



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT NAIROBI

#### SUCCESSION CAUSE NO. 1643 OF 2007

#### IN THE MATTER OF THE ESTATE OF THE HAMISI MOHAMMED MACHARIA (deceased)

#### RULING

1. Hamisi Mohammad Macharia, the deceased to whose estate these proceedings relate died intestate on 21<sup>st</sup> May 1986. On 27<sup>th</sup> June 2007 Muhammad Shabaan a nephew to the deceased filed a petition seeking letters of grant of administration. In the petition he named the widow and her 3 children as beneficiaries of the deceased and listed Plot No. 010879 Dandora Phase 1 Nairobi as the only property held by the deceased before his death. The grant of letters of administration intestate was granted on 2<sup>nd</sup> October 2007.

2. Subsequently on 25<sup>th</sup> April 2008 Said Salim Said filed summons for revocation of the said grant of letters of administration on grounds that the grant issued to Mohammad Shaaban is defective and that the named administrator had not listed the lawful heirs to the deceased. In opposition of the said application Muhammad Shaaban filed a replying affidavit dated 29<sup>th</sup> August 2008. He took issue with the applicant questioning where he had been for the past 21 years to bring the suit now. He stated that the Wambui his aunt was married to the deceased and he continued to take care of the property long after the deceased and his aunt died.

3. Said Salim adopted his affidavit dated 19<sup>th</sup> June 2008. He testified that he was a grandson to the deceased. He testified that the deceased had two daughters Saumu Hamisi Mohammed and Latifa Hamisi Mchana. His mother Latifa Hamisi had 7 children 5 boys and 2 girls while Saumu had no children. Fatuma Wambui was the deceased's friend and stayed with the deceased at his plot no. 879 based in Dandora. When the deceased died Wambui continued maintaining the property and collecting rent which he forwarded to his mother in Mombasa. He testified that Mohammad Shaaban claims to be a nephew to Wambui and has no blood relations with the deceased. Wambui died in 2005 and was buried by Mohammed during the said period he was in prison. He added that the property in question was his grandfather's and not Wambui's. He testified that his main issue was not money but mode of distribution used in the deceased's estate.

4. Peter Ngige Nguchu relied on his affidavit dated 24<sup>th</sup> October 2008. He testified that Said Salim was the son of Fatuma who was the daughter of the deceased hence he was a grandson to the deceased. That Mohammad Shaaban was a son to Wambui's brother who was cohabiting with the deceased. On various school holidays he spent at Ndandora herding the deceased's goats. He added that Mohammad Shaaban is not a child to the deceased.

5. On cross examination he testified that Wambui was the deceased's wife and lived with the deceased for a few years. Shaaban was Wambui's nephew.

6. Mohammad Shaaban testified that he was the administrator of the estate and relied on the

affidavit dated 29<sup>th</sup> August 2008. He denied knowing or seeing the applicant Salim when he lived with Wambui reasons he couldn't inform him what was happening and denied hiding facts from the court.

7. On cross examination it came out that he was neither the son of Wambui nor the deceased but a nephew to Wambui the deceased's wife who was a sister to his father. He testified that he got a letter from chief of Dagorretti. He attendant the burial of the deceased and claims that he did not see the applicant there. He testified that Fatuma collected rent from the said estate which comprised of 5 rooms with rent of about Kshs.4,000/- to Kshs.5,000/-. He also pays water, electricity and maintenance of the place. He denied any knowledge of the deceased's post office bank account. He stated that he applied for the grant in June 2007 as no one had done so and only sought the Court to decide on who was to administer the estate. He refutes Said's testimony that Latifa had children nor that Wambui sent money to Mombasa as she used the same to cater to her needs. That there is no money in the estate as there was a huge water bill. He testified that he never saw the applicant even when they appeared before the Kadhi's Court.

8. Mohammed A Jumaa relied on his affidavit dated 10/11/2008. He stated that the deceased was his neighbors and that Mohammed lived with them since 1980 and denied ever seeing the applicant there. On cross examination he testified that men and women stay separately during funerals and that they do not give property when they are alive.

9. Parties filed written submissions which I have considered. Issues arising are whether the grant was obtained through fraud and who is entitled to be an administrator or inherit the assets of the deceased. He submitted that no evidence on fraud was presented before this court. That section 66 provides for order of preference in inheritance to a deceased's estate.

(a) spouse

(b) Other beneficiaries

That when Wambui died she left no one to succeed her apart from the current administrator adding that the applicant has no prior entitlement to the deceased's estate than the spouse and since her death the nephew is her beneficiary. He submitted further that under Islamic law property of the deceased devolves as follows; the spouse, children, parents grandchildren (male only).

10. Section 66 of the Law of Succession Act sets out the order of preference the persons who are entitled to administration of the estate of an intestate. Section 66 provides 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 –surviving spouse or spouses with or without association of other beneficiaries; other beneficiaries entitled in intestacy, with priority according to their respective beneficial interests as provided by Part V; the Public Trustee; and creditors.”***

11. The deceased died in 1986 and the wife Fatuma Wambui subsequently died in 2005. The applicant applied for grant of letters of administration on 27<sup>th</sup> June 2007. By the said time the administrator applied for grant of letters of administration in relation to the estate of her aunt's husband her aunt Fatuma Wambui was already deceased. The administrator is neither a spouse nor a child to the deceased and does not bear any blood links to the deceased. He was a nephew to Fatuma Wambui who was married to the deceased to whom these proceedings relate as such going by section 66 of the Law of Succession Act he does not rank in preference to the applicant. I note that the children of the deceased are already deceased so next in line are the grand children of the deceased. In this regards I find that the grandson ranked in preference to the administrator.

12. The administrator was bound to comply with rule 7(7) of the Probate and Administration Rules, the same provides that; ***“Where a person who is not a person in the order of preference set***

*out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has-*

*(a) Renounced his right generally to apply for a grant; or*

*(b) Consented in writing to the making of the grant to the applicant; or*

*(c) Been issued with a citation calling upon him either to renounce such right or to apply for a grant.”*

The administrator/respondent acknowledges that the deceased had 2 daughters and they had children he ought to have been diligent to ascertain that there was no person in preference to apply for the grant of letters of administration before applying for the same. By getting the said grand-children of the deceased to renounce their right to administration or to consent in writing to the grant being made to him would have given him the go ahead to apply for grant of letters of administration for the deceased’s estate. I find that the applicant has met the thresh hold of revocation of Grant set out in section 76 of the Law of Succession Act Cap (160) I therefore revoke the grant issued to Mohammad Shaaban on 2<sup>nd</sup> October 2007. Costs in the cause.

Dated, signed and delivered this 27<sup>th</sup> day of February 2015.

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....**For the Applicant**

.....**For the Respondent**

.....**Court Clerk**