



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Succession Cause 558 of 2007**

**IN THE MATTER OF THE ESTATE OF SALIM AHMED SALIM (DECEASED)**

**RULING**

What is before this court is the application dated 4<sup>th</sup> August, 2011 seeking rectification of Grant. The applicant **KHADIJA KARAMA SAID** had obtained letters of administration in respect of the estate of her deceased husband **SALIM AHMED SALIM** (hereinafter referred to as '*the deceased*'). The deceased died testate having left a will dated 6<sup>th</sup> December, 2006. This ordinarily would have been a fairly routine application. However, some of the children/beneficiaries of the deceased's estate did raise certain concerns to the court through their advocate Mr. Kimani who appeared with leave of court as '*Amicus Curiae*' in this matter. On 5<sup>th</sup> September, 2012 **Hon. Justice Muriithi** did direct that counsel file submissions in this matter. That was done. I have given careful consideration to the record, to the said submissions as well as to the Law on Succession.

Counsel for the applicant argued that **Mr. Kimani Advocate** has no *locus standi* in the matter not having been formally appointed by any party and thus his submissions ought to be treated as void '*ab initio*'. Whilst it is true that there was no letter of appointment on the file with respect to Mr. Kimani, he was granted audience by my learned brother Judge as *Amicus Curiae* i.e. a friend of the court. In addition the court did direct that **both** parties file submissions and finally on this point the objectors being the children of the deceased have indicated that they have no desire to confront their biological mother in a court case. Once matters are brought to the attention of the court in this way then the court cannot turn a blind eye.

As stated earlier the deceased did leave a will dated 6<sup>th</sup> December, 2006. The validity of this will has been impugned. However, this is a matter on which this court cannot properly make any finding. The will appears valid on the face of it. Any other issues can only be canvassed adequately upon submission by way of affidavit or by way of *vive voce* evidence. Submissions by counsel from the bar will not suffice.

Of major concern to this court is the controversy surrounding the **name** of the deceased. The death certificate names the deceased as **Salim Ahmed Salim**. The author of the will is named as '*Salim Ahmed Salim*'. However, the Gazette Notice No. 1834 of 14<sup>th</sup> March, 2008 gives the names of the deceased as '*Said Ahmed Salim*'. Those are two very different names and cannot be deemed to refer to the same person. Unfortunately this error (whether inadvertent or deliberate) was not picked up and rectified to date. Counsel for the applicant argues that this is a mere technical error which can easily be dealt with by dint of Article 159(d) of the Constitution. However, I do not agree. This misdescription is **not** a mere procedural technicality – the misdescription goes to the very root of the matter being the name and identity of the deceased person. A Gazette Notice is a statutory requirement which is supposed to inform all and sundry of the passing of the deceased. This would include any persons with interest in his estate as well as any creditors of the estate. If the wrong name is published then such persons would be misled and would be denied an opportunity to take action if so desired.

Aside from this major anomaly there appears to have also been an error regarding the names of some of the beneficiaries. This alone could in my view be cured by allowing this application for rectification of the grant. Other matters of concern including the fact that despite the will having named seven (7) persons as **Executors** and **Trustee** the applicant proceeded to seek issuance of the grant alone and the grant was eventually issued in the name of the applicant alone. No consent or waiver was signed and/or filed by any of the other named Executors. In view of the error in the Gazette Notice (which as I

have found is a material defect) this court is constrained to invoke section 76(a) of the Law of Succession Act which provides:

**“76. 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) That the proceedings to obtain the grant were defective in substance.”**

My finding is that the Gazette Notice upon which issuance of the grant to the petitioner was based was defective. This defect was material and cannot be cured by allowing this application for rectification. Therefore, I do hereby revoke the grant issued and confirmed to the petitioner and I direct that parties do commence this process of obtaining the grant afresh. It is so ordered.

**Dated and delivered in Mombasa this 28<sup>th</sup> day of March, 2013.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Maundu for Petitioner

Mr. Thiaka h/b Mr. Kimani for the Respondent

Court Clerk Mutisya