

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 39 OF 1943

IN THE MATTER OF: THE ESTATE OF KHATOR BIN SALIM

RULING

INTRODUCTION

1. This is a ruling on the outcome of, and consequential orders arising from, a conferencing facilitated by the court on 15th July 2015 for the beneficiaries of the estate of Khator bin Salim upon request by the Counsel for the Administrator/Respondent with the concurrence of counsel for the Applicant/beneficiaries. The object of the conferencing as discernible from the order of the court of 18th June 2015: –

“The Beneficiaries of the estate of Khator Bin Salim, or their representatives do attend court on 15.7.15 at 9.00am for conferencing with the court to explore possible settlement of this cause.”

2. With concurrence of Counsel for the parties - Mr. Justice (Rtd.) Hayanga for the Applicants and Mr. S. M. Kimani for the Administrator – the following issues developed by the Court were put to the representatives of the various families beneficiaries of the Estate:

“Issues to be considered by the representatives of the families of deceased beneficiaries to the estate of Khator Bin Salim at the conferencing meeting called by the court on the 15th July 2015 with a view to narrowing down the dispute between the parties:

1. *Whether the future administration of the estate may be separated from the issue on account sought from the administrator Mr. Abdulrazak, so that a decision on the future administrators may be made and the issue of account for administration of the estate so far by the administrator is determined separately.*
2. *Whether representatives of the families of deceased beneficiaries may be appointed administrator in addition or instead of the administrator, Mr. Abdulrazak.*
3. *Whether the accounts sought by the applicants from the Administrator Mr. Abdulrazak may be ordered for the period ending on 31/7/15 from the date of his appointment as administrator.*
4. *Who may be appointed administrator (s) of the estate from the 1st August 2015 onwards.*
5. *Are there any agreements/consents as regards the distribution of the estate of Khator Bin Salim?*
6. *What then are the areas of dispute as regards the distribution of the estate of Khator Bin Salim?*
7. *Directions as to the hearing of the remainder of the dispute.*
8. *Any other relevant matter.”*

3. The outcome was captured in a table matrix developed by the court and now recast to present the results as follows:

Beneficiary	View	Outcome
1. Khadija Khator	Applicant - court should appoint two additional administrators	Administrator to continue with additional administrators
• Mohamed Bwana		

- Ali Bwana Administrator to continue with 2 others to be appointed

- 2. Sofia Khator Administrator to proceed with Administration of Estate to full distribution
- Saumu Mohamed Khamis Administrator to continue alone

- 3. Fatuma Khator ”
- Ismael Mohamed Administrator to proceed alone

- 4. Mwanaisha Khator ”
- Mariam Mohamed Administrator to proceed alone

- 5. Radhiya Khator ”
- Amina Ali Administrator to proceed alone

- 6. Fatuma Khator ”
- Abdulhamad Muhiddin Administrator to proceed alone

- 7. Kibibi Khator Additional Administrators
- Zazra Shaban Two additional administrators to be appointed

- 8. Mwanana Administrator to proceed alone Administrator to proceed alone
- Amali Ali Administrator to proceed alone

- 9. Mohamed Khator ”
- Mariam Mohamed Administrator to proceed alone

- 10. Abdulrahman Khator ”
- Rishard Abdul Rahman Administrator to proceed alone

- 11. Said Khator ”
- Hatswa Said Administrator to proceed alone

- 12. Rashid Khator Administrator to proceed as he is experienced but co-administrators to be appointed Additional administrators to be appointed
- Harun Rashid

- 13. Ali Khator Administrator to proceed but to be (1/2) Half Vote for each proposition for given co-administrators – Hashim Administrator to proceed alone or with

- Abdillahi Ali and Nazra co-administrators –
 - Ahmed Ali Administrator to proceed alone [Vote ½:½]
14. Ahmad Khator Administrator to proceed with co-Additional administrators
administrators
- Hashim Ahmad
15. Khamis Khator Administrator to proceed alone
- Rehema Administrator to proceed alone
Mohamed
Khamis
16. Khalifa Khator Administrator to proceed alone Administrator to proceed alone
- Zeinab Khalifa

Notes:

1. All the 16 beneficiaries were represented. All beneficiaries except 1 (Mwanana Khator) are deceased and their interests were represented by members of their households.
2. Two beneficiaries had their households represented by two persons and their views were recorded separately.
3. Where the two members of one household voted in opposite sides, the result weighted their respective contribution as one half of a vote.
4. Where a member proposed a named administrator or administrators to be appointed to join the current administrator the court recorded such proposed additional administrator(s).”

OUTCOME OF THE CONFERENCING

4. Votes for the present Administrator to proceed with the administration of the Estate alone were 11½ (72%). Votes for the Administrator to be joined by co-administrators were 4½ (28%). Votes for removal of the administrator – Nil (0%).

5. The outcome of the conference came out as the respective strength in numbers of representatives of beneficiaries who supported the present administrator and therefore took the view that he should proceed with the administration of the Estate alone to full distribution of the Estate as against those who did not support him, or who supported him, and wished that other person(s) be appointed to join him in the administration of the Estate. There was no voice for the removal of the present administrator and his replacement with complete new administrator(s) as most representative who addressed this aspect deferred to his ‘experience’ in estate management. Referral of the Estate to administration of the Public Trustee though alluded to in passing by the Court was not seriously considered by the representatives. It was clear that a majority of representatives of beneficiaries supported the present administrator, without his being joined by other administrators; representatives supported the present administrator and joined by other administrators.

