



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 666 OF 2011

IN THE MATTER OF THE ESTATE OF JUMAA ABDALLA MUNYU (DECEASED)

AMINA ALLI.....PETITIONER/APPLICANT

VERSUS

HALIMA JUMA ABDALLA..... PROTESTOR

RULING

1. The protestor herein filed an affidavit of protest dated 5/10/2020 against confirmation of grant under **Rule 40(6)** of the **Probate and Administration Rules**. The specific facts as contained in the affidavit in protest are that the petitioner/applicant fraudulently sought for grant of letters of administration on **12th July, 2012** by failing to inform the Protestor and other beneficiaries to the deceased's estate of an existing will as well as court process initiated; that the petitioner concealed from the court the fact that the succession of the estate herein is already instituted at the Kadhis court in Nairobi and is pending determination; that the last will and testament by the deceased is opposed as the same is contrary to the dictates of Islamic law of inheritance as it willed away more than 1/3 of the estate yet the consent of beneficiaries was not procured and further that the will gave equal shares to the legitimate beneficiaries just like the petitioner and another who are just cousins contrary to Sharia laws; that the petitioner did not file summons for confirmation of grant within the stipulated period wherein the grant was revoked for want of prosecution; that it is in the interest of justice and fairness that the matter herein be transferred to the Kadhi court as adjudicating this matter offends the rule of sub judice.

2. In opposition to the protest, the petitioner filed a replying affidavit filed on **18th December, 2020** and deponed inter alia; that the protest is misplaced, baseless and bad in law and ought to be struck out; that the administration of the deceased's estate has been made difficult due to lack of co-operation by the survivors of the deceased; that the deceased duly executed a will and exercised his testamentary freedom to dispose his property as provided for under section 5 of the Law of Succession Act and hence Islamic law is not applicable herein; that this court has jurisdiction to propound the will of the deceased as it is superior to the Kadhi courts and that the proceedings herein were instituted earlier than those at the Kadhi court which should be stayed; that testamentary freedom is not limited to any religious affiliation and that no morality has been raised to challenge the will and hence the estate should be distributed according to the said will dated 12/12/1992.

3. The protestor in response to the replying affidavit of the petitioner deposed a further affidavit dated **30th March, 2021** that the co-administrator to the will has distanced himself from being a co-executor of the will and actions of the protestor and that 2/3 of the property of the deceased must be devolved in accordance to the Qur'an and contended that the protestor being a niece of the deceased is not a legible heir. The protestor confirmed having filed the case at the Kadhis court since the cause herein had already been dismissed for want of prosecution and thus it was improper for the petitioner to come and seek to reinstate the cause despite knowledge of the existence of the case at the Kadhi court. It was finally averred that the testamentary and intestate succession of a person who died as a Muslim is to be guided by Shariah law.

4. The protest was canvassed by way of written submissions. The protestor's submissions are dated 30/3/2021 while those of the Petitioners are undated and filed on 9/7/2021.

5. In addition to what she stated in her affidavits, she submitted that the petitioner did not approach this court with clean hands as she did not disclose the fact of the existence of a similar cause filed at the Kadhi court in Nairobi which has led this court to reinstate the dismissed cause and issue a fresh grant in error. It was also submitted that the proper court to handle the matter is the Kadhi court pursuant to article 170(5) of the constitution as well as section 5 of the Kadhis Court Act and hence the protestor had the right to choose which forum to file the cause. It was also submitted that irrespective of the forum chosen, the substantive law applicable to the estate is Islamic law. Finally, it was submitted that the will herein is not valid in that the deceased being a Muslim was bound to ensure that he could only bequeath his property in a manner that he does not leave his heirs destitute. Reliance was placed in the case of Saifudean Mohamedali Vs Shenaz Abdulhussein Adanji [2011] eKlr. Learned counsel for the protestor pointed out that the matter already filed before the Kadhi court should be allowed to continue but however, should the court decide to hear the matter then it should hold that the will dated 12/12/1992 is invalid and that the deceased be deemed to have died intestate.

