



**In re Estate of Abdulrahim Mohamed Mahdi Bajnaf (Deceased) (Succession Cause 40 of 1977) [2025] KEHC 2111 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2111 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 40 OF 1977  
G MUTAI, J  
FEBRUARY 6, 2025  
IN THE MATTER OF THE ESTATE OF ABDULRAHIM  
MOHAMED MAHDI BAJNAF (DECEASED)**

**BETWEEN**

**ABDULLAH ABDULRAHIM MOHAMED ..... ADMINISTRATOR**

**AND**

**SAID ABDULRAHIM MOHAMED ..... ADMINISTRATOR**

**AND**

**ALYA ABDULRAHIM MOHAMED ..... RESPONDENT**

**RULING**

1. Abdulrahim Mohamed Mahdi Bajnaf, who I shall hereafter refer to as “the deceased”, died on 9th December 1975. At the time of his death, he was married to Ms Zainab Mahdi, who I shall hereafter refer to as “Zainab”. He was previously married to Ms Gamar Binti Ali Mahdi later. The deceased had an issue with Gamar, whose name is Abdullahi Abdulrahim Mohamed alias Abdillahi (who I shall hereafter refer to as “Abdullahi”). Abdullahi is a co-administrator of the estate and the applicant in the summons before the court.
2. It is common ground that the deceased was thus survived by the following dependants: -
  - a. Zainab Mahdi – the widow;
  - b. Said Abdulrahim Mohamed – son (by Zainab);
  - c. Alya Abdulrahim Mohamed – daughter (by Zainab);
  - d. Abdullahi Abdulrahim Mohamed – son (by Gamar).



3. Upon the demise of the deceased Zainab petitioned for a grant of letters of administration intestate. Gamar Bint Ali Mahdi objected to the grant. However, pursuant to a consent entered into by the parties, a grant was issued to Zainab Mahdi on 4<sup>th</sup> December 1979.
4. Zainab Mahdi died in 1988. At the time of her death, the grant had not been confirmed.
5. Vide summons for revocation of grant dated 20<sup>th</sup> August 2019 Abdullahi sought to have the grant issued to Zainab Mahdi revoked and or annulled. The said application was, however, not heard as on 28<sup>th</sup> January 2020 the grant issued to Zainab Mahdi was revoked by the consent of the parties. The court issued a grant in the name of Abdullahi and Mr Said Abdulrahim Mohamed (who I shall hereafter refer to as “Said”). The said grant is dated 28<sup>th</sup> January 2020.
6. The handwritten consent recorded in court is in the court file. It provided that any party thereto was at liberty to apply for the confirmation of the grant.
7. On 7<sup>th</sup> August 2020, Abdullahi filed the instant summons for confirmation of the grant. Vide the said summons, he sought the following orders: -
  - a. That the grant of letter of administration intestate made to Abdullahi Abdulrahim Mohamed and Said Abdulrahim Mohamed be confirmed;
  - b. That costs of the application be in the cause.
8. Abdullahi averred that they were seeking to confirm the grant to enable the joint administrators to complete the administration of the estate.
9. In the affidavit in support of the summons, Abdullahi identified the deceased’s heirs as himself, Said, and their sister Alya Abdulrahim Mohamed. The sole property identified as belonging to the deceased was given as Title No. Mombasa/Block XVII/884, which is at present in the name of Zainab. Since the grant was never confirmed, it is not clear how the transfer from the deceased to Zainab was effected.
10. Said, through his then advocates, Omar Said & Co. Advocates, also filed a summons for confirmation of the grant dated 31<sup>st</sup> August 2020, vide which he sought to have the grant issued to him and Abdullahi confirmed, for the distribution of the estate in accordance with Islamic law and for costs of the application to be provided for.
11. In the affidavit in support of the summons, Said stated in paragraph 2 that the grant issued to Zainab was revoked by consent and that a new grant was made to him and Abdullahi on 22<sup>nd</sup> January 2020. The affidavit in support of the summons was sworn by Said in the presence of Zainab Chiraghdin Ali, an advocate and a commissioner of oaths whose postal address was given as 43035-80100 Mombasa.
12. Said filed an affidavit of protest against the confirmation of grant, in which he contended that the applicant wasn’t entitled to any share of the remaining estate of the deceased as he had already received his share. He stated that, as Muslims, the estate ought to devolve to the beneficiaries in accordance with Muslim law rather than be shared equally as proposed in the summons.
13. He further contended that the applicant was paid his share of the estate through his mother and that the sum found as being due to him of Kes 62,000/- was given to his mother to hold in trust for him. In his view, the agreement between the parties was duly executed and performed.
14. He accused the applicant of being guilty of laches for taking more than 40 years to bring his claim. The delay was inordinate and inexcusable to him.



