has had complete control over the documentation pertaining to the deceased's Estate and has steadfastly refused to provide copies to her and as such, the Court ought to order her to turn over any documentation pertaining to the deceased's Estate, and all the assets that she has misappropriated.

### **THE RESPONDENT'S CASE**

In response to the Application, Shahira Lalani Alibhai, filed an Affidavit in reply sworn on 3<sup>rd</sup> March 2015. It was her deposition that she is the only wife of Zulfikar Hassanali Alibhai, and that he is survived by their two sons, Zaqi Alibhai, adult, and Haani Alibhai, a minor, and in that regard, she is the sole guardian of the minor.

She deposed that upon the death of her husband, the Applicant informed her that she wished to obtain her shares of the deceased Estate and in that regard, owing to the fact that she was not in the right mental state to deal with the succession matter given that she had just buried her husband and was still mourning. She indicated to her that as she had not participated in their late father's estate proceedings, she would have to trace and consolidate all the assets of the father and her husband in order to determine their respective shares and when ready, to commence the process of administering her husband's Estate.

She asserted that numerous demands have since been made by the Applicant and a dispute arose in that regard, which resulted to mediation, being conducted between them. That several mediation meetings were held and that at the mediation meeting held in 2014, the Applicant was requested to state how she wished the Estate of the deceased to be distributed, and her terms were accepted. Additionally, that the mediator proceeded to draft the settlement agreement reflecting their agreement but for unknown reasons, the Applicant rejected the mediation settlement agreement and has since refused to sign the same.

It was the Respondent's other assertion that the Applicant has been a stumbling block to the conclusion of the mediation process by constantly changing demands and refusing to sign the settlement, she has been

unreasonably and overly aggressive towards her, and she continues to make serious allegations and unreasonable demands in respect of the Estate.

She stated that one of the properties in which her husband invested in was the property L.R No. Nairobi/Block 94/148, which he purchased during their marriage and with resources totally unconnected with the assets or Estate of their father's estate as alleged by the Applicant. Further, that the monies used to purchase the said property were gathered from his savings, her income and savings, as well as credit assistance obtained from third parties and as such, she is entitled to a share of the same.

It was her other contention that her husband invested in the Nairobi Stock Exchange and held valuable shares at the time of his death and that some of the shares were held jointly in his name and the deceased's. In that regard, it was her argument that those shares automatically devolve exclusively to his husband and hence do not constitute part of the father's Estate.

According to her, it is incorrect for the Applicant to allege that all or major assets acquired by her husband during his lifetime formed part of the deceased's Estate or that they were acquired out of the proceeds of the deceased's Estate.

The Respondent objected to the Applicant being made an Administrator and averred that making her so would greatly prejudice her children and her as they will not be guaranteed the opportunity to challenge her decisions or actions when she is out of jurisdiction and that in any event, the Applicant is permanently domiciled in the United States and has been so domiciled for the major part of her life and as such, she is not in a better position to administer the Estate especially in view of the fact that the assets are based in Kenya.

The Respondent averred that she is better placed to administer the Estate of the deceased and as an Executor, she is in a better position to understand, trace and consolidate the assets of the Estate and administer it and further, that she is also readily available to answer any questions or concern that may be raised by the Court in the course of the administration. In addition, she argued that one of her sons is a beneficiary and a minor, and as such, the administration of the Estate cannot be entrusted solely to the Applicant especially as a continuing trust arises in favour of the minor beneficiary.

In her Further Affidavit sworn on 2<sup>nd</sup> December 2015, she denied having misappropriated the deceased's Estate and added that she does not have any knowledge or evidence of the full extent of the assets comprising of the deceased's Estate or Zulfikar's Estate. In any event, the Applicant has not adduced any particulars of the alleged misappropriations of the Estate.

The Respondent stated that she would rectify her Application for grant of probate in respect of Zulfikar's Estate in order to exclude properties that are in the deceased's name and those in his and Zulfikar's joint names.

She deposed further that Zaqi Alibhai is intelligent enough and perfectly capable of administering Zulfikar's Estate but however, she is entitled by law to apply as an Administrator of the same and that of the deceased as she is the personal representative of Zulfikar.

In her Written Submissions through Counsel dated 8<sup>th</sup> July 2016, she submitted that **Section 66** of the **Law of Succession Act** gives the Court a general guide as to whom preference will be given in considering an Application for the Grant of Letters of Administration.