6. Learned counsel for the petitioners raised four issues for determination namely; whether the alleged forgery of signatures on form 38 is proved; whether the applicant fraudulently obtained the grant; whether this court has jurisdiction to hear the matter; whether the validity of the will has been challenged. On the first issue, it was submitted that the protestor did not prove the alleged forgery beyond the threshold of proof as it turned out that the issue was to do with the protestor's lack of cooperation thereby making it hard to set down the matter for confirmation. On the second issue, it was submitted that the deceased was of sound mind and free to make the testamentary disposition of his property and that the initial grant was not objected by the protestor at all and which was later reissued upon dismissal of the cause and that this court has the jurisdiction to determine the matter. It was the submission of counsel that the protestor has failed to prove the allegations against the petitioners since the desire to have the will interpreted in accordance with Muslim law cannot be a ground for revocation of grant as this court could still interpret the same in such law as provided by the Law of Succession Act. The petitioners urged the court to dismiss the application with costs.

7. I have considered the rival affidavits and the submissions filed. It is not in dispute that the Petitioners herein filed a petition for grant of probate of written will for the estate of Jumaa Abdallah Munyu (Deceased) dated **8th August, 2011** where they listed the beneficiaries as follows:

- a. Mariamu Jumaa.
- b. Halima Jumaa.
- c. Mwanaisha Jumaa.
- d. Ibrahim Jumaa.
- e. Fatuma Jumaa.
- f. Bahati Jumaa.
- g. Abdulla Jumaa.

They also listed the assets of the deceased as follows:

- a. Machakos Municipality Plot No.909/627(Machakos Municipality Block 11/1212).**
- b. Machakos Municipality Plot No.909/626 (Machakos Municipality Block 11/).**
- c. Kathekani Settlement Scheme Plot No. 2221.**

It is also not in dispute that the petitioners failed to file summons for confirmation of grant within the stipulated one-year period leading to the dismissal of the Petitioner's Petition for want of prosecution on **28th June, 2017**. It is also not in dispute that the said orders of dismissal were later lifted and/or vacated when the 2nd petitioner herein filed an application for reinstatement. It is also not in dispute that the protestor filed another cause in August 2020 before the Kadhi court in Nairobi vide Succession Cause No. 49 of 2020 which is now pending determination. It is also not in dispute that the deceased herein had been a Muslim and had professed and embraced Muslim religion and that he had made a will prior to his demise regarding the manner in which his estate was to be shared between the beneficiaries. It is also not in dispute that the 1st petitioner has expressed his wish vide a letter dated 18/12/2020 through his lawyers that he had already voluntarily and orally renounced his executorship to the estate of the deceased as the beneficiaries had come of age but however the said sentiments are yet to be formally entered on the record so as to form part of the proceedings. This being the position, I find the following issues necessary for determination namely;

- a. Whether the High Court has jurisdiction to hear and determine the matter or whether the Kadhis court has the exclusive jurisdiction over the matter herein.**
- b. Whether the grant issued to the petitioners should be revoked.**

8. As regards the first issue, it was the contention of the protestor that since the deceased died a Muslim his estate should be handled by the Kadhi court where the cause has already been filed and that this court should be guided by the principle that where the constitution or a statute prescribes a procedure for the resolution of a particular dispute then such procedure should be strictly adhered to. Indeed, such a principle is good law and from the outset this court must look at the relevant provisions of the law so as to establish whether or not it has jurisdiction to entertain this matter. The jurisdiction of the Kadhis court is provided for in Article 170 of the constitution which establishes the court as one of the subordinate courts under part 3 of Chapter 10 of the constitution as follows:

“170. (1) There shall be a Chief Kadhi and such number, being not fewer than three, of other Kadhis as may be prescribed under an Act of parliament.

(2) A person shall be qualified to be appointed to hold or act in the office of Kadhi unless-

- a) professes the Muslim religion; and

b) possesses such knowledge of the Muslim law applicable to any of the Muslims as qualifies the person in the opinion of the Judicial Service Commission to hold a Kadhi's court.

(3) Parliament shall establish Kadhi's courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).

(4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within Kenya.

(5) 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 in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts."

