



In re Estate of Ahmedali Abdul Hussein Mamujee (Deceased) (Succession Cause 234 of 2013) [2023] KEHC 17599 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 234 OF 2013**

JN ONYIEGO, J

MAY 12, 2023

**IN THE MATTER OF THE ESTATE OF AHMEDALI
ABDUL HUSSEIN MAMUJEE(DECEASED)**

BETWEEN

MAZHER AHMEDALI MAMUJEE PETITIONER

AND

MURTAZA AHMEDALI ABDULHUSSEIN MAMUJEE RESPONDENT

RULING

1. The deceased in respect of whom these proceedings relate died on the December 7, 2010. Consequently, the respondent herein one Murtaza Ahmedali abdulhussein Mamujee petitioned for a grant of probate using a written will executed by the deceased on May 8, 1981 in which he and his mother (wife to deceased) one Shirin Ahmed Mamujee were appointed as executors. He however indicated that his mother died on October 8, 1984 hence the reason why he petitioned as the sole petitioner. In the petition, the respondent stated that the deceased was survived by him, the applicant herein Mazher Ahmed ali Mamujee and a daughter by the name of Masuma H Mohamedali.
2. Subsequently, a grant of probate of written will was issued to the respondent on February 6, 2014. However, by a summons dated September 10, 2018, the applicant herein sought revocation of the grant on grounds that it was obtained fraudulently through concealment from the court of something or material information to justify the grant.
3. It was the applicant's contention that pursuant to their mother's death on October 8, 1984 thus predeceasing the deceased herein, the deceased did execute a subsequent will dated March 17, 1999 in which he appointed him and the respondent as joint executors. According to the applicant, the respondent was aware of the latter will hence failed to disclose to the court the true position thus obtaining the grant fraudulently using the former will which was superseded by the subsequent will.



- Further, the applicant sought for orders compelling the respondent to give an accurate account of the estate since he was appointed as the executor(administrator) of the estate.
4. After canvassing the application, Hon Justice Thande delivered her ruling on June 19, 2020 thus revoking the grant. The court recognized that the applicable will was the one dated March 17, 1999 and not May 8, 1981. The respondent was then ordered within 90 days to give an accurate account of the estate from the date he was appointed the executor and administrator of the estate.
 5. Following that ruling, on January 4, 2021, Mazher(the applicant) filed a petition seeking to be issued with the grant of probate of written will as the sole executor to the exclusion of the respondent on grounds that; the respondent had previously fraudulently acquired a grant in respect of the deceased's estate after concealing material facts from the court and that he had failed to give an accurate account of the estate since his appointment as the executor contrary to the court's directions.
 6. The petition is supported by an affidavit sworn by the applicant on December 23, 2020 in which he restated the grounds for exclusion of the respondent from being appointed as one of the administrators of the estate. He went further to list the beneficiaries of the estate as himself, the respondent, Masuma and Mustafa.
 7. He also listed assets comprising the estate as; second share in XLVII/23 residential property on Mikanjuni road; second share in XL/51 property on Biashara & Nehru road; bank accounts-ABN Amro and Diamond Trust; private shares-Saifee Investments LTD; second share in diamond trust bank account; safety deposit box-jubilee insurance building; car; furniture; crockery; ornaments & memorabilia all valued at 227,340,000.
 8. Subsequently, the respondent on April 6, 2021 filed answer to petition for grant thus stating that he was rightfully entitled to be issued with a grant as he is one of the appointed executors. Further, that the applicant is not suitable as he does not reside in Kenya being a permanent resident in Canada hence his appointment will not serve the best interest of the estate.
 9. Contemporaneously filed with the answer to petition is a petition by way of cross-application for a grant in which the respondent stated that the applicant being a resident of Canada cannot sufficiently administer the estate as he has been absent from Kenya for a period of 10 years. That the applicant never attended his father's funeral a fact proving the applicant's inability to manage the estate while domiciled in Canada. He averred that being a resident of Mombasa where the property is situate, he will diligently administer the estate with the support of hi co-executor.
 10. Regarding the submission of the statement of accurate accounts, he averred that on March 2, 2021, he filed and served the respondent's advocates a statement of accounts and inventory of assets. In support of the petition by way of cross application, the respondent filed an affidavit sworn on April 1, 2021 reiterating the grounds set out in the petition. He attached documents to show how he managed the estate while he was acting as the administrator (see annexures 1-9 of the affidavit).
 11. Before the hearing of the petition and cross-application, the court did refer this matter for court annexed mediation which failed to yield any amicable solution. Consequently, parties agreed to canvass the petition and cross-application through affidavit evidence and written submissions.
 12. The applicant filed his submissions on September 20, 2022 through the firm of Hamilton Harrison & Mathews basically reiterating the content of the applicant's petition thus emphasizing the fact that the respondent having obtained fraudulently a grant that was later revoked is not fit to administer the estate. To support the position that a person who fraudulently obtains a grant cannot be trusted to faithfully administer the estate, the court was referred to the case of: *In Re Estate of Agwang Wasiro(deceased)* (2020) eKLR. The court was further referred to the case of *Rupal Shah & another v*



Ramesh Bhagwani Shah (2015) eKLR where the court removed an executor from administering the estate on grounds that his laying claim against the estate created conflict of interest as he seemed to advance his personal interest against the estate.

