



REPUBLIC OF KENYA



In re Estate of Saifudean Moamedali Noorbhai (Deceased) (Succession Cause 279 of 2013) [2024] KEHC 14838 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 279 OF 2013
G MUTAI, J
NOVEMBER 19, 2024
IN THE MATTER OF THE ESTATE OF SAIFUDEAN
MOAMEDALI NOORBHAI (DECEASED)**

BETWEEN

**HAMIDA ALIHUSSEIN 1ST APPLICANT
NAJMUDDIN HASSANALI MOHAMEDALI 2ND APPLICANT
MOIZ NOORBAHAI 3RD APPLICANT
ZEHRABAI TAHERIALI 4TH APPLICANT**

AND

KHURSHEE FAROOQ RESPONDENT

AND

OMAR ABEID KURBY INTERESTED PARTY

RULING

1. Before me is a Summons dated 18th April 2024. Vide the said summons, the Administrators/Applicants seek the following orders against the Respondent:
 - a. Spent;
 - b. That the court order the Respondent as an Administrator to sign the transfer for property known as Title No. Mombasa /Block XVI/203 in favour of the Interested Party;
 - c. That in the alternative, the court do issue an order to the effect that the Deputy Registrar to effect the transmission of the property known as Mombasa/Block XVI/203 from the Administrators to the Interested Party;



- d. That the costs of this application be costs in the cause.
2. The application is supported by the affidavit of Ms Hamida Alihussein sworn on 18th April 2024, in which she deposed that she is one of the Administrators of the estate of Safudean Mohamedali Noorbhai (deceased) and that she was swearing the affidavit on her behalf, as well as on behalf of Najmuddin Hassanali Mohamedali, Moiz Noorbhai and Zehrabai Taheriali. She said they wished to transfer the property to the Interested Party. The Respondent had refused to sign a consent that would enable that to be done so that each of the ten co-owners could share Kes 10,000,000, which the Interested Party had agreed to pay as consideration. She deposed that the Respondent had refused to sign without providing a reason.
 3. The deponent of the said affidavit annexed various documents, including a copy of the certificate of lease issued on 23rd July 2014, which showed that Title No. Mombasa/Block XVI/203, measuring 0.1492 acres, was owned by Gulamhussein Mohamedali Noorbhai and nine others but was leased to Omar Abeid Kurby, the Interested Party herein and also Form LRA 65 (the surrender of lease).
 4. It is evident from the surrender of lease form that Hamida Alihussein, Najmuddin Hassanali Mohamedali, Moiz Noorbhai and Zehrabai Taheriali were administrators of different estates which together co-owned the suit premises.
 5. Although a Petition for the Grant of Probate of the Written Will of the deceased in this cause was filed, no full grant has been issued. All there is in the court file is a limited grant ad litem under section 54 and the 5th Schedule of the *Law of Succession Act*, which was for the purposes of collecting and getting in and receiving the estate and for its preservation until further representation was granted.
 6. The Respondent filed Grounds of Opposition dated 25th July 2024, vide which the Applicant's capacity to file the Application was denied. The Respondent denied that this court has jurisdiction to hear and determine the matter related to interests in and title to land, which is the sole prerogative of the Environment and Land Court. Further, it was urged that the respondent is a stranger to the estate of Saifudean Mohamedali Noorbhai (deceased) and isn't a personal representative nor a beneficiary of the same. She contended that the application was a gross abuse of the process of court and that it would be manifestly contrary to the interest of justice and fairness if the application were upheld.
 7. The application was canvassed by way of written submissions.
 8. The submissions of the applicant are dated 20th August 2024. The Applicants' counsel identified the sole issue coming for determination as being whether the orders sought ought to be issued. Mr Mkan, learned counsel for the applicants, submitted that the ten owners of the suit property are all deceased and that the Applicants and the Respondent were administrators of their estates. He urged that the Respondent needed to sign the transfer and that his refusal to do so was without justification.
 9. The submissions of the Respondent are dated 28th August 2024. Mr Idris Ahmed, learned counsel for the Respondent, submitted that this Court lacked jurisdiction as the matter in dispute was one regarding the right to land.
 10. He also urged that the Probate and Administration Court could not determine disputes between an estate of a deceased person and third parties. Reliance was placed on the decisions of the Courts in *re Estate of Kimani Kinuthia (deceased)* [2008]eKLR, *re Estate of Henry Kithia Mwitari (deceased)* [2021]eKLR and *re Estate of David Kalasia Lwangu (deceased)* [2019]eKLR.
 11. I have considered the application, the Grounds of Opposition and the parties' submissions.



12. I note that the Respondent is not a beneficiary of this estate, nor is she a personal representative of it; instead, she is the Administrator of the estate of Esmail Mohamed Noorbhai, having been issued a grant on 29th September 1980.
13. By its nature, the dispute between the parties isn't a succession dispute since the respondent has no claim to the deceased's estate, nor does Hamida have a claim to the estate of Esmail Mohamedali Noorbhai (deceased). The dispute is about the disposition of a property co-owned by 10 parties and whether a party or parties could refuse to execute a document of transfer to the Interested Party.
14. That being the case, this court does not have jurisdiction to hear and determine it. The jurisdiction lies with the Environment and Land Court. This is so because Article 162(2) of *the Constitution* of Kenya provides that:-
- “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.”
15. *The Constitution* then states at Article 165(4) that:-
- “(5) The High Court shall not have jurisdiction in respect of matters-
- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”
16. The importance of jurisdiction cannot be gainsaid. If this court has no jurisdiction it cannot take any further steps. To do so would be futile. In the locus classicus case of *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA stated:-
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
17. Further what the Applicants seek to resolve is a dispute between the estate of the deceased person herein a third party to the estate. I agree with the counsel for the Respondent that this cannot be done by the Probate and Administration Court.
18. Even if this court had jurisdiction, it is clear to me that the 1st Applicant does not have a confirmed grant that would enable her to transfer the estate's immovable property. Her signature in LRA 65



would be of no effect as only an administrator in possession of a confirmed grant can purport to transfer an interest in land. In *Otieno v Ougo* [1986-1989] EALR 468, the Court rendered itself thus:-

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

19. In the circumstance, I find and hold that the application dated 18th April 2024 has no merit. The same is dismissed.
20. As this is a succession matter, each party shall bear his or her costs.
21. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:

Mr Ahmed, for the Respondent;

Mr Mkan, for the Administrator/Applicant; and

Arthur - Court Assistant.

