



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

PROBATE AND ADMINISTRATION CAUSE NO. 225 OF 1991

IN THE MATTER OF THE ESTATE OF ALAMIN SAID ALI (DECEASED)

**YAHYA SAID ALAMIN MANDHRY.....PETITIONER/
APPLICANT**

-VERSUS-

**SAADA ALAMIN
MANDHRY.....RESPONDENT**

RULING

The applicant, through the firm of *M/s Christine Kipsang & Co. Advocates* filed Summons for Revocation or Annulment of Grant dated **18th May, 2009** on **19th May, 2009**, this being brought under ss.71,76,79,80,82,83,94 and 95 of the Law of Succession Act (Cap.160, Laws of Kenya) and Rule 44 of the Probate and Succession Rules. The applicant's prayers were as follows:

- (i) *that, the grant of probate to **Saada Alamin bin Said Mandhry** and **Rukiya Alamin bin Said Mandhry** made on **24th March, 1992** be revoked and/or annulled;*
- (ii) *that, in the alternative, the respondents be ordered to provide accounts of the estate to the Court, and distribute the estate.*

The petition rests on two main grounds:

- (a) *that the grant was obtained fraudulently, through a false statement and concealment of material facts; and that the grantees have neglected to provide accounts and to distribute the estate;*
- (b) *that the respondents have wilfully neglected the administration of the estate and have committed the same into the hands of one **Ali Mandhry** who has mismanaged it.*

In the supporting affidavit sworn on **18th May, 2009**, **Said Alamin Mandhry** (the petitioner) avers that **Alamin bin Said Mandhry** had died on **29th May, 1991** and thereafter, grant of probate was made to **Saada Alamin bin Said Mandhry** and **Rukiya Alamin bin Said Mandhry**; the deceased left two properties, namely a building at Kibokoni, Mombasa, and a parcel of land measuring 8.11 acres, at Kisauni, Mombasa; the respondents exclusively took over the administration of the estate, to the detriment of the petitioner; the building left by the deceased comprised a ground floor with three shops – one used by **Saada Alamin Mandhry** as a boutique, and another rented by her; the third shop had been owned and managed by the deponent between 2005 and 2006, and he had then left it to his wife and children during his sojourn at Iringa in Tanzania; the first floor is occupied by the deponent’s mother (**Esha**) and two of his sisters (**Rukiya** and **Shuwekha**) and a son of **Rukiya** (**Nassir**).

The deponent deposed that the deceased had left behind nine beneficiaries: **Saada Alamin Mandhry** (daughter); **Asia Alamin Mandhry** (son); **Rukiya Alamin Mandhry** (daughter); **Said Alamin Mandhry** (son); **Shuwekha Alamin Mandhry** (daughter); **Swabra Alamin Mandhry** (daughter) **Mahfudh Alamin Mandhry** (daughter); **Ali Alamin Mandhry** (son); **Esha Abdalla Masoud** (widow).

The deponent averred that the administrators have been running the estate’s shop, and operating a bank account, but rendering no accounting; that the administrators have not conducted proper administration, nor presented any accounts of the estate, nor called any family meeting to discuss the affairs of the estate.

The deponent swore a further affidavit on **25th June, 2009** deponing that “*the respondent, in collusion with **Ali Mandhry** have exclusively taken over the administration of my late father’s estate to the detriment of the applicant.*”

Saada Alamin Mandhry (the respondent) had sworn a replying affidavit on **11th June, 2009** deponing, *inter alia*, that the deceased had owned only half share of the building at Kibokoni (L.R. No. Mombasa/Block XXIX/5), and two-thirds share of the Kisauni property (L.R. No. 754/III/MN) – i.e. the two suit properties.

The deponent denied the accusations made in the supporting affidavit in respect of alleged maladministration of the affairs of the estate. As to future arrangements for distribution of the estate, the respondent thus deposed:

“...I aver that from the time of the confirmation of grant, we have been consolidating the deceased’s estate for purposes of distributing the same to the beneficiaries including the sub-division of plot 754/III/MN into several sub-plots, which process was almost [complete] as we were about to issue the deed plans in respect of the said sub-plots but we have stopped the process after the applicant through his wife, registered a caveat in respect of the said plot.”

Learned counsel **Mrs. Christine Kipsang**, in her submissions on behalf of the applicant, urged that, on the basis of the affidavit evidence, “**the grant herein ought to be revoked since the administrators are administering in [a manner] [not prudent or] transparent...**”

Counsel relied on the terms of s.76(d) and (e) of the Law of Succession Act (Cap.160, Laws of Kenya); and these provide as follows:

“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 on its own motion –

....

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either –

- (i) to apply for confirmation of the grant ...; or
- (ii) to proceed diligently with the administration of the estate; or
- (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

Counsel cited as supporting authority the High Court’s (*Koome, J*) decision in *Ngatia v. Ngatia* (2008) 1 KLR (G&F) 850, in which the grant of letters of administration issued and duly confirmed, was revoked.