9. From the above provisions, it is clear that the jurisdiction of the Kadhi's court is limited to questions relating to personal status, marriage, divorce or inheritance in proceedings where all the parties profess Muslim religion and submit to the jurisdiction of the court. The same constitution of Kenya 2010 is a progressive one in which the Bill of Rights is deeply entrenched in that it recognizes the right of a Muslim to exercise his/her right to choose the forum of adjudication through the High Court. The national values and principles of governance under Article 10 of the constitution are available to any Kenyan citizen to exercise. All Muslims have a choice to make in the exercise of their freedom to submit to the jurisdiction of the Kadhi's court and those wishing to approach the High Court can do so without any hindrance.

10. As the protestor has contested the jurisdiction of this court to hear and determine this matter, there is need to have a look at the constitutional provisions regarding the jurisdiction of the High Court. Article 165(3) of the constitution gives the High Court unlimited jurisdiction on civil matters as follows:

"165(3) Subject to clause (5), the High Court shall have-

a. Unlimited original jurisdiction in criminal and civil matters;

"165(5) The High Court shall 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)."

Under section 47 of the Law of Succession Act the High Court has jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient provided that the High Court may for the purposes of that section be represented by Resident Magistrates appointed by the Chief Justice. The Kadhi's Court's jurisdiction over the estates of deceased Muslims is provided under section 48(2) of the Law of Succession Act as follows:

"For the avoidance of doubt it is hereby declared that the Kadhi's courts shall continue to have and exercise jurisdiction in relation to estates of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates."

11. Other than the Law of Succession Act, the Kadhi's court also has jurisdiction under section 5 of the Kadhi's Court Act to determine questions of Muslim law where parties profess Muslim religion as follows:

"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 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."

12. Being guided by the above provisions, I have no doubt that a Muslim who professes Muslim religion has the option of submitting to the Kadhi's court or presenting his/her dispute before the High Court. In the present case, the petitioners have opted to have the matter determined by this court while the protestor wants the dispute resolved before the Kadhi's court. It is noted that the cause herein had been lodged much earlier than that in the Kadhi's court and that the petitioners herein are left with filing summons for confirmation of grant so that the estate can be distributed. Even though the parties profess Muslim religion, there will be no prejudice since the law applicable will be Muslim law pursuant to the guidelines provided for in section 2(3) and 48(2) of the Law of Succession Act when the parties will be canvassing the issue of the confirmation and distribution of the estate of the deceased. I am guided by the decision of the Court of Appeal sitting in Mombasa in the case of the estate of **Ismail Osman Adam (Deceased) Noorbanu Abdul Razak Vs Abdulkader Ismail Osman Mombasa Civil Appeal No. 285 of 2009** delivered on 5/12/2013 upheld the choice of Muslim parties to submit to the Kadhi's court or to file the succession proceedings in the High Court when it held thus:

"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 dispute. Section 47 makes it clear that the High Court has jurisdiction to entertain any application and determine any dispute under the 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 Muslim. However, if the High Court assumes jurisdiction to the estate of the 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 Law of Succession Act. 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 the Muslim law. In *Saifudean Mohammedali Noorbhai Vs Shehnaz Abdehussein Adanji, Mombasa Civil Appeal No. 142 of 2005 (unreported)* this court said in part:

Kenyan courts have held in past judgements 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) of the Law of Succession Act, 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."

13. It is noted that the petitioners in filing the matter before this court had opted not to submit themselves to the Kadhi's court and their choice of court should not be faulted since the High Court has jurisdiction to entertain the dispute. The protestor's counsel's suggestion that the matter now pending at the Kadhi's court should be allowed to proceed is not acceptable in view of the foregoing observations. The matter pending before the Kadhi's court must be stayed in order to allow this matter be determined.

14. In light of the foregoing observations I find that the High Court has jurisdiction to entertain the matter filed herein by the petitioners.

15. As regards the second issue, it is noted that the protestor seeks to have the grant issued to the petitioners revoked. 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."

