



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

**SUCCESSION CAUSE NO. 11 OF 2009**

**IN THE MATTER OF THE ESTATE OF THE LANTE OSMAN SHARRIFF OMAR NOOR a.k.a  
(OSMAN OMAR) (deceased)**

**RULING**

1. Osman Shariff Omar Noor, the deceased to whose estate these proceedings relate died intestate on 11<sup>th</sup> December 2004. On 6<sup>th</sup> January 2008 the widow Khadija Shariff Osman and her son Kamal Shariff Osman petitioned for grant of letters of administration and the same was granted on 4<sup>th</sup> May 2009 and subsequently confirmed on 3<sup>rd</sup> May 2010 listing 2 sons and 3 daughters as beneficiaries to the deceased's estate. In the said confirmation of grant they listed Land reference No. 209/5360 and Kajiado block 1/120 as the assets of the deceased.
2. On 3<sup>rd</sup> November 2010 one Ann Gathoni Wanjiru petitioned for revocation of the said grant claiming that the administrators whilst obtaining the said grant of letters of administration concealed material facts. She claims that she and her daughter are dependents of the deceased and sought for provision and maintenance for herself and her daughter. She claims that she was a wife to the deceased having married the deceased under Islamic and kikuyu customary law and were blessed with one issue a daughter Naima Shariff Omar. They have been left out of the list of dependents and have no means of livelihood she stated that since the death of the deceased she and her daughter have been supported by the in-laws from rental income from L.R. NO.9923/24 until 2010 when flow of income reduced.
3. On 3<sup>rd</sup> November 2010 the deceased's brother one Mohammed Shariff to filed another application for revocation of the said grant. He claimed that plot No. L.R. 9923/24 located in Kajiado was inherited from their late father and the same was held in trust on his behalf and the behalf of his siblings by the deceased. That though the property had been charged twice by the father the loans had been fully paid and the property was redeemed. He added that the deceased had sold his share to the said property at Kshs. 600,000/- and the other siblings as noted in a sale agreement executed in May 2004 hence relinquishing his share, the deceased died the same years. Subsequent to the said sale the siblings demolished the development therein and made a 2 storey building at an estimated cost of Kshs. 8 million and the same were put up for rent.
4. He added that the deceased had married Ann Gathoni Wanjiru under Kikuyu customary law and Islamic law. He argued that the chief's letter obtained from Kikuyu did not reflect the true position of their family as the administrator had never lived in Kikuyu. He urged the Court to remove plot no. L.R. No. Kajiado/ Block/1/120 from the list of the estate of the deceased and to revoke the Grant of letters of administration confirmed on 3<sup>rd</sup> May 2010. On 5<sup>th</sup> November Justice Kimaru granted the objector temporary injunction pending the inter partes hearing and determination of

the application dated 13<sup>th</sup> November 2010.