For the respondent, it was urged that the summons herein is incompetent, by virtue of s.2(3) and (4) of the Law of Succession Act (Cap.160); the said s.2(3) provides:

“Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.”

And s.2(4) of the Act thus provides:

“Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.”

Counsel urged that since *Alamin Said Ali* died a Muslim, by this fact, the provisions of the Law of Succession Act (Cap.160) do not apply to the devolution of his estate, but the matter is governed by Islamic law. It was submitted that the petition herein is incompetent, insofar as it is not made under the principles of Islamic law. Counsel submitted that under Islamic law, there is no requirement for obtaining letters of administration or probate of a will: and hence **“there are no circumstances giving rise to the revocation of letters of administration”**; and so, in the circumstances of this case, the provisions of Part VII of the Law of Succession Act [which provides for the administration of estates] are inconsistent with Islamic law and are inapplicable.

Counsel supported the foregoing argument with a passage from the learned work by *W.M. Musyoka, Law of Succession* (LawAfrica, 2006), p.295:

“According to the general principles of Islamic jurisprudence, there was no administration but a mere distribution of the estate by the heirs or by the state. The notion was that the estate did not vest in the personal representative of the deceased or the state but in the heirs, from the moment of the death of the deceased. Administration of estates, in the sense of...recognition of executors or appointment of an administrator is alien to Islamic law or jurisprudence. The duty of distributing the estate of the deceased lies with the state or the heirs...”

Counsel relied on the High Court’s (*Etyang, J.*) decision in *Chelanga v. Juma* [2002] 1 KLR 339 (at pp.353-354):

“The provisions of the Law of Succession Act [Cap.160, Laws of Kenya] do not apply to testamentary or intestate succession [in respect of] the estate of any person who at the time of his death is a Muslim. In lieu of those statutory provisions, the devolution of the estate of any such person has to be governed by Muslim law. The provisions of Part VII of the Law of Succession Act relating to the administration of estates shall, where they are not inconsistent with those of Muslim law, apply to every Muslim dying before, on or after the 1st January, 1991.”

Learned counsel also contested the petition herein for suing in respect of a matter that was *sub judice*. The applicant herein had, in **December 2006**, filed a petition in the Kadhi’s Court: Succession Cause No. 206 of 2006, ***Said Alamin mandhry v. Saada Alamin Mandhry***; he was seeking the determination of the heirs, their shares, and distribution of the estate according to Islamic law. The said cause is now *part-heard*, before the trial Court.

Counsel urged that the petitioner herein is estopped from proceeding with this cause: for the petitioner has succession proceedings pending before the Kadhi’s Court.

Even with Part VII of the Succession Act applied, counsel urged that the petitioner had not shown or proved the necessary conditions to warrant a revocation or annulment of the grant of letters of administration to the respondents.

Counsel submitted that the petitioner had not shown any defect, concealment or fraud to have marked the proceedings leading to the issuance of the grant in question; and that, even on the basis of the work relied on by the petitioner, ***W.M. Musyoka’s Law of Succession*** (2006), ***“all the heirs, without considering gender, have the same powers and therefore the respondents have powers to be appointed as executors of the deceased’s will.”***

Learned counsel, on the basis of the affidavit evidence, urged that the respondent has diligently administered the deceased’s estate, as required by law; progressive steps have been taken in the estate’s management, towards eventual distribution among all the heirs.

Although the petitioner contests the grant made on **24th March, 1992** he has not established the case for annulment on grounds of ***fraud***. Although the petitioner contends that the respondent failed to dutifully administer the estate, he said little about the fact that some of the management steps could not be taken owing to obstacles he, himself created, with the lodgment of a caveat against the property title.

The petitioner has not shown, on the basis of principles of Islamic law, that the respondent has committed any wrong or impropriety in the administration of the estate. In my opinion, the petitioner has made no case, on the facts of this case, for the revocation or annulment of the grant, in the terms of s.76 of the Law of Succession Act (Cap.160); and his attempt to rely on the High Court’s decision in ***Ngatia v. Ngatia*** cannot succeed.

More relevant still, as a basis for resolving the dispute, is the failure by the petitioner to account for his own pending case before the Kadhi’s Court: Succession Cause No. 206 of 2006, ***Said Alamin Mandhry v. Saada Alamin Mandhry***. The petitioner invoked the jurisdiction of the Kadhi’s Court, which is right in the middle of clearing his gravamen; and no question has ever arisen as to the ***jurisdiction*** of that Court to hear and determine the matter. It follows that, as of now, the proper Court seized of jurisdiction ***is*** the Kadhi’s Court. So, on what basis does the petitioner move this Court? None, in my opinion.

I hereby dismiss with costs the petitioner’s summons for revocation or annulment of grant dated **18th May, 2009**. I also dismiss the alternative prayer that the respondent be ordered to provide accounts of the estate, and to distribute the estate, save as part of the conduct of administration under the original grant of

24th March, 1992, as duly confirmed on *23rd December, 1992*.

Orders accordingly.

SIGNED at **NAIROBI**

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 12th day of October, 2011.

M.A. ODERO
JUDGE