15. Said stated that there were three witnesses to the transaction in which Abdullahi's share of the estate was settled: Mr Shariff Ali Bin Ahmed Hashim, Mohamed Hassan Bamragha and Asma Salim Ahmed.
16. The protestor deposed that his mother survived the deceased and was, therefore, entitled to a portion of the estate amounting to 1/8 of it while he would get twice what his sister was entitled to under Islamic law. In his view, the applicant was not entitled to any share at all.
17. The protest and the summons for confirmation of the grant were canvassed by way of viva voce evidence.
18. The applicant called two witnesses, himself and Alya Ali Mahdi.
19. The first witness was Alya Ali Mahdi. Ms Alya is the sister of the applicant's mother. She denied that the applicant received a share of the deceased's estate. It was her evidence that one witness for the respondent, Asma Islam Mohamed Mahdi, was 10 years old when the deceased died and that she could not, therefore, be a credible witness. In her view, Asma would not have been able to remember anything. When cross-examined, she stated that the suit property was rented out and that all proceeds went to Said.
20. The applicant testified on 1<sup>st</sup> March 2023 as the second witness. It was his evidence that he was 4 years old when his father died. He stated that he was brought up by his mother and aunt. Before his mother died, she told him that there was a house in Moons, a lorry, cash in an account and a Peugeot car that belonged to the estate. He denied ever receiving his inheritance. He blamed the delay in filing the succession proceedings on the fact that it took him a long time to recover from the demise of his mother.
21. The respondent called three witnesses. The first was Mohamed Hassan Bamragha. Mr Bamragha is a businessman who resides in Kizingo. He testified that he married Zainab Mahdi in 1977 after her husband died. He claimed not to know Abdillahi well but acknowledged that he had met him twice, once at MA Bayusuf's workshop and the second time during the court session.
22. It was the evidence of Mr Bamragha that Abdullahi had paid all his dues at the office of AYA Jiwaji and Jiwaji Advocates. He testified that the suit property is the property of Zainab.
23. When cross-examined, he insisted that the subject house belonged to Zainab.
24. The protestor was the 2<sup>nd</sup> witness. He testified that his mother died in 1990 from a sudden ailment. Mr Said denied giving instructions for the revocation of the grant. When shown signatures that were said to be his, in which he consented to the revocation of the grant, Mr Said became cagey. During cross-examination, he admitted that he wasn't in a position to know whether his stepmother was paid or not.
25. The last witness was Shariff Ali Bin Ahmed Hashim. Mr Hashim testified that he knew Gamar. It was his evidence that Mr Abdullahi's portion of the inheritance was paid through a cheque given to her at AYA Jiwaji's office. He claimed to have been present when the cheque was handed over. The cheque was given to cater for the benefit of the child in satisfaction of his inheritance.
26. Upon the conclusion of the hearing, the parties filed written submissions.
27. The written submission of the applicant are dated 17<sup>th</sup> July 2024. Vide the said submissions it was urged that this court do confirm the grant.
28. Counsel gave a history of the matter, in particular how the grant was obtained, the objection raised by Ms Gamar Bint Ali Mahdi, and the consent entered into on 27<sup>th</sup> November 1979 vide which Abdullahi Abdulrahim Mohamed was recognized as an heir of the estate and as a result of which the grant was issued to Zainab Mahdi on 4<sup>th</sup> December 1978.



