



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

Succession Cause 260 of 2002

IN THE MATTER OF: THE ESTATE OF ABDULRAHMAN

OMAR CHEKA

Coram: Before Hon. Justice L. Njagi

Mr. Wachira for Applicant

Mr. Oruko for Respondent

Court clerk - Ibrahim

RULING

This ruling relates to two applications which seek similar orders. The first of these applications is made by way of a chamber summons dated 19th October, 2006, and brought under Rule 44(1) of the Probate & Administration Rules, and Section 76(a), (b) and (c) of the Law of Succession Act. The application seeks two orders –

1. That the grant of Letters of Administration made to OMAR ABDULRAHMAN OMAR CHEKA in this matter on 22nd January, 2004, and confirmed on 6th August, 2004 be revoked.
2. That the costs of this application be provided for.

The application is supported by the annexed affidavits of MWANAMKUU LALI SHEE and FATUMA MUMIN, and is based on the grounds that –

- (a) The aforesaid Letters of Administration were obtained fraudulently by the making of false statements and untrue allegations of facts as to the knowledge, signature and/or consent of the beneficiaries to the estate;
- (b) The remaining beneficiaries of the Estate do not want OMAR ABDULRAHMAN OMAR CHEKA to administer the Deceased's Estate on his own and/or at all.
- (c) The remaining beneficiaries of the Estate were not consulted nor did they approve the appointment of OMAR ABDULRAHMAN OMAR CHEKA as the sole administrator.

The second application is made by chamber summons dated 23rd April, 2007, and brought under Section 76 of the Law of Succession Act, and Rules 44(1) and 73 of the Probate and Administration Rules. The application seek the following orders –

1. That the Honourable Court be pleased to revoke and annul the grant of letters of administration and confirmed grant issued to Omar Abdulrahman Omar Cheka on 11th March, 2003 and 5th August, 2004 respectively.
2. That the Honourable Court be pleased to issue fresh letters of administration and confirm grant to the following dependants –
 - (i) Mwanamkuu Lali Shee
 - (ii) Tunu Fatuma Abdulrahman Cheka
 - (iii) Salim Abdulrahman Cheka
3. That the Honourable Court be please to restrain Omar Abdulrahman Omar Cheka either by himself or agents from selling, transferring any property of the estate of the late Abdulrahman Omar Cheka or using distributing, transacting business and/or wasting any of the properties of the estate and/or collecting rents, income or funds of the estate and/or interfering with any assets of the estate in any way whatsoever.
4. That the Honourable Court be pleased to order the said Omar Abdulrahman Omar Cheka to account for all the money rental income and funds and all the assets of the estate that he has received since the death of the late Abdulrahman Omar Cheka.
5. That sureties of the estate be summoned to appear in court to show cause why they should not forfeit their respective guarantee for allowing the said Omar Abdulrahman Omar Cheka to intermeddle with the estate of the late Abdulrahman Omar Cheka.
6. That the costs of the application be borne by the said Omar Abdulrahman Omar Cheka.

The application is supported by the annexed affidavits of TUNU FATUMA ABDULRAHMAN CHEKA and SALIM ABDULRAHMAN CHEKA, and premised on the grounds that –

- (a) The letters of administration and confirmed grant were obtained fraudulently by concealing material facts and without consent of the dependants
- (b) The grant of letters of administration and confirmed grant was obtained by means of untrue allegations of facts to justify the grant.
- (c) The administrator named has grossly intermeddled with the assets and income of the estate.
- (d) The said administrator is wasting the estate.

At the hearing of these applications, Mr. Wachira appeared for the applicants in the application dated 23rd April, 2007; Mr. Mazrui appeared for the applicants in the application dated 19th October, 2006; and Mr. Oruko appeared for the Respondent in both applications. After considering the pleadings and the oral submissions of all the counsel, I note that the main vein running through both applications and their supporting affidavits is that the sole administrator obtained the grant of the letters of administration intestate fraudulently in that the other beneficiaries did not consent to the grant. He is also accused of intermeddling with the assets of the estate, and failing to complete the administration of the estate.

The first allegation is supported by the affidavit of Mwanamkuu Lali Shee, the widow of the deceased and one of the heirs of his estate. In her affidavit sworn on 16th October, 2006, she avers that the sole administrator obtained the letters of administration by falsely purporting to have obtained the consent and signatures of the other beneficiaries. She further states that she is personally aware that neither she nor any of the other beneficiaries signed or consented to the respondent being appointed sole administrator of the estate, nor did he consult them before making his application.

