



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 95 OF 2006

PUBLIC TRUSTEES.....PLAINTIFF

VERSUS

MOHAMED OMAR MOHAMED.....1ST DEFENDANT
AHMED OMAR MOHAMED.....2ND DEFENDANT
TWAHIR OMAR MOHAMED.....3RD DEFENDANT
ABDALLA OMAR MOHAMED.....4TH DEFENDANT
MUHIDIN OMAR MOHAMED.....5TH DEFENDANT
SAID OMAR MOHAMED.....6TH DEFENDANT
MANTHURA OMAR MOHAMED.....7TH DEFENDANT
UMI OMAR MOHAMED.....8TH DEFENDANT
TEBA OMAR MOHAMED.....9TH DEFENDANT
HAFWA OMAR MOHAMED.....10TH DEFENDANT
KHADIJA OMAR MOHAMED.....11TH DEFENDANT

R U L I N G

The Public Trustee filed this Originating Summons as the Administrator of the Estate of Omar Mohamed Mohamed Hatimy alias Bin Mohamed bin Mohamed El-Barawi by virtue of a grant of Letters of Administration Intestate issued in Probate and Administration Cause No. 318 of 2005 in the High Court at Mombasa. The Public Trustee filed the Originating Summons under the proviso of Section 11 of the Public Trustee Act and Rule 41 (3) and (4) of the Probate and Administration Rule for the determination of the following questions by the court:

1. *Whether the Public Trustee can approve the sale and transfer of the property described in Title No. Mombasa/Block XVII/721 in favour of **MOHAMED OMAR MOHAMED**.*
2. *Whether the Public Trustee can approve the sale and transfer of the property described as Title No. Mombasa/Block/XVII/502 in favour of **AHMED OMAR MOHAMED** the second Respondent herein:*
3. *Whether the Public Trustee can approve the sale and transfer of property described as MALINDI/402 certificate No. 764 in favour of **MOHAMED OMAR MOHAMED** and **AHMED OMAR MOHAMED** the first and second Respondents herein jointly.*

In the supporting affidavit sworn by the Assistant Public Trustee in the Coast region, Mr. George Nyakundi, on 24th April 2006, it is deponed inter alia, that:-

- The deceased was survived by six sons and five daughters as the only heirs to his Estate and they are named herein as the Respondents.

- The deceased was the owner and registered proprietor of various properties subject matter of this application

The said Assistant Public Trustee further states on oath, that:-

“.....6. **THAT the deceased on the 5th day of June 2000 entered into an agreement of sale with Mohamed Omar Mohamed the first respondent herein to sell his property known as MOMBASA/BLOCK XVII/721 (annexed hereto and marked “PT 3” is a copy of the said sale agreement).**

7. That the deceased on the 5th day of June 2000 entered into an agreement of sale with Ahmed Omar Mohamed the second respondent herein to sell his property known as MOMBASA/BLOCK XVII/502.(Annexed hereto and marked “PT 4” is a true copy of the said agreement).

8. That on the same 5th day of June 2000 the deceased entered into a sale agreement with Mohamed Omar Mohamed and Ahmed Omar to sell to them jointly his property known as Plot No. 402, Malindi, (annexed hereto and marked “PT 5” is a true copy of the Sale Agreement).

9. That the purchaser here variously demanded and required the Public Trustee to execute the formal transfers of the sold premises to themselves (annexed hereto and marked “PT 6” are copies of demand letters).

10. That upon the apparent delay on the part of the Public Trustee to transfer the sold premises, the two purchasers filed two suits in court being Civil suit. (O.S.) No. 127 of 2003 and 172 of 2003 to compel the Public Trustee to transfer the properties. (Annexed hereto and marked “PT 7” is a copy of the court’s ruling in Civil Suit No. 127 of 2003 whose decision had the same effect on Civil Suit No. 172 of 2003)

11. That the Public Trustee had filed summons for the confirmation of the original grant issued to her and the distribution of the Estate of the deceased according to Islamic Law of Succession in the High Court Probate and Administration Cause No. 318 of 2005.

12. That the Public Trustee as the personal representative and administrator of the Estate of the deceased intends to execute the formal transfers of the sold properties to the purchaser according to the said sale agreement.

13. That Said Omar Mohamed, Muhidin Omar Mohamed, Manthum Omar Mohamed, Umi Omar Mohamed Twahir Omar Mohamed and Tebu Omar Mohamed who are respondents have protested to the Public Trustee the Intended transfer of the properties mentioned at paragraph 5 above to the purchaser, on the grounds that the sale agreement are forgeries.

14. That the Public Trustee referred the Sale Agreements to the Criminal Investigations Department of the Kenya Police for verification of the signatories and possible prosecution of the forgers (Annexed hereto and marked “PT 8” are copies of correspondence).

15. That the Criminal Investigations Department carried out an investigation, and concluded that there was neither fraud nor forgery committed in the execution of the Sale Agreements. (Annexed hereto and marked “PT 9” is letter of conclusion from the Department).

16. That Mr. Ngacaku Gakuhi before whom the Sale Agreement were executed has confirmed by letter to the Public Trustee that the agreements are genuine (annexed hereto and marked “PT 10” is a copy of the said letter dated 14th March 2003.