She contended that upon the father in law's death, he left a Will appointing his son, Zulfikar, as the sole executor of his Will and Estate, and that Zulfikar died before he completed the probate process and distribution of all the assets of the Estate. She stated further that Yasmin has alluded to a number of baseless possible reasons why the distribution of the late father's estate was not completed, when entirely innocent explanations are readily apparent. The most likely reason being that the process was halted when his son Zulfikar moved to another law firm where there was no formal Probate department. He was far too preoccupied in his new job and work demands, and thereafter, he moved to Dubai for a few years, and

the matter was left in abeyance.

According to her, given that the Will did not make provision for what was to happen if the appointed executor was deceased before distribution was complete, **Sections 63 and 64** of the **Law of Succession Act** apply. Further, that Clause 4 of Hassanali's Will, Zulfikar was a residuary legatee of the Estate and hence, **Section 64** applies in the circumstances and that being his personal representative, is entitled to a Grant of Letters of Administration.

Shahira contended that given the existing mutual mistrust and animosity, it will neither be prudent nor expedient to have her and Yasmin appointed as joint Administrators. Additionally, that it will not be realistic to have either of them appointed in preference of the other as Administrator.

While placing reliance on **Rule 27** of the **Probate and Administration Rules** and the decision in **MUIGAI VS MUIGAI AND ANOTHER (1995-1998) 1 EA 206**, it was her other submission that the Court has powers to 'pass over' a person entitled to a Grant of Letters of Administration if, by reason of special circumstances, it appears necessary or expedient to appoint as Administrator some person other than the person entitled to the Grant.

She submitted further that Yasmin is domiciled in the United States of America and as a U.S citizen, and since the death of her brother, she is rarely in Kenya save for the few occasions where she has had to fly in the country for brief periods for the very specific purposes of this Court matter. In that regard, she contended that it is extremely sensible to appoint a person who is residing in Kenya, who can attend to all administrative matters and render a true account of the Estate wherever called upon to do so by the Court.

While citing **Section 58** of the **Law of Succession Act**, it was her argument that the Grant of Probate and Certificate of Confirmation cannot be issued at the same time. She urged further that where children are concerned in an Estate, there must be two Administrators to take up probate, as was held in **VERONICAH MWIKALI MWANGANGI VS DANIEL KYALO, CIVIL CASE NO. 867 OF 200**.

As regards the orders of stay sought in the present Application, it was her contention that the said orders sought were for the inclusion of the property identified as L.R No. Nairobi/Block/94/148 (the Nyari Property), and various stock listed in the Application for Grant of Letters of Administration in **Succession Cause No. 2660 of 2013**, as well as a flat in Mamlaka Road Apartments.

It was her submission that the Nyari property was purchased by Zul and the funds used therein were completely independent of the assets of the deceased and whether there is any merit to Yasmin's claim in the said property is a matter of evidence, of which there is none.

It was her further submission that this Court lacks the jurisdiction to stay proceedings pending before another Court of competent jurisdiction. In that regard, she relied on **The Owners of Motor Vessel 'Lillian S' vs Caltex Oil Kenya Ltd [1989] KLR 1** to emphasize on the importance of jurisdiction.

Finally, it was submitted that the Court ought to consider the position of Mrs. Shahira regarding the nomination by each party of two mutually acceptable suitably qualified and experienced independent impartial persons to administer and distribute the deceased's Estate and furthermore, that the orders for stay of **Succession Cause No. 2660 of 2013** is unnecessarily oppressive in view of the fact that the contested assets, the Mamlaka flats and the shares held in the deceased's sole name, can be removed from the Application for Grant of Letters of Administration.

For the foregoing reasons, she urged to the Court to dismiss the present Application and proceed to determine the distribution of the Estate in a just and equitable manner that is fair to all the beneficiaries.

## **DETERMINATION**

Based on the Parties' respective cases, as I have reproduced above, two key issues emerge for determination namely:

- a) Who should administer the Estate of Hassanali Alibhai Lalji; and
- b) What assets constitute the estate of Hassanali Alibhai Lalji and what assets constitute the estate of Zulfikar Hassanali Alibhai?
- c) Whether the Court should grant orders of stay in regard to **Succession Cause No. 2660 of 2013**.

***Who should administer the Estate of Hassanali Alibhai Lalji?***

In the present case, the Executor to the father's Estate, Zulfikar Alibhai, died before he obtained Confirmation of Grant and thereby resulting to the administration of the Estate being left in limbo. He had been appointed as the Executor and he is the deceased's son. In that regard, the deceased has left behind Yasmin Dennig, the Applicant and his daughter. The deceased's wife also died and as such it is only the deceased's daughter that is alive.

