



REPUBLIC OF KENYA



In re Estate of Nurto Ali Sheikh (Deceased) (Succession Cause 41 of 2012) [2024] KEHC 7797 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 7797 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
SUCCESSION CAUSE 41 OF 2012**

SM GITHINJI, J

MAY 14, 2024

**IN THE MATTER OF THE ESTATE OF NURTO ALI SHEIKH
(DECEASED)**

BETWEEN

SWALEH AWESO PETITIONER

AND

RAO ALI SHEIKH 1ST OBJECTOR

ADAN IBRAHIM HILOLE 2ND OBJECTOR

RULING

- 1 The petition for letters of administration intestate in respect of the estate of the late Nurto Ali Sheikh (deceased) was filed herein on 23/3/2012 by the Petitioner in his alleged capacity as a good Samaritan of the deceased. On 31/5/2018, the Petitioner was issued with a limited grant of letters of administration which prompted the institution of the present objection proceedings.
- 2 By way of affidavit of protest sworn on 8/10/2018 and summons for revocation of grant of letters of administration dated 14/10/2019 the 1st and 2nd Objectors respectively challenged the limited grant issued to the Petitioner. The grounds relied upon by the 1st Objector are that:
 1. He was the lawful husband of the deceased, Nurto Ali Sheikh having been married to her on 6/7/1985. And that they lived together for 23 years until she met her demise.
 2. The deceased had no children and that the Petitioner is a total stranger to her estate.
 3. The grant of letters of administration issued to the Petitioner was fraudulently issued on the basis of false information and concealment of material facts.



4. As at that material time, there was a pending suit at Kilifi Kadhi's Court Succession Cause No. 26 of 2017 transferred from Mombasa Kadhi's Court Succession Cause 101 of 2007 over the estate of the deceased herein.

On his part, the 2nd Objector relied on the following grounds: -

1. That he was married to the deceased in 1979 until the year 2003 when they divorced.
 2. That he was at material times in possession of the deceased estate being a residential house built on Plot No. 546/21 (A).
 3. That this court lacks jurisdiction to administer the estate of persons professing the Muslim faith.
 4. That the Petitioner failed to disclose material facts to the court prior to issuance of the grant of letters of administration.
- 3 The Petitioner opposed the summons for revocation. He filed a replying affidavit on 20/5/2019 stating that the issues raised by the 1st Objector were raised in Mombasa Kadhi's Court Succession Cause 101 of 2007 which suit the 1st Objector had withdrawn. That the deceased prior to her death, had long divorced both objectors and was living with the Petitioner as her adopted son. He deposed that the deceased's wish was to have all her property surrendered to the mosque as wakf. He added that the objectors had no valid claim or at all against the deceased's estate.
 - 4 It is noteworthy that this matter proceeded by way of viva voce evidence which I have summarized as hereunder.

Evidence

- 5 The 1st Objector adopted his affidavit and further affidavit dated 18/10/2018 and 12/2/2019 respectively, and witness statement dated 6/10/2019 as his evidence in chief. He told the court on cross examination by Mr. Otara counsel for the Petitioner, that before her demise, the deceased handed over the necessary asset documents to the Petitioner and that he was given the inventory thereof by the 2nd Objector, whom he claimed was his employee. The 1st Objector added that he had two wives and that he never divorced the deceased. He explained that he would visit the deceased on weekends alone.
- 6 On further cross-examination by Ms. Mwangi counsel, for the 2nd Objector, he reiterated that the 2nd Objector never married the deceased and that he only worked for him and the deceased while living in a store within the deceased's property.
- 7 On his part, the 2nd Objector testified that the deceased was his wife and that he never divorced her. He added that the dispute herein is over a property situated in Maweni area, Malindi, which he claimed belongs to him. He admitted that the Petitioner collects the rent from the tenants within the property and that the Petitioner is an adopted child of the deceased.
- 8 He told the court on cross examination that he is currently married to another person. He added that he was the one who bought the land in dispute and built the house thereon and gave the same to the deceased. He told the court that he never divorced the deceased but did not have a registered certificate of marriage between himself and the deceased. On re-examination, the 2nd Objector stated that he married the deceased in 1974 and divorced in 1982.
- 9 The Petitioner testified as PW1. He told the court that he was raised by the deceased and when he met her, she was married to the 2nd Objector, while living at Maweni area. He explained that the house