5. The application dated 3/11/2010 came up for hearing on 18th November 2014. The objection was heard by viva voce evidence. The objector testified that the deceased was his elder brother and was holding the property L.R. No. 9923/24 in trust and annexed a copy of the title to the said parcel of land adding that the license and electricity bills were in the name of his late father. The property was used as collateral in a bank to secure a loan before it was transferred and registered in the deceased's name. He added that the deceased sold off his share to the other siblings and they became the owners of the same. The construction was stopped due to these proceedings.
6. He testified that the deceased had a second wife by the name of Ann Gathoni Omar with whom he had a daughter with and that the deceased used to take care of them. He however could not tell when the child was born. He stated that his family had been taking care of the child since the death of the deceased.
7. On cross examination he reiterated that the title was registered in their father's name and that the number appearing on the electricity bill. He also stated that the title did not indicate that the said parcel of land was held in trust. He stated that the sale agreement was done by a lawyer and they paid the deceased Kshs. 200,000/-. He reaffirmed that the deceased had another wife and produced hospital bills and a hospital medical report for the said child. He however stated that he did not attend the marriage ceremony.
8. The respondent widow to the deceased testified that she and the deceased had 5 children 2 sons and 3 sisters.; that though the deceased died in Kenyatta they used to live in south C where she lives to-date. She testified that the two properties in the schedule L.R. 209/5360 and Kajiado Block 9923/24 were properties of the deceased and he left her with all the papers to the said property. She denied knowing that the deceased had another wife or a child adding that she did not attend the deceased's burial.
9. On cross examination she testified that the property is theirs as the husband could not have taken loans with the said property and adduced a copy of the said title in court. She stated that many people went to see the deceased at the hospital and also attended the funeral adding that she should have been in the entourage and if it was true the child was deceased's they are willing to assist.
10. The administrator in her replying affidavit dated 9th February 2010 denied Ann Gathoni's claims that she was married to the deceased stating that she had not adduced any evidence to support her claim. She argues that the applicant is an impostor used by the deceased's brother one Mohammed Sheriff Omar to deny the rightful beneficiaries of the estate. She however claims that Ann worked as her husband's secretary in his laundry business '*Shariff Dry Cleaners*'. Further that she did not make her claims known, did not attend the deceased's burial nor interact with the family for over 6 years. She denied Mohammed's allegations that plot no. L. R. No. Kajiado Block 1/120 now registered under the administrator's name was being held in trust by the deceased for his siblings claiming that the same together with L.R. 209/5360 indicated in the schedule belonged to the deceased and that he had left her with all the papers to the same.
11. Parties filed written submissions. I have considered the evidence adduced by the parties. Two main issues emerge;
  - i. **Whether the parcel of land Kajiado Block 9923/24 registered in his name belonged to the deceased or was he holding the same in trust for the siblings?**
  - ii. **Whether Naima was a child of the deceased?**
  - iii. **Whether objector has proved that she was a wife to the deceased or was a beneficiary to the deceased?**
12. It is trite law that he who alleges must prove. The objector alleges that the deceased held the suit parcel of land in trust for his siblings. In the case of *Mumo –vs- Makau (2004) 1 KLR 13*, it was

**held that a trust is a fact that has to be proved by evidence. The legal burden to prove the existence of the trust rests with the one who alleges it.** To discharge this burden, the objector testified that the suit properties was inherited from their late father and was to be held by the deceased in trust for him and the other siblings.

13. He testified that the deceased had indeed sold his share of the parcel of land vide sale agreement dated 27th May 2004 for Kshs.600,000/- with Kshs. 200,000/- being paid on execution of the sale agreement and the balance of Kshs. 400,000/- to be paid later. The same is signed by the deceased. The administrator/respondent has not raised any issues on the said signature. The objector annexed a letter from Nairobi Hospital dated 29th February 2012 which indicated that the letter dated 14th August 2004 claimed to be from the said hospital was a forgery and did not emanate from the said hospital. The said letter had indicated that the deceased had been referred to the said hospital on 14th April 2004 and was under clinical observation with a brain tumor for 3½ months. The same was aimed to show that the deceased was not in his rightful mind when he entered into the said agreement.
14. The electricity bill annexed to the said application were in the names of Shariff Oman Noor and so were the payment receipts for the loans secured by the said property dating from 1975 to around 1982. The title indicates that the said parcel of land was registered in the names of the deceased Osman Omar on 24th February 1984. I find that from the evidence adduced the said property was initially owned by the deceased's father Shariff Oman Noor before it was registered in the deceased's name. I find that the respondent has not rebutted the evidence adduced by the objector as such I find that the objector has proved the existence of trust and that the said parcel of land was held in trust by the deceased on behalf of his other siblings.
15. The objector Ann alleges she was a 2nd wife to the deceased having married him under Kikuyu customary law and Islamic law. She gave viva voce evidence and the same received backing from the deceased brother Mohammed. On whether Ann was a wife under Kikuyu customary law. In the case of *Hortensiah Wanjiku Yawe –vs- The Public Trustee C. A no.13 of 1976*, the Court of Appeal for East Africa held inter alia:
  - I. **The onus of proving customary law Marriage is generally on the party who claims it.**
  - II. **The Standard of proof is the usual one of a civil action namely 'on the balance of probabilities'**
  - III. **Evidence as to the formalities required for a customary law marriage must be proved to that standard.**
  - IV. **Long cohabitation as man and wife gives rise to a presumption of marriage in favor of the party asserting it.**
  - V. **Only cogent evidence to the contrary can rebut the presumption.**
  - VI. **If specific ceremonies and rituals are not fully accomplished, this does not invalidate such a marriage.**
16. For a marriage contracted under customary law a party who claims to have been so married must prove by credible evidence the issue of capacity, consent, nungurario, ruracio and commencement of cohabitation. Even if dowry is not a one day affair, there must be some evidence that the 1st respondent had already taken the 1st step on the road towards the fulfillment of that obligation. There must be evidence of the said ceremony or payment of dowry. The objector in her evidence did not show if at all the above conditions were met. In that case am not convinced that the objector has proved that there was a valid customary marriage between her and the deceased.
17. Ann also alleges that she was married to the deceased under Islamic law. A Muslim marriage is defined in Section 2 of the Mohammedan Marriage and Divorce and Succession Act Cap. 156 to

