



In re Estate of Osman Shariff Oman Noor (Deceased) (Succession Cause 11 of 2009) [2023] KEHC 1784 (KLR) (Family) (6 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 11 OF 2009
MA ODERO, J
MARCH 6, 2023
IN THE MATTER OF THE ESTATE OF OSMAN
SHARIFF OMAN NOOR AKA OSMAN OMAR
(DECEASED)**

BETWEEN

KHADIJA SHARIFF OSMAN 1ST APPLICANT

KAMAL SHARIFF OMAR 2ND APPLICANT

AND

MOHAMED SHARIFF OMAR 1ST OBJECTOR

OSMAN NAIMA SHARIFF 2ND OBJECTOR

RULING

1. Before this court is the summons dated September 2, 2020 by which Khadija Shariff Osman (the 1st applicant) And Kamal Shariff Omar (the 2nd applicant) seek the following orders:-

“1. The applicants/administrators be granted letter of administration thereafter be at liberty to apply for confirmation of the grant and distribution of the estate of Osman Shariff Osman Noor Aka Osman Omar (Deceased) who died on December 11, 2004 on the grounds that:-

a. That the applicants herein are the legal representatives of the estate of Osman Shariff Oman Noor Aka Osman Omar (deceased)



- b. That the grant and certificate of confirmation issued to the applicants herein was revoked on February 26, 2015.
 - c. That subsequently the estate of Osman Shariff Oman Noor Aka Osman Omar (deceased) remain unadministered therefore necessitating the instant application.
2. The application which was premised upon section 66 of the *law of Succession Act* and rules 26, 27, 49 and 173 of the *Probate and Administration Rules* was supported by the affidavit of even date sworn by the 1st applicant.
3. The 1st objector Mohamed Shariff Omar opposed the application through his replying affidavit dated March 5, 2021. Likewise the 2nd objector Naima Osman Shariff opposed the application through her replying affidavit dated May 14, 2021.
4. The matter was canvassed by way of written submissions. The applicants filed written submissions which were undated. The 1st objector filed written submissions dated July 7, 2021 whilst the 2nd objector relied upon the written submissions dated June 21, 2021.

Background

5. The Succession cause relates to the estate of the late Osman Shariff Omar Noor (hereinafter the 'Deceased') who died intestate at the Kenyatta National Hospital on December 11, 2004. A copy of the death certificate appears annexure 'KSO1' to the affidavit in support of the petition for grant of letters of administration intestate dated January 6, 2008.
6. Vide a letter written by the chief the deceased was survived by the following persons:-
 - 1) Khadija Shariff Osman - Widow
 - 2) Abdulhakim Shariff Osman - Son
 - 3) Halima Shariff Osman - Daughter
 - 4) Fatiya Shariff Osman - Daughter
 - 5) Kamal Sharif Osman - Son
 - 6) Samia Shariff Osman - Son
7. Following the demise of the deceased his widow Khadija Shariff Osman And Son Kamal Shariff Omar applied for and were on May 4, 2009 issued with a grant of letters of administration intestate. That grant was duly confirmed on May 3, 2010.
8. On November 3, 2010 the two objectors herein filed summons seeking revocation of the grant. The 1st objector Ann Gathoni Wanjiru argued that as a daughter of the deceased she was a beneficiary of his estate but had been excluded by the administrators in the distribution of the estate.
9. On his part the 2nd objector Mohamed Shariff a brother to the deceased objected to the inclusion of the parcel of land known as LR No 9923/24 located in Kajiado County as an asset belonging to the estate of the deceased. The 2nd objector argued that the said property had been inherited from their late father and asserted that the deceased held the same in trust on his own behalf and on behalf of all the other siblings.



10. The summonses for revocation of grant were heard jointly by hon Lady Justice Rose Ougo who in a ruling delivered on February 26, 2015 revoked the grant which had been issued to the applicant. In that ruling the hon Judge made the following orders:-
- “ i. The grant of letters of administration intestate made to Khadija Shariff Osman And Kamal Shariff Omar on 4th and confirmed on May 3, 2009 is revoked.
 - ii. I find that Plot No LR 9923/24 listed as an asset in the deceased’s estate was held by the deceased in trust for the applicant and his other siblings.
 - iii. Plot No LR 9923/24 is removed from the list of assets in schedule of the deceased’s estate.”
11. Following the ruling of February 26, 2015, the applicants made several attempts to file an appeal against that decision. Their appeal was finally heard on merit vide Civil Application No 387 of 2018 but the application to file appeal out of time was dismissed by hon Lady Justice Fatuma Sichale (Judge of Appeal) in a ruling delivered on October 11, 2019.
12. The applicants then went back to the drawing board and filed the present application.
13. As stated earlier the application was opposed by the 1st objector who submitted that the same was ‘*Res Judicata*’. The 2nd objector insisted that as a child of the deceased she ought to be included in any petition for grant of letter of representation to the estate.