17. That I swear this affidavit in support of the annexed application for orders that the Public Trustee do approve the sale and transfer of the properties sold by the deceased.

18. that what is stated herein is true to the best of my knowledge, information and belief save where otherwise stated.”

As expected from what is stated in paragraph 13 of the said affidavit the some of beneficiaries other than the two purported purchases objected and protested against the intended transfers of the properties to the two respondents/alleged purchasers.

The 3rd, 6th, 7th, 8th, 9th 10th and 5th Respondents have specifically opposed the application and filed Replying affidavits and retained advocates to act for them. They have all questioned the impartiality of the Public Trustee in discharging his duties.

At the hearing of the said application and upon considering the nature of the application and the fact that the Public Trustees intended transfers of the properties is opposed by the majority of those he is under a duty to represent and protect, the court directed that the suit issue to be determined is:-

- **Whether the Public Trustee is entitled to pursue the originating summons in view of the objections of the majority of the beneficiaries to the Estate?**

Section 11 of the Public Trustee Act under which the proceedings are instituted, it is provides:-

“Disputes to be deiced on Petition by the court.

Where probate of the Will or Letters of Administration has been granted to the Public Trustee under this Act, and where the Public Trustee in accordance with the provisions by Section 8 (1) is the court in the petition of the Public Trustee or any person interested in the estate shall decide all disputed matters claims and demands in respect thereof and shall make such orders as it thinks fit concerning the collection, sale, investment, disposal or administration of the Estate.

Provided that –

(i) In any case in which it appears to be not desirable that the matter in question should be so decided, the court may direct such proceedings, to be instituted as appear proper for the due decision thereof,

I have considered the Originating Summons herein, the supporting affidavit, the opposing affidavit and submissions by Counsel.

It is my interpretation that the Public Trustee has power and discretion to make an application for the approval of transfers on the basis of what is perceived to be existing liabilities against the estate proven by written Sale Agreements. However, what happens when the intended transferees are a minority of the beneficiaries to the Estate and the majority are opposed to the said transfer? Can the Public Trustee attempt to institute such proceedings as if it is a dispute between the beneficiaries? With respect, it is clear from the contents of his affidavit that the Public Trustee is prosecuting the application after forming a view that he ought to be authorized to transfer as the transactions are valid, genuine and enforceable. A perusal of the pleadings will demonstrate that the Public Trustee has sided with the 1st and 2nd Respondents who claim to be purchasers of the 3 properties in their own right.

It is a fact that the 3 properties constituted a substantial part of the Estate of the deceased. If it is transferred and not available for the general distribution to the beneficiaries, the Estate would be substantially depleted.

In my view looking at the facts the Public Trustee ought to have acted impartially as required by law.

According to “Underhill’s law of Trusts and Trustees” 12th Ed. Law 1970 – at p. 318

“ (1) A Trustee must be impartial in the execution of his trust, and not in exercise of his powers so as to confer an advantage on one beneficiary at the expense of the another.”

Applying this principle, it is not the place of the Public Trustee in view of the nature and extent of the dispute to have made value judgments on the validity or enforceability of the sale agreements. While the Public may not find evidence to sustain the offences of forgery, yet it is not the function of the Police or the Public Trustee to resolve disputes between beneficiaries. Once there is a dispute, the Public Trustee can present the suit to court for a fair determination and discharging his duties fairly, impassionately, objectively and impartially. The content and tenor of the Public Trustee’s affidavit is tilted in favour of the alleged purchaser and prejudicial to the interests of the majority of the beneficiaries. As a result I find and hold that he was not entitled to make the application in this case. The claim here is not a dispute by beneficiaries inter se, but the claims of purchasers. In view of the disputes, the purchasers as possible claimants or creditors should have been advised to file their own suits independently without the Public Trustee and the Estate incurring any costs.

I have considered that the claimants herein had been convicted previously for falsely obtaining a Grant to the same Estate and their integrity and credibility are in question.

The Public Trustee should have invoked Section 11(2) to Public Trustee Act and asked the claimants to file their own suit.

In view of the foregoing the Public Trustee is in clear breach of his obligation and duty to act fairly and impartially and he is not entitled to prosecute the application. The court must stop this abuse of power and duties.

In previous proceedings, the Public Trustee had been found to be indolent by justice Maragaa and in this case, I find that he is acting impartially. It is now questionable whether the beneficiaries of this Estate should allow the Public Trustee to continue with the Administration of the Estate of the deceased.

I hereby in exercise of this court’s powers and inherent jurisdiction, dismiss the Originating Summons dated 24th April 2006 with costs to the 3rd, 5th, 6th, 7th, 8th, 9th, 10th and 11th Respondents.

Dated and delivered at Mombasa this 29th day of November 2010.

M.K. IBRAHIM

J U D G E

CORAM

Mr. Maliro for the Applicant/Public Trustees

Mr. Khatib for the 5th Respondent

Mr. Kiarie for the 3rd, 6th, 7th, 8th and 9th Respondent.

No Appearance for the 1st Respondent

Mr. Mutugi h/b for Mr. Ngetich for the 2nd Respondent.

Ruling read in their presence.

Ibrahim, J