29. Upon the demise of Zainab, counsel submitted that both the applicant and the protestor were appointed as the administrators of the estate of the deceased.
30. Counsel identified the issue coming up for determination as being whether the applicant had received his share of the estate. It was submitted that the answer to that question was in the negative. He urged that the evidence of Asma wasn't credible, while the alleged payment of Kes 62,000 wasn't sufficiently attested, nor could it adequately compensate the applicant for his share of the estate.
31. For that reason, it was urged that the applicant was entitled to a share of Title No. Mombasa /Block XVII/884.
32. Counsel accused the protestor of being an intermeddler.
33. Reliance was placed on the decision of the court in re Estate of Veronica Njoki Wakagoko (deceased) [2023] eKLR and in re estate of M'Ngarithi M'Miriti [2017] eKLR.
34. It was therefore argued that the grant be confirmed so that the applicant could get his lawful share of the estate.
35. The submissions of the protestor is dated 30<sup>th</sup> September 2024. Mr Karina learned counsel for the respondent identifies 4 issues as coming up for determination: -
  - a. Whether there was a valid application against the deceased executor?
  - b. Whether the purported advocates for the deceased executor had any lawful authority to act for her;
  - c. Whether the respondent had lawful parties to sue;
  - d. Whether the applicant is entitled to reasonable provision from the estate of the deceased.
36. It was argued that a valid suit against a deceased person couldn't exist. Reliance was placed on the decision of the Environment and Land Court in Japheth Nzila Mwangi vs Hamisi Juma Malee [2022] eKLR.
37. Regarding the second issue, it was urged that the death of the instructing client terminated the advocate/client relationship, and as such, all actions taken after 23<sup>rd</sup> November 1990 were null. In support of this contention, reliance was placed on the case of Ummur Suleiman Kara vs Ma Zabeen Sidik [2014] eKLR.
38. Are the respondents lawful parties to sue? Counsel urged that they could not acquire any liability since there was no formal order joining them to the proceedings as executors of the estate of their deceased father's estate and that they were not the executors of their deceased mother's estate.
39. It was denied that the applicant was entitled to a reasonable provision as he had already received his share of the estate.
40. I have perused the court file. In the affidavit of protest to the confirmation of the grant, Said admits that consent was recorded in court on 22<sup>nd</sup> January 2020, vide which the previous grant was revoked, having become useless and inoperative.
41. Although he now denies having signed the consent or having authorised advocates to do so on his behalf, the court record shows that the firm of Omar Said represented him at the material time and that an advocate in the said firm represented him in court on numerous occasions up until the time



- the firm now representing him took over. If, as he alleges, they had no instructions to represent him, why hasn't he taken action against them?
42. If the grant was obtained fraudulently, one would expect Said to have applied for it to be revoked. Although five years have passed, he hasn't done so.
  43. As the grant has not been confirmed, dealing with the properties would have been unlawful under Section 82 (b) (ii) of the *Law of Succession Act*, which expressly forbids the sale of immovable property before confirmation of the grant.
  44. In my view, the issues coming up for determination are whether to confirm the grant and, if so, on what terms. Abdullahi prefers that the estate be shared equally, while Said wishes to have it distributed in accordance with Islamic law among all the dependants, with the exception of Abdullahi, who he claims got his share.
  45. Was the applicant paid his share of the estate through his mother? This issue is contested. Said, relying on a document supposedly obtained from AYA Jiwaji & Jiwaji Advocates, contends that he was paid. I have considered the documents produced in support of the said contention. The latter provides very scanty information. It does not state that any payment had by the 28<sup>th</sup> of August 1980 been made. It is a promise of payments to be made in future. Were these payments actually made? Did Gamar receive any money by cheque, as alleged by Mr Bamragha and Mr Hasham? Did the applicant actually benefit as intended by the deceased? What was the ultimate fate of the payments made, if any, to the East African Building Society?
  46. Given the contested facts, I am inclined to believe the applicant. He appeared credible. His testimony that he worked as a porter in the Old Kilindini port does not reflect what one would expect of a trust fund kid living off the interest from his fixed deposit account.
  47. I must state that it was Said who asserted that the applicant revived his share of the estate. It was, therefore, his burden under Section 109 of the *Evidence Act* to prove the said allegation. Section 109 of the *Evidence Act* says;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
  48. Did the applicant receive his share of the estate? I am persuaded that I should make a decision that is less likely to lead to injustice. Equality is equity. Given the doubt, I find and hold that the applicant didn't receive his share of the estate.
  49. Although Said attempted to challenge the grant issued, I note that the grant has not been revoked. In fact, he admits in his protest that he entered into the consent that gave rise to the grant.
  50. The 1<sup>st</sup> respondent cannot, in my view, approbate and reprobate his role in the manner in which this matter has been prosecuted.
  51. I, therefore, dismiss the protest filed. Having done so, I now consider the summons for confirmation of the grant.
  52. In this circumstance, I confirm the grant issued on 28th January 2020. I order that Chief Kadhi ascertain each party's beneficial interest under the applicable Islamic law within 60 days of the date hereof. Once that is done, the certificate of confirmation of the grant showing each party's share of the estate, as determined by the Chief Kadhi under Islamic law, will be issued.



53. As this is a family matter, each party shall bear its own costs.

54. Orders accordingly

**DATED AND SIGNED IN MOMBASA THIS 6TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr Egunza, for the Applicant;

Mr Karina, for the Respondent; and

Arthur - Court Assistant.