**Section 66** of the **Law of Succession Act** provides a guide in regard to whom Letters of Administration should be granted. It stipulates that:

***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-***

- (a) Surviving spouse or spouses, with or without association of other beneficiaries;***
- (b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;***
- (c) The Public Trustee; and***
- (d) Creditors***

***Provided that, where there is partial intestacy, letters of administration in respect of the intestate shall be granted to any executor or executors who prove the will.***

It will be noted that the foregoing provision is tailored in regard to instances of intestacy. However, **Section 63** of the **Law of Succession Act** contemplated a scenario such as in the present case whereby an Executor becomes incapable of undertaking his mandate as an Administrator. It states that:

***When a deceased has made a will, but-***

- (a) He has not appointed an executor; or***
- (b) The only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of the will, or have failed within the time limited by a citation to apply for probate; or***
- (c) All proving executors have died before completing administration of all the property to which the will applies,***

***A universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be un-administered.***

**Section 65** of the **Law of Succession** further provides that:

***When there is no executor, and no residuary legatee or representative of the residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or the Public Trustee, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.***

A plain reading of **Section 65**, as reproduced above, indicates that where an Executor is incapacitated, the Court may consider any other such person who would be entitled to the administration of the estate of the deceased if the deceased had died intestate. As such, that calls for a consideration of such persons as stipulated under **Section 66** of the **Law of Succession Act**.

It therefore follows that in the circumstances of the present case, the person entitled to the Letter of Administration is the deceased's daughter, Yasmin Dennig.

As to the question of a legatee and his role in administration, I can do no better than to quote Nyamweya J. in **MUMBUA MUSYOKI AND 6 OTHERS VS MBENYA MUSYOKI, SUCCESSION CAUSE NO. 34 OF 2011**, where she opined thus:

***“A universal or residuary legatee therefore has priority to apply for letters of administration with will annexed, failing which sections 64 to 65 of the Act provides for the following order of priority, a personal representative of the universal or residuary legatee, persons entitled to administer the deceased's estate if he had died intestate; the Public Trustee; any other legatee with a beneficial interest in the estate of the deceased; or a creditor of the deceased.***

***A residuary legatee is a person named in the will to receive the residue of the deceased's estate, while a universal legatee is a residuary legatee that receives the entire residuary estate. The parties herein will therefore need to determine whether the deceased's will had a residuary or universal legatee, and if not, who among them has priority to apply for a grant of letters of administration with will annexed.”***

While bearing the foregoing in mind, the Court observes that Zulfikar was the Executor and a legatee of the deceased's Estate. In that regard, and pursuant to **Section 64** of the **Law of Succession Act**, his personal representative, Shahira Lalani Alibhai, has the same right to administration as the deceased residuary legatee and she therefore has an equal right to administer the deceased's Estate.

In the interest of justice and proper administration of the Estate, and in balancing the interests of the Applicant and the Respondent, the Court concludes that it is prudent that both Parties be included in the Administration of the father's Estate. The Court is therefore inclined to order that both the Applicant and the Respondent apply for Letters of Grant of Administration for them to administer the deceased's Estate jointly.

The Court however notes that the relationship between the two is strained and this may hamper the effective administration of the Estate. In that regard, it is therefore prudent to have a third-party to be a neutral arbiter in order to ensure the Estate administration is undertaken in accordance with the law. While the Parties submitted that there is need for a third-party to be appointed as an Administrator, none of them suggested the person to be so appointed and in that context, the Court directs that the Public Trustee as a third-party in the administration of the Estate. This finding is further fortified by the fact that the Applicant resides in the United States and the father's Estate is based in Kenya and as such, it would not be effective to have the father's Estate solely being administered by her and yet she is resident outside Kenya.

This decision is reinforced by the fact that from the father's estate, according to his Will, the estate was to be shared by the deceased Zulfikar and Yasmin in equal shares. Therefore Zulfikar's share of his father's estate shall revert to the widow and 2 children. The Respondent is best placed to protect Zulfikar's share of the father's estate for herself and children of the deceased. Similarly, the sole surviving child of

Hassanali Alibhai Noorani is the Applicant is entitled to the other half share of their father's estate. She ought to safeguard her interest in their father's estate.

Furthermore, **Section 7 of the Public Trustee Act, Cap 168 of the Laws of Kenya [Revised Edition, 2012]**, gives this Court the discretion to appoint the Public Trustee as an Administrator, notwithstanding that there are persons who under the Law of Succession Act or any other written law, would in the ordinary course be legally entitled to administer the deceased's Estate.