Analysis and Determination

14. I have carefully considered the application before the court, the reply filed thereto as well as the written submissions filed by the parties. The issues for determination are:
- (i) Whether this application is *Res Judicata*.
 - (ii) Whether the application has merit
 - (i) *Res Judicata*
15. The objectors submit that the present application is *Res Judicata* as the issues raised therein were determined by hon Lady Justice Ougo in the ruling delivered on February 26, 2015.
16. The doctrine of *res judicata* is provided for under section 7 of the [Civil Procedure Act](#) cap 21, Laws of Kenya, as follows:-
- “No court shall try and suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”
17. Therefore in order to satisfy the principle of *Res Judicata* it must be shown that:-
- i) There is a former suit or proceeding in which the same parties in the subsequent quit had litigated.
 - ii) The issue in dispute was directly or substantially in issue in the former suit.
 - iii) That a court with competent jurisdiction had heard the matter and finally determined it.



18. The aim of this doctrine is to discourage endless rounds of litigation over the same issue. There must be finality with regard to any issue brought to court.
19. The Court of Appeal in the case of *Uburu Highway Development Limited v Central bank of Kenya & 2 others* [1996] eKLR explained the application of the above doctrine and held that in order for the defense of *res judicata* to be applicable, there must be a previous suit in which the matter was in issue; the parties were the same or litigating under the same title; a competent court heard the matter in issue; and the issue has been raised once again in a fresh suit.
20. The factors that the court ought to consider on the issue of *res judicata* were laid out by the Supreme Court in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR, as follows:

“Hence, whenever the question of *res judicata* is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 Others*. (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”
21. It is common ground that the applicants herein applied for and obtained grant of representation way back in the year 2008. The objectors then applied to have the grant issued to the applicants revoked. That application was fully heard by hon Lady Justice Ougo. The hon Judge then revoked the grant which had been issued to the applicants. The attempts made by the applicants to appeal that decision were unsuccessful.
22. I have carefully perused the ruling delivered on February 26, 2015. Nowhere in that ruling did the court disqualify the applicants as administrators of the estate. The court only dealt with and determined the grievances which had been raised by the two objectors.
23. With regards to the 1st objector the court found that the property known as LR No 9923/24 Kajiado did not belong to the estate of the deceased but rather the same was held by the deceased in trust for himself and his siblings. The court directed that Plot No LR No 9923/24 Kajiado be removed from the list of assets in the schedule of the deceased’s estate.
24. Based on the above ruling which remains valid and enforceable the applicants cannot in their petition include the property LR 9923/24 Kajiado as an asset belonging to the estate of the deceased.
25. Regarding the claims by the 2nd objector that she was a daughter to the deceased and therefore a beneficiary to his estate, the hon Judge found that the evidence adduced by the 2nd objector was inadequate to prove her claim. Thus the court dismissed the 2nd objectors claim.
26. In her replying affidavit the 2nd objector raises the same issues which she had raised in her evidence before hon Lady Justice Ougo. I find that the 2nd objector claims are ‘*Res Judicata*’. The same were already heard and determined by a court of competent and concurrent jurisdiction. The only remedy available to the 2nd objector would be to file an appeal against the ruling of February 26, 2015.
27. All in all I find that although the court revoked the grant which had been issued to the applicants the court did not specifically bar the applicants from filing a fresh petition for grant.



28. Accordingly I find that this present application is not *Res Judicata* at all. The question of who was entitled and/or qualified to apply for the grants of representation to the estate of the deceased was not determined by the hon Lady Justice Ougo
- (ii) Merits of this application
29. It is not in dispute that the applicants herein are the widow and son respectively of the deceased. They are the closet kin and stand in priority to the 1st objector in applying for the grant.
30. The estate of the deceased currently has no administrator and has not been distributed over nineteen (19) years after the demise of the deceased. This is not a desirable state of affairs.
31. The duty of this probate court is to oversee the distribution of the estate to the genuine heirs. It is to the benefit of the estate and the beneficiaries to have administrators appointed to spearhead the distribution of the estate.
32. Finally I do find merit in this application. I allow the same and make the following orders:-
- (1) The applicants Khadija Shariff Osman And Kamal Shariff Omar be issued with a fresh grant of letters of administration in respect of the estate of the late Osman Shariff Osman Noor.
 - (2) The administrators to file a summons for confirmation of grant within thirty (30) days indicating the mode of distribution of the estate.
 - (3) The property known as Plot No LR No 9923/24 Kajiado is to be excluded from the schedule of assets belonging to the deceased's estate.
 - (4) The summons for confirmation of grant to be served upon the two objectors who are at liberty to object to the same if they so wish.
 - (5) This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 6TH DAY OF MARCH, 2023.

MAUREEN A. ODERO

JUDGE