6. As regards the proposed additional administrators, Nazra Seiban, Harun Rashid and Hashim Ahmad were put forward. Nazra and Hashim work and reside in Mombasa while Harun works and resides in Nairobi. On inquiry by the Court, at the kind prompting of the Counsel for the Administrator - pursuant to section 56 of the Law of Succession Act - there were no concerns as to the suitability of the proposed persons to serve as administrators: all were adult persons of means, in employment or self-employment, and none was an un-discharged bankrupt or person of unsound mind or suffering a debilitating physical or other infirmity. In all the permutations presented to court as to desirable proposed administrators in the event that the court appointed less than the three proposed, Nazra Seiban was a common denominator, accompanied by one or the other or both proposed additional administrators.

7. The concerns of those who spoke in favour of additional administrators was alleged lack of consultation and communication on the affairs of the Estate where the present administrator was alleged to dispose of estate property, without consent of, or consulting, the beneficiaries and thereafter paying them what they considered were meagre amounts out of the huge proceeds of sale. It appeared that the whole dispute between the parties centred, in addition to distribution of the Estate, on a question of transparency and accountability in administration.

FINDINGS OF THE COURT

8. The court takes the view that the dispute between the parties in this Succession Cause may be narrowed by an order for redressing the peripheral issue of administrator(s) to free the minds and energies of the parties towards the final distribution of the Estate of the Deceased herein and thereby bring to a conclusion the more than half-century old succession proceedings. I consider that upon the conferencing with the parties the court is in a position consistently with power to make grants under section 53 of the Law of Succession Act and the inherent powers of the court rule 73 of the Probate and Administration Rules to make orders and directions in that regard.

9. Although the consultation with the parties at the conferencing did not result in a majority for appointment of additional administrators, the court considers that there was a significant proportion of the beneficiaries at 28%, close to a third of the beneficiaries, who felt prejudiced by the lack of consultation and communication and accountability with regard to the administration of the Estate by the lone administrator. The appointment of administrator is a matter of judicial and equitable consideration, rather than democratic ‘tyranny of numbers’ determination.

10. With respect to administrator who felt no need to appoint other administrators ‘because the estate was not big’, it is not the size of the estate that calls for the more than one administrator but rather the size of the beneficiaries and their likely divergence in interest and viewpoints and or the nature of estate, as where there are continuing trusts, see section 58 of the Law of Succession Act.

11. The Court takes the view that in ordinary course of things where there are 16 beneficiaries of a no doubt substantial, if not big, an Estate there is likely to be disagreements on the mode and shares of distribution or even the mere administration of the estate. Where, in addition, some of those beneficiaries fear a violation of their interests in the Estate and their right to account by an administrator in the course of administration under section 83 of the Law of Succession Act, the court is justified to consider a more equitable representation in the administration of the Estate.

12. Accordingly, despite the democratic outcome of the conferencing described above, the court takes note of the considerable concern on representation of some of the beneficiaries and in seeking to redress the situation considers that the appointment of additional representatives to the Estate administration is necessary. By analogy in cases of continuing trusts, the court will on its own motion consequent upon the conferencing consider the issue of appointment of additional administrators. Section 58 (2) on continuing trusts provides –

“58. (2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion.”

13. In determining the number of persons to join the present administrator, and having seen and heard the beneficiaries, I consider that while there is need to make an order for additional representation, there is a danger that in introducing a majority of persons as administrators will create divisions and slow down administration in cases of likely disagreements with the present administrator, and should the majority incomers decide to act by majority vote escalate the disagreements and ‘misunderstandings’ and, consequently, delay the eventual administration and distribution of the estate. On the other hand, a single additional administrator will while addressing the concern of want of consultation, communication and

accountability felt by some of the beneficiaries also create circumstances where the decisions of the administration must be made by consensus, which will result from consultation with the 16 beneficiaries whom the two administrators will represent. That is a worthy outcome of the conferencing.

14. Accordingly, the Court finds that the appointment of one additional administrator to work with the present administrator will meet the justice of the case. As a common denominator in the proposals put forward by the beneficiaries, Ms. Nazra Said Seiban appeared to command the respect of the beneficiaries who wished to have additional representatives. Through her, their legitimate concerns of lack of consultation communication and accountability will, going forward, be redressed.

DIRECTIONS AND ORDERS

15. The Court makes an order that **Ms. Nazra Said Seiban** and the present administrator **Abdulrazak Khalifa** be appointed co-administrators of the Estate of the deceased **Khator Bin Salim** with effect from the **1st August 2015**.

FURTHER DIRECTIONS

16. As this court is proceeding on transfer effective 1st September 2015 and this Cause is set for hearing on the 9th September 2015 - no doubt before another court, I do not consider it convenient to give any further directions as to the hearing of the dispute herein as such directions, given by this court before handing over the matter to the in-coming court, may unduly (and even appear to disrespectfully) hamstring the in-coming court which will eventually hear and determine the dispute on its merits. I consider it appropriate that the in-coming court determines the further directions to be given for the hearing of the pending applications in this Cause.

17. Costs in the Cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF JULY 2015.

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JUDGE

In the presence of: -

..... for the Applicant

..... for the Respondent/Administrator

..... Court Assistant.