***What assets constitute the estate of Hassanali Alibhai Lalji and what assets constitute the estate of Zulfikar Hassanali Alibhai?***

Before the issue of disentangling of assets for each of the estates, there are preliminary issues to be addressed; that the deceased owed his sister Yasmin 200,000 US dollars and is therefore a creditor to his estate. Apart from the testimony by the Applicant on the issue no evidence was produced to confirm this position. He who alleges must prove. In the absence of establishing the debt on a balance of probabilities then the Applicant cannot claim such funds from the estate.

The evidence on record is to the effect that Zulfikar dealt with his parents while they were alive and administered the estate. The Respondent was not involved in the administration of the deceased's father's estate. Unless the claims are established by cogent evidence, the widow and children of Zulfikar cannot be held responsible for and acts and or agreements that the deceased may have committed to in the absence of proof.

In **Succession Cause 1793 of 2000**, the father's estate is to be distributed by virtue of Will dated 30<sup>th</sup> July 1996. The Will appointed Zulfikar as executor of the estate and their mother to enjoy life interest. Thereafter the properties shall be distributed between Zulfikar and Yasmin as tenants in common.

The assets though not enumerated in the Will from the facts in the Court file comprise of;

- a) ½ share Mamlaka Road Apartment
- b) ½ Share /stock in joint names of Hassanali Alibhai Lalji and Zulfikar Alibhai
- c) ½ share of any other asset discovered later as belonging to the estate of the father.

In **Succession cause 2660 of 2013** the son and brother's estate is to be distributed between the widow and 2 children of the deceased. The assets that comprise of the said estate are;

- a) ½ share of Mamlaka Road Apartment (Zulfikar's share of father's estate)
- b) Shares/stock registered in the name of Zulfikar Alibhai
- c) ½ share of shares/stock registered in names of Hassanali Alibhai Lalji and Zulfikar
- d) L.R. Nairobi/Block /94/148 (the widow testified that Zulfikar bought said property from partnership funds from law firms where the deceased previously worked in and funds from friends.)
- e) Motor vehicles of the deceased Zulfikar
- f) Bank Accounts of the deceased Zulfikar

***Whether the Court should grant orders of stay in regard to Succession Cause No. 2660 of 2013***

The Court notes that the said Succession Cause is in regard to the Estate of Zulfikar and hence, the proceedings therein are limited to his Estate. In that regard, the Administrator therein is at liberty to proceed with the administration of the Estate of the deceased therein and hence, it would not be in the

interest of justice to have those proceedings halted.

The Administration of the Estate therein should however be limited to Zulfikar's Estate and any properties jointly owned by Zulfikar and the deceased herein should be administered in the present proceedings.

## **CONCLUSION**

Before I conclude on this matter, the Court recalls that the Applicant urged it to grant both Letters of Administration and a Confirmation of the same in the present Application. It is to be noted that the Law of Succession Act contemplates a period of six months for Letters of Administration to be confirmed. **Section 71** of the **Act** is to the effect that:

*(1) After the expiration of a period of six months, or such shorter period as the court may direct under sub-section (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*

The aforementioned **sub-section (3)** provides that:

*The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied-*

*(a) That there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;*

*(b) That it would be expedient in all circumstances of the case so to direct.*

The Court is however of the view that the circumstances of the present case do not warrant the immediate confirmation of the Grant of Letters of Administration and as such, the prayer by the Applicant must fail.

## **DISPOSITION**

Based on the above analysis, the Court disposes the Application in the following terms:

**(1) The following are hereby appointed as Administrators to the Estate of Hassanali Alibhai Lalji:**

**(a) Yasmin Alibhai Dennig;**

**(b) Shahira Lalani Alibhai; and**

**(c) The Public Trustee**

**(2) Shahira Lalani Alibhai to process grant of letters of administration with regard to Zulfikar's estate in Succession Cause 2660 of 2013 under Section 67 of Law of Succession Act.**

**(3) The 3 Administrators of the estate of Hassanali Alibhai Lalji Succession Cause 1793 of 2000 to process confirmation of grant under Section 71 of law of Succession Act**

**(4) Stay of Execution orders are hereby vacated**

**(5) Any aggrieved party is at liberty to apply**

**(6) Let each Party bear its own costs to this Application.**

**DELIVERED DATED AND SIGNED IN ON THIS 13<sup>th</sup>DAY OF OCTOBER, 2016**

**M.W.MUIGAI**

**JUDGE**

*In the presence of*

*The Respondent in person*