- at Maweni was initially built of mud but was later renovated by a lady identified as Aretha, whom he alleged was also raised by the deceased. He narrated that the deceased eventually divorced the 2nd Objector due to some issues they had, and he ended up taking care of the deceased until her demise. That prior to her demise, the deceased left all her properties to him with the instructions that the same be donated to the mosque upon her death.
- 10 It is the Petitioner’s testimony that sometime after the deceased’s death, he allowed the 2nd Objector to occupy one of the rooms within the suit property for free. He explained on cross-examination that the suit property is situated at Maweni area within Malindi and comprises of a Swahili house. He added that part of the estate also comprised of other movable items like gold. The Petitioner asserted that he is not a beneficiary of the deceased’s estate but a trustee of the wakf.
- 11 On further cross-examination by Mr. Miller, counsel for the 1st Objector, the Petitioner stated that the deceased adopted him at the age of 40, mainly to oversee her operations. He added that the deceased handed over her properties to him in the year 2001 in the presence of the 2nd Objector who was her husband then. The Petitioner’s testimony marked the close of the hearing.
- 12 Parties filed written submissions which I have carefully perused.
- 13 It is pertinent to note that this matter was first heard and determined by Justice Nyakundi in his judgment dated 17/12/2021. The court revoked the grant issued to the Petitioner on 31/5/2018 and ordered parties and beneficiaries to abide with a judgment delivered in Kilifi Kadhi’s Court Succession Cause No. 26 of 2017. Thereafter and upon an application filed by the Petitioner, it was established that the court proceeded on an error on the face of the record for abiding with proceedings that had long been discontinued. At the consensus of all parties herein, the judgment delivered by Nyakundi J was ultimately set aside on 10/3/2022.
- 14 Having established so, I find that the issues for determination are: -
- i. Whether this court has jurisdiction to determine this matter.
 - ii. Whether the limited grant issued to the Petitioner should be revoked or confirmed.

Analysis and Determination

- 15 It is settled that jurisdiction is the starting point on every judicial determination, for a court of law to entertain a matter when not seized of jurisdiction is an exercise in futility. Neither can the court arrogate upon itself jurisdiction that it does not have. (See the *Owners of Motor Vessel “Lilian S” v Caltex Oil (K) Limited* [1989] KLR). It is also trite that the jurisdiction of each court flows from either the *Constitution* or legislation.
- 16 The jurisdiction of the Kadhi’s Courts is established under article 170 of the *Constitution* of Kenya 2010. Article 170(5) provides that:
- “The jurisdiction of a Kadhi’s Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.”



17 The above provision is simulated in section 5 of the [Kadhi's Court Act](#), cap 11 Laws of Kenya which states that:

“A Kadhi's Court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

18 It is evident therefore that the only limitation set by the law on jurisdiction of the Kadhi's court is the nature of the subject matter, whether both parties profess the Muslim faith, and the choice of whether or not both parties submit to the Jurisdiction of the Kadhi's court. Both *the Constitution* and the [Kadhi's Court Act](#) recognize and give effect to the right of Muslims to choose to utilize the regular system of adjudication through the High Court.

19 This question of jurisdiction of the High Court in such matter resolves itself in the holding of the Court of Appeal *in Re the Estate of Ismail Osman Adam (Deceased), Noorbanu Abdul Razak v. AbdulKader Ismail Osman*, Mombasa Civil Appeal No. 285 of 2009 which upheld the choice of Muslim parties to submit to the Kadhi's Court or to file succession proceedings in the High Court. In his decision Githinji, JA as he then was, held:

“There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes. Section 47 makes it clear that the High Court has jurisdiction to entertain any application and determine any dispute under the [LSA](#) [[Law of Succession Act](#)]. However, by section 48(2) the jurisdiction of the High Court is not exclusive as Kadhi's Courts have also jurisdiction to entertain disputes relating to the estate of deceased Muslims. However, if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3) [of the [Law of Succession Act](#)], the law applicable in the High Court as to the devolution of the estate is the Muslim law and not the [LSA](#). As an example, disputes relating to the validity of a will made by a Muslim and the ascertainment of heirs and shares of each will be determined in accordance with Muslim law. *In Saifudean Mohamedali Noorbhai v. Shehnaz Abdebussein Adamji*, Mombasa Civil Appeal No. 142 of 2005 (unreported) this Court said in part:

‘Kenya Courts have held in past judgments that every litigant of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi's Court’

However, by virtue of section 2(4) [LSA](#), the law relating to the administration of the Estate of the deceased Muslim is the one stipulated in Part VII of the [Act](#), that is, sections 44-95 in so far as those provisions are not inconsistent with Muslim law.”

20 The outcome is that this Court is equipped with the requisite jurisdiction to entertain this matter.

21 Having said so, I “will now address the substantive issue, that is, whether the grant issued to the Petitioner should be revoked.



22 The law on revocation and annulment of grants is found in section 76 of the [Law of Succession Act](#) as follows:

“76. Revocation or annulment of grant

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 of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) 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;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (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 within one year from the date thereof, or such longer period as the court has ordered or allowed; 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.

[In re Estate of Prisca Ong'ayo Nande \(Deceased\)](#) [2020] eKLR the court stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons...”

23 The objectors strongly took the position that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of facts material to the case. I have thoroughly analyzed the facts presented by the Objectors herein; it seems to me that their grievance or the facts



that they allege to have been concealed were, firstly, that there was a Kadhi's court order distributing the deceased's estate. As already established, this allegation is of no basis and consequence at this point. Secondly, that the Petitioner failed to disclose to the court that the Objectors were beneficiaries of the deceased's estate by virtue of being widowers.

- 24 The question that needs to be addressed therefore is whether the Objectors are beneficiaries of the deceased's estate.
- 25 In relation to the 2nd Objector, there is no proof of marriage between himself and the deceased. In his testimony, he admitted that he did not have a certificate of marriage and that he was not living with the deceased immediately prior to her death. Moreover, in his supporting affidavit to the summons for revocation of grant, the 2nd Objector swore that he married the deceased in the year 1979 and divorced her in 2003. The deceased died on 2/5/2007, evidently long after the two had apparently divorced. His annexure N2 therein, being a confirmation letter from the then Malindi Kadhi, demonstrates the same. In any event and in the absence of a marriage certificate, I am hesitant to believe his testimony on his marriage to the deceased, considering that the marriage certificate between the 1st Objector and the deceased indicates that the two got married on 6/7/1985. My conclusion is that the 2nd Objector is not a beneficiary of the estate herein.
- 26 The evidence shows that the deceased was first married to the 1st Objector (now deceased) on 6/7/1985. On the one hand the 1st Objector claimed that he never divorced the deceased. The Petitioner on the other, claimed that the deceased and the 1st Objector divorced in 1979. How then could have the two divorced years before they even got married? This is a question the Petitioner failed to answer in his evidence. The evidence on record, and which this court of law shall rely upon, being a marriage certificate, shows that the 1st Objector and the deceased got married in Malindi on 6/7/1985; and that the marriage was registered on 4/4/2004.
- 27 The Petitioner did not advance any evidence to support his allegation that the deceased had divorced the 1st Objector. Therefore, in the absence of such evidence, I am inclined to find that the 1st Objector was married to the deceased up to and until her demise.
- 28 Having said so, I am satisfied that the process leading to the issuance of the limited grant to the Petitioner was marred by misrepresentation and concealment of matter, particularly, failure to disclose to this court the surviving beneficiary. The outcome is that the grant issued to the Petitioner on 31/5/2018 is hereby revoked. This paves way for any rightful beneficiary to the Estate of Nurto Ali Sheikh(deceased) to apply for letters of administration. Each party to meet own's costs in this proceedings.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 14TH DAY OF MAY, 2024.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Otara for the Petitioner

Ms Lucy Mwangi for the 2nd Objector – (absent)

Mr Miller for 1st Objector – (absent)



Absent parties be notified.