These concerns are echoed by Fatuma Mumin, a former wife of the deceased and the mother of four heirs to the estate. In her affidavit sworn on 19th October, 2006 in support of the application for revocation of the grant, she avers that the administrator behaved fraudulently in obtaining the grant of letters of administration in his sole name by, inter alia, falsely purporting to have obtained consent from the other beneficiaries. She also asserts that she is personally aware that her children, who are issues of the deceased and bona fide heirs to the estate, did not consent to the respondent being appointed as the sole administrator of the estate, nor were they consulted by him while making his application. Furthermore, she says, when the grant was made to the respondent in his sole name, her children were all minors having not yet attained the age of eighteen years, and it was not possible for them to consent and/or sign in support of the respondent's application for grant of letters of administration without the deponent's approval on their behalf. Thus, any purported signature and/or consent by the said children was false.

The above sentiments are further aired by Tunu Fatuma Abdulrahman Cheka, a daughter of the deceased, in her affidavit sworn on 21st April, 2007. In that affidavit, she deposes that the grant was obtained fraudulently by making a false statement and concealing from the court that the dependants, including the deponent, did not consent to the grant of letters to the administrator; the consent of the applicants and other dependants was never sought; and the consent of Mwanamkuu Lali Shee, the widow of the deceased, was neither sought nor granted.

The respondent filed a replying affidavit sworn on 22nd May, 2007. In paragraph 1 of that affidavit, he avers that he is a co-administrator of the estate of the deceased. That is not true. The respondent is the sole administrator of the estate of the deceased, and not a co-administrator. I wonder why he chose to make such a statement on oath when the record shows the contrary.

In paragraph 7(g), the respondent says that at the time of processing the grant, the applicant had given her consent and was fully aware of what was taking place, and it's therefore hypocritical of her to turn around and condemn and criminalize the process she supported. The deponent has not adduced any evidence to substantiate this allegation. If the applicant had indeed consented, nothing would have been easier for the deponent than to produce a copy of the consent which the applicant signed. He has not produced any such consent.

On the contrary, the consent Form which was attached to the application is quite telling in several respects. Firstly, it is dated 19th November, 2003, and shows that the only persons who purported to consent to the letters of administration being granted to the respondent were Salma Abdulrahman Omar Cheka, Salim Abdulrahman Omar Cheka, Biosa Abdulrahman Omar Cheka, and Hawa Omar Cheka. The name of Mwanamkuu Lali Shee, the widow of the deceased, who had been a co-administrator in the first grant dated 10th March, 2003, does not appear on that list, nor does the name of Tunu Fatma Abdulrahman Cheka, a daughter and dependant of the deceased, whose consent ought to have been sought and obtained.

Secondly, the affidavit in support of the petition dated 17th September, 2002, shows that the deceased was survived by the following persons whose respective ages were as shown in brackets as of that date – Mwanamkuu Omar Cheka, widow (54 years); Omar Abdulrahman Omar Cheka son (40 years); Fatma Abdulrahman, daughter (34 years); Salma Abdulrahman, daughter (18 years); Biosa Abdulrahman, daughter (15 years); Salim Abdulrahman, son (14 years); Hawa Abdulrahman, daughter (12 years). As observed above, in the application by which the respondent was appointed sole administrator, the only persons who purported to give consent were Salma, Salim, Biosa, and Hawa. Since the subsequent application was dated 19th November, 2003, which was one year after the first application, the persons consenting would have been aged as follows – Salma, 19 years; Biosa, 16 years; Salim, 15 years; and Hawa, 13 years. Only Salma had, therefore, attained the age of majority. All the others were minors, who could not, and therefore did not, consent. The omission of Mwanamkuu Lali Shee and Tunu Fatma Abdulrahman from that list, and yet these were persons who were entitled to apply for letters of administration to the estate of the deceased in equality with the respondent, means that they did not consent. Similarly, the inclusion of three minors on the list of those who allegedly consented means that

only one person, Salma, effectively consulted.

Thirdly, even if Salma and her three minor siblings validly consented, the Form 38 which they used is unique in a very material particular. After their names, the Form does not contain the operative words – “... do hereby consent to letters of administration to the estate of the said deceased.” For these reasons, I find that the respondent obtained the grant of the letters of administration and the confirmation thereof without disclosing that some other parties entitled to apply for letters of administration to the estate had not given their consent, and that three of the four who consented were minors. By so doing, the respondent thereby concealed from the court something material and fundamental to the case.

The second main allegation levelled against the respondent is that he is intermeddling with the estate. The only scintilla of evidence in substantiation of this charge is that the respondent has been collecting rent from some tenants at Tudor Estate. Since the respondent is the administrator of the estate, I don't think that he can be faulted for collecting rent unless and until his grant of the letters of administration is revoked. Until then, I don't think that much turns on this accusation.