13. It was learned counsel's submission that the respondent having excluded his siblings from the administration of the estate cannot be entrusted with the administration of the same estate hence should be excluded.
14. The respondent filed his submissions on September 21, 2022 through the firm of Collette Akwana who restated the content in the answer to petition and petition to cross-application. Counsel submitted that the respondent was not aware of the existence of the second will hence cannot be accused of failure to disclose material facts or information. Counsel further submitted that being the only child to the deceased who was residing in Kenya, he had a duty to protect the estate as the rest were not interested.
15. On the allegation of fraud, counsel submitted that the application for revocation of the grant was not opposed as service was not effected upon the respondent hence no specific proof. To support the position that fraud must be proved specifically, the court was referred to the holding in the case of Vijay Morjaria v Navinsingh Madhu Singh Darbar and another (2000) e KLR where the court of appeal held that fraud must be specifically pleaded and particulars thereof stated on the face of the pleadings.
16. On the question of submission of accurate statement of accounts and inventory of assets, counsel submitted that the same had been rendered adequately.

Analysis and Determination

17. I have considered the petition herein, answer to petition and cross-application to petition for grant and counsel's rival submissions. Issues that arise for determination are; whether the applicant should be granted the grant of probate to the exclusion of the respondent and secondly, whether the respondent has satisfactorily rendered accurate statement of accounts and inventory of assets.
18. The crux of the petition herein, answer to petition and cross-application is the contestation as to the right person to whom the grant of probate should issue. Section 53 of the Law Of Succession Act does provide that;

A court may;

- a. where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of his contents) to have left a valid will, grant, in respect of all property to which such will applies, either-
 - i. probate of the will to one or more of the executors named therein;
or
 - ii. If there is no proving executor, letters of administration with the will annexed; and
 - b. If and so far as there may be intestacy, grant letters of administration in respect of intestate.
19. Section 60 of the same Act also does provide that when several executors are appointed, probate may be granted to them all simultaneously, or at different times. However, under section 47 of the Law Of Succession Act, the high court is bestowed with the power and or jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient. In other words, the court has discretion to determine on the most



- suitable person to grant a grant of probate or letters of administration depending on the circumstances of the case.
20. In Kerugoya succession no. 187 of 2012 *In re Estate of Eunice Wanjiru Karuri (Deceased)* [2018] e KLR it was the court's view that it had jurisdiction to make orders which were in the interest of justice and for just conclusion of causes which relate to the estates of deceased persons.
 21. In the instant case, there is no dispute that the respondent had petitioned for a grant of probate based on the will made on May 8, 1981 which was issued but later revoked as there was a subsequent grant which the respondent did not disclose. The ruling revoking the grant was not appealed against hence the question of non-disclosure of material information is spent. The respondent therefore is barred from litigating over the same issues which were canvassed and determined under the revocation application.
 22. The key issue begging consideration is whether the respondent can be excluded from administering the estate. It is not in dispute that the will relevant for purposes of distributing the estate herein is the one made on March 17, 1999. It is also not in dispute that in the said will the applicant and respondent are the only executors who then under section 53 of the *Law Succession Act* are entitled to be issued with the grant jointly. However, the application of section 53 aforesaid is subject to other factors hence it is not automatic that appointed executors must be issued with a grant
 23. Ordinarily, the respondent having been found to have fraudulently obtained the revoked grant, his suitability to continue administering the estate would be questionable. See: in *re Estate of Agwang Wasiro*(supra) where the court disqualified an untrusted administrator from continuing being an administrator.
 24. However, in the circumstances of this case, if the respondent is excluded from the administration of the estate, only the applicant will remain. The applicant admittedly is a permanent resident of Canada. Will he efficiently administer the estate while domiciled in Canada? In my view, he will not manage the estate effectively while based in Canada. For that reason and in the best interest of justice, I will find that the participation of the respondent in the administration of the estate is inevitable as he is a resident in Kenya.
 25. Regarding the second ground on failure of the respondent to account for the estate, the respondent explained the effort made in accounting for the estate. The applicant did not file any rejoinder to the explanation in the affidavit sworn in support of the cross-application to petition. I will only assume that he is comfortable with the explanation.
 26. Taking into consideration the circumstances surrounding this case and the duration it has taken to conclude this matter and in exercise of this court's discretion under section 47 of the *Law Of Succession Act* and rule 73 of the *Probate And Administration Rules*, I am persuaded to issue a grant of probate of written will jointly to the respondent and applicant who are co-executors. In the interest of time, the two shall apply for confirmation of the grant within 30 days from the date of delivery of this ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MAY 2023

J.N. ONYIEGO

JUDGE

