



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 124 OF 1999

**IN THE MATTER OF THE ESTATE OF ABDULREHMAN MOHAMED MOHAMED
(DECEASED)**

AL-AMIN ABDULREHMAN HATIMY.....APPLICANT

VERSUS

1. MOHAMED ABDULREHMAN MOHAMED

2. MOHIDIN ABDULREHMAN MOHAMED.....RESPONDENTS

RULING

Before court is the Notice of Motion dated 8th November, 2007 by which the applicant **AL AMIN ABDULREHMAN HATIMY** seeks *inter alia*, the following prayers:

“2. THAT this Honourable court be pleased to order that the respondent herein deposits all the funds and monies belonging to the estate held in various foreign banks by the respondents in court within twenty one (21) days or such period as the court may order.

3. THAT in the event of the respondents failure to comply with prayer number (2) herein above, the sureties herein namely ZUBEIR MOHAMED MOHAMED AL-AMIN of P.O. Box number 81302 MOMBASA and RISHAD NOOR MUHIDIN MOHAMED of P.O. Box 81302 MOMBASA be summoned to show cause why they should not be ordered to make good the loss suffered by the estate in consequence of the breach by the former Administrators of the Estate.

4. THAT this Honourable court be pleased to issue any other and/or further orders for the protection of the Estate as it may deem fit.”

The application was supported by the affidavit of the Applicant. The respondent **MOHIDIN ABDUL REHMAN MOHAMED** did on 13th December, 2007 file his grounds of objection in which he prayed:

“THAT the circumstances of this case call for exercise of the courts inherent jurisdiction as preserved by Rule 73 of the Probate and Administration rules so as to secure the ends of Justice.”

MR. MUTUBIA Advocate acted for the Applicant whilst **MR. MWAKISHA** appeared for the respondent. Both parties filed written submissions with respect to the application and highlighting of those written submissions was done on 14th December, 2012. The matter is now pending a ruling. At the outset I must render an apology to all parties concerned about the delay in rendering this ruling. This has been occasioned by the great challenge currently facing the Mombasa High Court due to a severe shortage of Judges. It has proved difficult to on the one hand keep up a momentum with respect to the hearing of cases and on the other hand maintain a reasonable flow of Judgments/Rulings. The delay is sincerely regretted.

Briefly this matter concerns the estate of the late **ABDULREHMAN MOHAMED MOHAMED HATIMY** (herein after referred to as '*the deceased*') who passed away on 18th September, 1998. A Grant of letters of administration in respect to the estate of the deceased were made on 8th December, 1999 to **Mohamed Abdulrehman Mohamed** (the 1st Respondent in this Succession Cause) and **Mohidin Abdulrehman Mohamed** (the 2nd Respondent) in their capacity as sons of the deceased. The deceased was said to have been survived by 16 dependants inclusive of the two administrators and the estate's assets included 12 pieces of property in Mombasa as well as cash in seven (7) accounts in Hong Kong, Karachi and Thailand. A certificate of confirmation of Grant was issued on 13th September, 2000 and the estate was to be distributed in accordance with Islamic Sharia Law.

On 6th March, 2002 Al-Amin Abdulrehman Hatimy (the applicant herein) who is also a son to the deceased and was one of the 16 listed beneficiaries, together with other beneficiaries applied for the revocation of the Grant issued to the respondents on the ground that it was obtained by fraud/concealment of material facts and that the respondents had failed to diligently administer the estate. This application was heard by the High Court which on 24th May, 2006 ruled that the estate was in danger of waste if the delay in distribution persisted and granted the order for revocation of Grant. Thereafter the applicant and **UMI KULTHUM ABDULREHMAN MOHAMED HATIMY** applied to be appointed as co-administrators of the estate. The Notice of Petition was gazetted on 29th September, 2006. The 2nd respondent and two other beneficiaries filed an objection to that Grant on 27th October, 2006. No further action appears to have been taken until July, 2007 when their lawyer wrote to the Deputy Registrar of the High Court seeking that the Grant be issued since the objectors had not taken any steps as required by section 68(2) of the Law of Succession Act. The letters of Administration were subsequently issued on 17th September, 2007. On this basis the present application dated 8th November, 2007 was filed. The applicant in his supporting affidavit claims that the 2nd respondent collected funds from various bank accounts belonging to the deceased which funds the 2nd respondent allegedly deposited into his own account in the United Kingdom. It is further claimed that the 2nd respondent has absconded with over Kshs. 44 million belonging to the Estate.

On 26th June, 2008, the 2nd respondent filed an application seeking the revocation of the Grant made to the applicant and **Umi Kulthum** on the basis that

1. Consent had not been obtained from all the beneficiaries as required under Rule 26 Probate and Administration Rules.
2. The full and true extent of the estate had not been disclosed to the court and
3. An objection was pending action and disposal under Rule 17 of the Probate and Administration Rules.

