



REPUBLIC OF KENYA



**In re Estate of Ismail Osman Adan (Deceased) (Succession Cause  
121 of 1991) [2023] KEHC 23602 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23602 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**SUCCESSION CAUSE 121 OF 1991**

**G MUTAI, J**

**OCTOBER 17, 2023**

**IN THE MATTER OF THE ESTATE OF ISMAIL OSMAN ADAM (DECEASED)**

**BETWEEN**

**MOHAMED HUSSEIN ISMAIL ..... ADMINISTRATOR**

**AND**

**NURBANU ESMAIL OSMAN ALIAS NOORBHANU  
ABDULRAZAK ..... ADMINISTRATOR**

**RULING**

1. The late Ismail Osman Adam, the deceased herein, died testate on 25<sup>th</sup> March 1991. He left a will made on 28<sup>th</sup> January 1987, bequeathing his only property, Title No. Mombasa/Block XVII/66, on which a block of flats is erected to his two sons, Abdulkader Ismail Osman and Mohamed Hussein Ismail Osman, in equal shares. He appointed Abdulkader Ismail Osman as the executor of the said will.
2. The executor of the will petitioned the court for a grant of probate of the will, which was issued on 7<sup>th</sup> November 1991. The same was subsequently confirmed on 14<sup>th</sup> September 1992.
3. The applicant herein filed Succession Cause No.50 of 2001 before the Kadhi's Court Mombasa, protesting her exclusion as a beneficiary under the will. In the said cause, she alleged that the will was contrary to Islamic sharia law. The proceedings were, however, stayed by this court. On 11<sup>th</sup> March 2005, the applicant herein filed summons for revocation of grant under Sections 26 and 76 (a) and (c) of the *Law of Succession Act* and concomitantly withdrew her petition in the Kadhi's Court. The summons for revocation was heard by way of viva voce evidence before Lady Justice M. Odero, who, on 30<sup>th</sup> July 2009, delivered her judgment dismissing the same.
4. Being dissatisfied with the said judgment the applicant filed Civil Appeal No .285 of 2009. In its judgment, the Court of Appeal allowed the appeal and remitted the matter to the High Court for rehearing before a judge other than Odero, J.



5. The matter was then heard by Lady Justice M. Thande. In her ruling of 12<sup>th</sup> May 2017, she identified three issues as coming for determination; whether the proceedings to obtain the grant of probate were defective in substance; whether the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant, notwithstanding that the allegation was made in ignorance or inadvertently; and whether the deceased being Muslim could legally bequeath his estate to his sons to the exclusion of all other children.
6. On the first issue, the court relied on Rule 26 of the Probate and Administration Rules and found that the proceedings to obtain the grant of probate were not defective in substance as the respondent followed due process.
7. On the second issue, the court deemed the deceased to have been of sound mind when he made the will.
8. On the third issue, the court found the will to be contrary to Islamic Sharia law, not just for providing for only two of the deceased's children to the exclusion of all other children, but for providing for legal heirs whose share was already stipulated in the Quran.
9. In its final orders, the court revoked the grant of probate of the written will of the deceased, issued to Abdulkader Ismail Osman on 7<sup>th</sup> November 1991 and in lieu thereof issued a grant of letters of administration intestate in respect of the estate of the deceased to Abdulkader Ismail Osman. The deputy registrar was directed to forward this matter to the Hon. Chief Kadhi, for his guidance on the distribution of the estate of the deceased in accordance with Islamic sharia law.
10. The Hon.Chief Kadhi, in his opinion dated 29<sup>th</sup> May 2017, stated that the deceased had seven sons and three daughters. He opined that each son is entitled to an 11.76% share, while each daughter is entitled to a 5.88% share of the deceased's estate. That the share of any beneficiary who died and was survived by his /her descendants would be inherited by his/her dependants. On 20<sup>th</sup> June 2017, Lady Justice Thande ordered that the estate of the deceased Ismail Osman Adam being 1/6 of MSA/Block XV11/66 be distributed as per the advice of the Hon.Chief Kadhi. She also ordered that the Land Registrar cancel the title of the said suit property and issue a new title reflecting the said distribution.
11. The applicant herein filed a chamber summons application dated 25<sup>th</sup> August 2022 seeking leave to institute contempt proceedings against the 1<sup>st</sup> administrator for violation/breach of court orders issued on 20<sup>th</sup> June 2017 by Hon. Lady Justice M. Thande and order to enjoin the registrar of land Mombasa to these proceedings. This court, in its ruling of 29<sup>th</sup> March 2023, dismissed the said application and directed the two administrators to take steps to complete the distribution of the estate of the deceased person to the beneficiaries within six months of the date of the ruling in accordance with the order of 20<sup>th</sup> June 2017 and to file a full and accurate statement of account of the completed administration.
12. On the 24<sup>th</sup> May 2023, Mr. Yose counsel for the 2<sup>nd</sup> administrator, informed the court that they had met and reached a stalemate. The court then ordered that the two administrators, together with their counsels, appear in open court on 5<sup>th</sup> June 2023.
13. On 5<sup>th</sup> June 2023, through the virtual court Mr. Yose, learned counsel for the 2<sup>nd</sup> administrator, submitted that his client has sentimental attachment with the suit property and did not wish to have the same sold. He proposed that the title be cancelled, and his client's name be included. He also submitted that the only surviving beneficiaries of the deceased were three.
14. On the other hand, Ms Iman Said, learned counsel for the 1<sup>st</sup> administrator submitted that the surviving beneficiaries were five in number. Four have children, while one didn't but had a wife. She proposed that the applicant be allowed to buy the property within 30 days in accordance with the current market



value, failing which she would be bought out. Counsel further submitted that the value of the property is Kes.6,416,666.07. The applicant's share is 5.88%, which would amount to Kes.377,299.99.