**mean any marriage contracted in accordance with and recognized as valid by Mohammedan law.** Mohammedan marriages are governed by the Koran and the applicable legal rules. In my view what constitutes an Islamic marriage is a matter of fact which should be proved. The Mohammedan Marriage and Divorce Registration Act require registration of all Muslim marriages within seven days after the said ceremony at the office of the registrar of Islamic marriages. The Registrar before registering the marriage has to ascertain the identity of the parties; if they have capacity to marry and that the marriage did actually take place. The evidence on record is to the effect that the marriage was allegedly celebrated between 1990 and 1992. There is no evidence that the same was registered under the Mohammedan Marriage and Divorce Registration Act as there is no documentary proof of its existence neither was any evidence called to prove this. Since Ann did not have the said certificate she ought to have called people who witnessed, officiated or attended the said. The objector is required to establish that the said ceremony was in conformity with the Islamic law on marriage and that it resulted in a valid Islamic marriage. From the evidence adduced there is no conclusive evidence that the objector was ever married to the deceased. I am not convinced that she has proved she was a wife to the deceased if at all. I therefore dismiss her application dated 3<sup>rd</sup> November 2010.

18. Was Naima a child of the deceased? The objector Ann has adduced an acknowledgment of birth notification dated 19th March 2000. The same stated the father's name as Shariff. To corroborate her evidence Mohammed in support of Anne's claim adduced photos of the deceased with Anne and one with him carrying a baby. There were also letters from the school addressed to mama or baba Naima and copy of a cheque dated 24/1/2009 issued to the school as school fees for Naima. The same had been issued by Shariff Dry cleaners and signed by the deceased. I find that this evidence is inadequate to rule that she was the child of the deceased.

19. On the issue of whether the respondent is guilty of non-disclosure of material facts when he applied for the grant of representation Section 76 of the Law of Succession Act states that:-

***“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -***

***a) .....***

***b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.”***

***In the case of Samuel Wafula Wasike -vs- Hudson Simiyu Wafula [1993] LLR (CAK) (Kwach, Omolo and Tunoi JJA) held:-***

***“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”***

20. It is my view therefore that the issuance of grant and subsequent confirmation of the same to the respondent was irregular having been obtained through fraudulent misrepresentation of material facts and same should be revoked. I therefore allow prayers 1, 3 and 4 of the notice of motion dated 13th November 2010 filed by Mohammed Shariff Omar.

- i. The grant of letters of administration intestate made to Khadijah Shariff Omar and Kamal Shariff Omar on 4<sup>th</sup> and confirmed on 3<sup>rd</sup> May 2009 is revoked.
- ii. I find that Plot no. L.R. 9923/24 listed as an asset in the deceased's estate was held by the deceased in trust for the applicant and his other siblings
- iii. Plot no. L.R. 9923/24 is removed from the list of assets in schedule of the deceased's estate.

Each party to bear their own costs.

Dated, signed and delivered this 26<sup>th</sup> day of *February* 2015.

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....**For the Applicants**

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

**Mr. Makori**

**Court Clerk**