The third and final charge against the respondent is that he has failed to proceed diligently with the administration of the estate. The grant of letters of administration herein was made to the respondent on 21st January, 2004. An application for confirmation of the grant was made by a chamber summons dated 4th August, 2004. It sought to have the grant confirmed during the vacation on the grounds that the local administration and the beneficiaries were anxious to have the estate distributed promptly in accordance with Muslim Law. It was a further ground that the petitioner, who is the respondent herein, was of ill health and was scheduled to travel to the USA early in September, 2004, to seek advanced medical attention and treatment. It was also stated in another ground that it was necessary and incumbent that the petitioner (the respondent herein) do distribute the estate before his departure abroad since he was likely to stay for a period exceeding six months. It was lastly stated that the summons for confirmation of grant were most urgent for they would allow the respondent herein a period of about one month before departure abroad to finalise distribution of the estate in accordance with Muslim Law.

The tone of this application rings a sense of urgency in the administration of the estate. Indeed, according to the last ground stated above, it was anticipated that the distribution of the entire estate would be completed within one month of the confirmation of the grant. This sense of urgency was reiterated in paragraphs 10, 11 and 12 of the Supporting affidavit sworn by the respondent on 3rd August, 2004. In those paragraphs, the respondent averred that the beneficiaries were anxious to have the estate distributed at the first opportune moment; that due to his ill health he was scheduled to travel to the USA on or about 9th September, 2004, which may cause him to be away for more than six months; and that in the circumstances, he prayed that the grant herein be confirmed forthwith to enable him distribute the estate in the intervening period of about one month before his departure abroad. For these reasons, the respondent was allowed to urge his application during the vacation, and the grant was confirmed on 5th August, 2004. It was then ordered that the estate be distributed in accordance with Islamic Law.

The period between that date and the filing of the 1st application herein dated 19th October, 2006, was slightly more than two years. The second application dated 23rd April, 2007 found the matter still in a state of slumber. An exercise which was expected to be completed within about one month has taken more than two years to complete. In that context, I am not able to share the optimism urged by Mr. Oruka, learned counsel for the respondent, that the respondent has made a commendable effort to administer the estate without co-operation from other dependants, and that this application is an attempt by the applicants to fight a fair distribution. The respondent has not explained why it has taken so long to complete a job which he himself anticipated to do within one month. It is not even clear, to-date, how far the administration has gone. In the circumstances, I find that he has not proceeded diligently with the administration of the estate.

Mr. Oruko submitted that the particulars of the alleged fraud had not been disclosed, and that there was a period of 8 months before confirmation, and therefore anyone with any objection should have objected

within that period. The answer to both these issues is found in Section 76 of the Law of Succession Act. With regard to the first one, Under Section 76 (b), the court has jurisdiction to revoke a grant if it finds that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. These, per se, are the particulars of fraud against which a grant may be revoked. This court has found that the respondent did not disclose in his petition that some of the beneficiaries who were entitled to petition for the grant had not consented; nor did he disclose that three of the four persons whom he named as having consented were actually minors. This, in the context of Section 76 paragraph (b), was fraudulent. As the applicants had pleaded lack of consent, I find that they had thereby disclosed the alleged fraud.

Secondly, the opening words of Section 76 are self explanatory. The section says –

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled ...”

It follows, therefore, that even if one did not raise any objection before the grant was confirmed, one may always object to it even after it has been confirmed. The applicants herein were therefore within their rights to raise the issue after confirmation.

The last point of law is raised by the respondent himself in paragraph 12 of his replying affidavit. The relevant part thereof reads –

“THAT I have been informed and advised which information and and advise (sic) I verily believe ... that married daughters cannot under the law be made administrators of the estate of a deceased father in the presence of living sons.”

Technically, this clause offends the proviso to Order XVIII rule 3(1) of the Civil Procedure Rules and should therefore be struck off the record for failing to disclose the source of the information and advice. But even if it is not struck off, this court is not aware of any authority on such a statement and no such authority has been cited.

For the foregoing reasons this court finds that the applicants have shown conclusively that the grant of the letters of administration in this matter were obtained improperly, and accordingly makes the following orders –

1. That the grant of the letters of administration intestate made in this matter to Omar Abdulrahman on 21st January, 2004 and confirmed on 5th August, 2004, be and are hereby revoked.
2. That a fresh grant of letters of administration intestate of all the estate of ABDULRAHMAN OMAR CHEKA, deceased, who died domiciled in Kenya on the 11th February, 2002, be and are hereby granted to –

Mwanamkuu Lali Shee

Tunu Fatuma Abdulrahman Cheka, and

Salim Abdulrahman Cheka.

3. The grant is hereby confirmed.

Dated and delivered at Mombasa this 12th day of November, 2007.

L. NJAGI

JUDGE