15. The court then directed the parties to file affidavits giving factual background of the matter, identities of the other beneficiaries and proposed method of resolution of the matter.
16. The applicant filed a replying affidavit sworn on 16<sup>th</sup> June, 2023. She stated that the same was in respect of her having the suit property registered in her name as her father, the deceased herein had several properties that he intended to be shared among his children, namely, Mlango Wa Papa (Mombasa Old Town), Swahili House, Kibokoni, Mombasa Old Town Apartment Block, Majengo Sokoni House and Mombasa Majengo Stadium Property. Her three brothers Abdulsatar Ismail, Abdulkader Ismail (Deceased) and the respondent had all her father's property registered in their names. Despite the order of the court that the suit property be shared among all beneficiaries, she was the only one without a property in her name. As such it was only fair and just that the suit property be registered in her names.
17. She stated that the estate was survived by five beneficiaries, to wit, Kulsum Ismail Osman, Abdulsatar Ismail Osman, Mohamed Hussein Ismail Osman, Suleiman Ismail Osman and herself.
18. She further stated that she had a sentimental attachment to the suit property and urged the court to allocate the same to her and order it to be registered in her name.
19. On the other hand, the respondent filed a replying affidavit sworn on 23<sup>rd</sup> June 2023 vide which he stated that distribution of the estate is yet to be concluded as the applicant keeps moving the court with application after application.
20. He further stated that the orders of 20<sup>th</sup> June 2017 did not impliedly, expressly or specifically order the inclusion of the name of the respondent in the title of the suit property. That inclusion of her name in the title would not amount to the finalization of the distribution of the estate.
21. He stated that the estate was survived by 10 beneficiaries of which 4 are deceased. None of the beneficiaries of the deceased beneficiaries has petitioned for appointment of personal representatives and it would be impossible to effect changes in a document without personal representatives of the deceased beneficiaries.
22. He further stated that the estate has no proceeds and no beneficiary has profited from the same. He urged that the applicant be given priority to buy out the rest of the beneficiaries and, in the alternative, she be compensated for her share of the estate.
23. On 11<sup>th</sup> July 2023, when the matter came for hearing before me, Mr. Yose, counsel for the 2<sup>nd</sup> administrator/applicant, submitted that they had tried to resolve the matter, but their efforts were futile.
24. I have considered the affidavits filed by the parties as well as rival submissions made by the advocates. Clearly, the two siblings have no love lost between them. It would appear to me that the distribution of the estate won't be completed.
25. The applicant has not tendered any evidence that the properties alleged to belong to the estate but registered in the names of two other beneficiaries belonged to the deceased herein.
26. It is my view that the opinion of Chief Kadhi was very clear, as were the orders that this Court issued on 20<sup>th</sup> June 2017. The said orders have not been appealed against or reviewed. They are therefore still in force.



27. Litigation must come to finality as was stated in the case of *Jasbir Singh Rai & 3 others versus Tarlochan Singh Rai & 4 others* [2007] eKLR where Bosire JA stated: -

“This application appears to challenge the doctrine of finality. This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down. It is a doctrine or principle based on public interest. As I stated earlier, there are instances where the public interest principles are in conflict, and the courts must balance one aspect against another and decide which one supersedes the other, of course, depending on the facts and circumstances of each case. The conflict here is that the applicants feel they were not given a fair hearing by an impartial Court. The principle of finality requires that litigation should come to an end. On the basis of the existing rules of practice, the applicants were heard by this Court and judgment was pronounced.”

28. Although the applicant has proposed that her name be included in the title of Title No. Mombasa/Block XVII/66, I do not see how that would be helpful. The relationship between the parties is bad. If that were done, the applicant and the respondent would be locked up in a lifelong, miserable co-ownership of the property. In any case, the deceased's share in the said property is a sixth. If the names of each of his ten beneficiaries were added, the description of the proprietors of the property would be too lengthy.

29. It is my view that the most important task facing the administrators is completing the distribution of the estate of the deceased. Given the relationship between the parties herein, that might not be possible soon. This Court, being cognizant of the realities of this matter, ought to issue orders that bring this unfortunate contestation between siblings to a close.

30. In the circumstances, the orders that commend themselves to me are as follows: -

1. I order that the deceased's estate, that is, the 1/6 share in Title No. Mombasa/Block XVII/66, be sold. The applicant shall have the first right to buy the same within 30 days of the date of this ruling. When calculating the purchase price, her share, as determined by the Chief Kadhi shall be considered;
2. In the event that she is unable or unwilling to buy out her co-beneficiaries, the respondent and or other beneficiaries shall have the right to buy out the applicant's share at the best possible open market value, within 30 days of the date the applicant was deemed as unable or unwilling to exercise her right to purchase the same; and
3. If the applicant and the respondent cannot exercise their respective rights under orders 1 and 2 above, then Title No. Mombasa/Block XVII/66 shall be sold at the best possible open market value, and the proceeds therefrom distributed to the beneficiaries of the estate of the deceased in accordance with the advice of the Chief Kadhi dated 29<sup>th</sup> May 2017.

31. Given the nature of this matter I make no orders as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS**

**GREGORY MUTAI**

**JUDGE**



In the presence of:-

Mr. Yose for the Applicant;

Ms. Iman Said holding brief Mr. Khalid Salim for the Respondent; and

Mr. Arthur Ranyondo – Court Assistant