This application for revocation was by an order of the court kept in abeyance pending the outcome of this present application.

As is evident from the above narration this has been an extremely contentious and long standing succession dispute running from 1999 to the present time. I have given careful and deep consideration to the submissions both written and oral made by counsel in respect to the application dated 8th November, 2007. It is clear that at various times firstly the respondents and lately the applicants both acting on letters of Administration issued towards them have been engaged in administering the estate of the

deceased. Unfortunately the estate has not been fully distributed.

In considering this application three (3) important issues immediately stand out for determination.

1. Was the Grant of letters of Administration to the Applicant and his co-Administrator proper in the light of the objection which had been raised?
2. Was the said Grant properly issued in light of the lack of consent from all the beneficiaries?
3. Are the prayers sought in this present application warranted?

1. **Was issuance of the Grant proper in light of the objection?**

The law of Succession Act provides that upon Notice of a Petition for issuance of a Grant being placed in the Kenya Gazette, any party who so wishes may lodge an objection thereto. In this case the applicant and his co-administrator **Umi Kulthum** did upon revocation of the first Grant, petition the court for issuance of a grant to themselves. The Notice of Petition was gazetted on 29th September, 2006. An objection was filed on 27th October, 2006 by the 2nd respondent and two other beneficiaries. Nothing more seems to have happened until July, 2007 when the applicant through his counsel wrote to the Registrar seeking that the grant be issued as no action had been taken under section 68(2) of the Law of Succession Act. Section 68 of Cap 160 provides as follows:

“68(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow.

2. **Where notice of objection has been lodged under sub-section(1) the court shall give notice to the objector to file an answer to the application and a cross-application within a specific period.” [my own emphasis]**

Further Rule 17(5) of the P&A Rules states:

“The registrar of the registry in which the objection is lodged shall forthwith upon the lodgment of the objection cause a notice in Form 67 to be sent to the objector, by registered post or otherwise as he may think fit, requiring him to file in the registry within such period as the registrar may specify in the notice an answer in form 25 to the petition for a grant together with a petition by way of a cross-application in Form 84, supported by an affidavit, for a grant to the estate of the deceased to be made to the objector”. [my emphasis]

Rule 77(6) goes on to provide that subsequent to such notice having been sent to the objector by the registrar then the file shall be referred to the court for directions. My reading of the above provisions is that these are **mandatory** steps which must be taken upon the lodgment of an objection. In this case these steps were not followed. There is no evidence that there was any compliance with Rule 17(5). This is a serious omission which renders the issuance of the Grant to the applicant subject to challenge by the objectors. However, for the purposes of this ruling, it is noted that the said objectors have not been totally shut out of the succession proceedings. They have still put in this application challenging the manner in which the administrators have dealt with the estate which application is now under consideration.

2. **Was Issuance of the Grant to the Applicant’s proper in light of the failure to obtain consent from all beneficiaries?**

The law of succession by virtue of section 26 requires that any application for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate. Once again this appears not have been complied with nor were any citations issued which discrepancy renders the issuance of the Grant to the applicants unprocedural. This court therefore is in a dilemma as to whether to nullify the Grant which has been issued unprocedurally or whether to allow the matter to proceed despite these discrepancies. However, in view of the fact that this is an extremely old matter which first came to court in 1999 and given that the omission was due to an error on the part of the

Deputy Registrar [i.e. the court] it is desirable that the matter be concluded without any further delay, I am inclined to take the latter option. In any event as I have mentioned above, the applicants have not been totally shut out of the proceedings.

3. Are the orders sought in the Notice of Motion dated 8th November, 2007 merited?

The bone of contention would appear to be the manner in which the estate has been administered to date. There is an allegation that a sum of Kshs. 44 million has been misappropriated. In order for the court to find on these allegations, it is essential that a proper account be made of the manner in which the estate has been administered to date. There exists a court order revoking the Grant issued to the 2nd respondent and again this requires that he do account for the part he played in administering the estate. Whilst it may be premature to grant the order to deposit funds in court (at least until it can be reasonably established the amounts held on behalf of the estate), I do hereby direct that the respondents do within thirty (30) days of today's date render to the court a full and detailed account of his administration of the estate of the deceased including any funds received and held on behalf of the estate. Each party to pay its own costs. Thus the Notice of Motion dated 8th November, 2007 is partially allowed in the above terms.

Dated and delivered in Mombasa this 28th day of June, 2013.

M. ODERO

JUDGE

In the presence of:

Ms. Tsuma h/b Mr. Mutubia for Applicant

Ms. Athman h/b Mr. Mwakisha for 2nd Respondent

Court Clerk Mutisya