



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Succession Cause 363 of 2007

IN THE MATTER OF THE ESTATE OF YUMBE SHEE YUMBE DECEASED

BETWEEN

AMINA SHEYUMBE MUHAJI.....PETITIONER

AND

1. SHAFI MUHAJI SHEE

2. SHEYUMBE MUHAJI SHEE

3. BWANAKOMBO MUHAJI SHEE

4. TWAHIR ZUBERI SHEYUMBE SHEE

5. MOHAMED ZUBERI MUHAJI SHEE.....INTERESTED PARTIES

RULING

Shafi Muhaji Shee, Sheyumbe Muhaji Shee, Bwanakombo Muhaji Shee, Twahir Zuberi Sheyumbe Shee and Mohamed Zuberi Muhaji Shee, the interested parties, have lodged this summons for revocation of the Grant of probate issued to Amina Sheyumbe Muhaji on 20th September 2007. They also seek an order restraining the said Amina Sheyumbe Muhaji (hereinafter “the petitioner”) from selling or offering for sale, collecting rent or destringing for rent or in any other way from dealing or interfering with plot No. 2923 (original No. 1365/2) Section 1 Mainland North and from accessing any funds at Standard Chartered Bank Limited which comprise the estate of the deceased pending the hearing and determination of this application or further orders of the court.

The interested parties contend that the petitioner obtained the grant of probate fraudulently by making false statements and concealing from the court several matters material to the case. The material alleged to have been false is the allegation by the petitioner that she was a child of the deceased yet she was not and the material alleged not to have been disclosed is the fact that the interested parties are the only heirs to the estate of the deceased under Islamic Law.

The interested parties further contend that the proceedings to obtain the grant were defective in substance having been based on a purported will that was null and void.

The application is supported by an affidavit sworn by the first interested party, Shafi Muhaji Shee. It is deponed in the affidavit that the said interested party is a nephew of the deceased and subsequent to her

death, he discovered that she had purportedly made a will on 8th February 2005 bequeathing her entire estate to the petitioner. He then sought a declaration that the said will is void in Petition No. 196 of 2005 which petition was struck out on technicalities on 4th May 2007. Undeterred, he filed HCCC No. 322 of 2007 in which he seeks *inter alia* a declaration that the purported will was not duly executed and attested and is therefore null and void. That suit is pending disposal.

The first Interested Party has further deponed that in February 2009 he learnt that the Petitioner had obtained the Grant of Probate in these proceedings, hence this application. Annexed to the affidavit are numerous exhibits which document the background to the dispute between the parties.

The application is opposed and there are replying affidavits sworn by the Petitioner, Hezron Gekonde Advocates and one Salim Mohamed Bakabe. The Petitioner also filed a further affidavit.

When the application came up before me for hearing on 31st March 2009, counsel agreed to file written submissions which were highlighted on 20th May 2009.

I have anxiously considered the application, the affidavits filed and all the annexures exhibited. I have also considered the submissions of counsel and the Law. Having done so I will first dispose of the preliminary objections raised by counsel for the petitioner. There is an objection based on the form of the application. Counsel for the petitioner says that the summons should have been issued by the court and as the same were not, the application should be struck out. In my view the objection has not been well taken as I hold the view that no application may be defeated because the form provided has not been adopted. The Petitioner has not demonstrated the prejudice she will suffer by the failure to use the prescribed form.

Counsel for the petitioner has also challenged the prayers sought. In his view the Interested Parties should have elected whether they desire a revocation or an annulment. That objection has also not been well taken. In my view whether the Grant will be revoked or annulled cannot prejudice the petitioner. She has not been misled by the manner the prayers have been sought.

The objection raised on the basis that the first Interested Party Shafi Muhaji Shee has filed Mombasa HCCC No. 322 of 2007 (Shafi Muhaji Shee – v – Mwanamina Shee Yumbe) has caused me concern. The first interested party has exhibited copies of the Originating Summons to his affidavit in support of this application. In the suit the first Interest Party seeks the following orders:

- 1) A declaration that the deceased Yumbe Sheyumbe Shee, known also as Yumbe Habibi, and also as Yumbe Binti Sheikh died intestate and the plaintiff is entitled to petition for a grant of Letters of Administration intestate to the estate of the deceased.
- 2) That the purported Will of the deceased dated 8th February 2005 is not duly executed and attested and accordingly is null and void.
- 3) An order directing the purported executor Mwanamina Shee Yumbe to abstain and cease from selling, mortgaging, charging, alienating or collecting rents or otherwise interfering with the estate of the deceased in her character as the purported executor of the deceased estate.
- 4) That costs of this summons be provided for.

That suit is still pending disposal by this court. It is plain that the primary ground for lodging the suit is the first Interested Party's contention that the Will the petitioner relied upon to obtain a grant of probate to the estate of the deceased herein was made and executed by the deceased when she was in such a state of mind arising out of her mental and physical illness due to her old age as not to know what she was doing. The first interested party further contends that the impugned Will was not attested or sufficiently/validly attested and is accordingly null and void. That ground is the same main ground upon which the present application is based. The court is called upon to make a finding on the disputed Will in this application. The court in the Originating Summons will also be called upon to make a

pronouncement on the same Will. Suppose, for the sake of argument, determine that the Will is valid and dismiss the interested parties' application and the judge who will try the first interested party's said Originating Summons decides that the Will is invalid and declares that the interested party is entitled to petition for a grant of representation. That scenario would give rise to an impossible situation. To avoid such a situation, I make the following orders:

- 1) A determination of this application is stayed pending the hearing and disposal of HCCC No. 322 of 2007.
- 2) Pending determination of the said suit the status quo obtaining at the date of this ruling shall be maintained.
- 3) Costs shall be in the cause.
- 4) I grant to each party Liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Mwakireti for the Applicant and Mr. Mogaka for the Petitioner.

F. AZANGALALA

JUDGE

24TH JUNE 2009