16. The Protestor strongly took the position that the proceedings leading to the issuance of the grant were defective in substance as she claimed that the petitioners concealed from the court of the fact that the succession of the estate herein had already been instituted at the Kadhis Court and is pending determination. Similarly, the petitioners are blamed for failing to take immediate steps to ensure confirmation of the grants and that the delay has led to the expiration of a leasehold term in the property Machakos Town 11/121. The protestor maintains that the terms of the will made by the deceased are contrary to the dictates of Islamic Law of inheritance. Finally, it was contended that the petitioners failed to secure the consent of the beneficiaries to the making of the grant.

17. The above provisions of the law to be fulfilled require that a Petitioner for grant of letters of administration will be deemed *prima facie* to have obtained a fraudulent grant, with respect to the estate if he or she fails to issue notice to any of the dependents or beneficiaries to the estate of the deceased, including obtaining their necessary consents as mandatorily provided in the Succession Act. Equally the grant of letters turns out to be defective if the evidence shows that it was issued in error, misrepresentation of facts, concealment or nondisclosure of material evidence relevant and admissible for the making of the grant of representation. In one of the leading judgments of the court in this area of law in *Matheka and Another V Matheka (2005) EA 251* it is clearly stated as follows:

"A grant may be revoked either by application or by an interested party or on the courts own motion. Even when revocation is by the court upon its own of motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegations of facts essential. I n point of Law or that the person named has failed to apply for Confirmation or to proceed diligently with the administration of the estate. The grant may also be revoked if it can be shown to the court that the person to which the grant has been issued has

failed to produce to the court such inventory or account of administration as may be acquired”

18. I have perused the consent to making of a grant filed by the petitioners (Form r.26(2) and note that seven beneficiaries duly signed the said consent including the protestor herein. A similar consent was signed by the beneficiaries in the succession cause No. 49 of 2020 at the Kadhi's court in Nairobi. Even though I am not a handwriting expert, I find the signatures to be somehow similar. It is instructive that the parties herein did not opt for oral evidence where witnesses are cross examined at length with a view to testing their veracities. The protestor in her affidavit indicates that she and the 2nd petitioner had litigated together before the Kadhi's court wherein some conservatory orders were made regarding the assets of the deceased and from those averments there is evidence that the protestor had been aware of this succession matter as she confirmed that the 2nd petitioner had been appointed by the deceased as a co-executor of the deceased's will. The protestor's grouse that the 2nd petitioner is out to dupe the beneficiaries to sign documents is not based on a genuine worry that the 2nd petitioner is out to deprive them of the properties since the said petitioner requires the consent of the beneficiaries in order to file summons for confirmation of grant. The beneficiaries will have the opportunity to decline to grant consent or file affidavits of protests to the proposed distribution. The protestor should allow the process to continue so that all the issues in controversy regarding the estate of the deceased are thrashed for the benefit of all the beneficiaries. The Protestor's objection to the will allegedly made by the deceased is not a ground to warrant revocation of grant as the protestor is at liberty to seek to call upon the petitioners to propound the said will and the parties will have the opportunity to probe the said will. The suggestion by counsel for the protestor that the impugned will be rejected and the deceased be deemed to have died intestate must be rejected for the reason that the said will is yet to be tested by having the executors propound the same and until the same is done, the court cannot at this stage impugn the will without evidence being tendered. I am not satisfied that the Protestor has furnished sufficient reasons warranting revocation of the grant issued to the Petitioners. In any case revoking the grant will lead to delay as the beneficiaries need to have the shares identified and the estate distributed without delay.

19. In light of the foregoing observations, I find the protestor's protest dated 5/10/2020 lacks merit. The same is dismissed with no order as to costs. The following orders are hereby made:

- a. The Petitioners are directed to file and serve summons for confirmation of grant upon all the beneficiaries within thirty days from the date hereof.**
- b. The Protestor or any of the beneficiaries be at liberty to seek to have the Petitioners propound the will made by the deceased before confirmation of grant.**
- c. An order of status quo shall be maintained regrading all the assets of the deceased as disclosed in the petition herein pending confirmation of grant.**
- d. Succession Cause No. 49 of 2020 lodged at the Kadhi's court shall be stayed pending determination of the matter herein.**

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 13TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE