



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

SUCCESSION CAUSE NO. 236 of 1990

ESTATE OF BAKARI OMAR (DECEASED)

SALIM BAKARI HAMID.....APPLICANT

VERSUS

KHAMIS BAKARI OMARI.....RESPONDENT

RULING

1. In the application before me dated 25.10.19 SalimBakari,the Applicant seeks the following orders:

1. Stay of proceedings in Kadhi Succession Case No. 167 of 2017.
2. Transfer of Kadhi Succession Case No. 167 of 2017 to this Court.
3. Setting aside of the order of 31.7.17 and all consequential orders in Kadhi Succession Case No. 167 of 2017.
4. Revocation of grant of letters of administration issued to KhamisiBakariOmari, the Respondent on 31.7.17 in Kadhi Succession Case No. 167 of 2017.
5. Costs.

2. The grounds upon which the Applicant has premised the Application, are that Bakari Omar, the deceased whose estate is the subject of the proceedings herein died on 7.9.85 in Mavueni, Kilifi. A grant of letters of administration in respect of his estate was issued to the Applicant and his brother, Omar Bakari on 10.2.92 and confirmed on 21.9.92. Omar Bakari died on 31.12.06. In December 2018, as the Applicant was at the Land Registry in Kilifi, pursuing the registration of Plot No. Kilifi/Vipingo/176 (the Plot) which is part of the estate, he discovered that the Land Registrar had been served with a vesting order in respect of the Plot. The vesting order, had been issued in favour of the Respondent, as the sole heir of the deceased in Mombasa Kadhi Succession Cause No. 167 of 2017. The Applicant accuses the Respondent of obtaining the vesting order fraudulently by making a false statement that the Respondent is the sole heir of the deceased, yet he is only one of 19 heirs, and that the estate only comprised the Plot. The Respondent did not disclose to the Kadhi's Court that the matter of the estate of the deceased had been dealt with by this Court in this cause. The Respondent did not also inform the other heirs that he had moved to the Kadhi's Court. In his petition in the Kadhi's Court, the Respondent annexed the death certificate of one KahindiYaa and not that of the deceased.

3. The Applicant further contends that the vesting order is in conflict with the grant obtained herein and further that the Kadhi's Court had no jurisdiction to entertain a matter that had been determined by this Court. If the said orders are not set aside the heirs of the deceased are bound to lose their entitlement in the Plot.

4. In his grounds of opposition dated 2.3.20, the Respondent contends that the Application is frivolous and an abuse of the Court process as concluded proceedings cannot be stayed. The orders sought can only be granted in an appeal or review. The Respondent in his replying affidavit of even date denied the allegations by the Applicant. He averred that at the time the Grant was obtained and confirmed, he was an adult, yet he was not involved in the process, nor was his consent obtained. As such, the Grant was obtained fraudulently. He denied filing the petition in the Kadhi's Court fraudulently as alleged by the Applicant. He further contended that the Kadhi's Court had jurisdiction to deal with the matter. If the Applicant is aggrieved by the decision of the Kadhi's Court, then he ought to have applied for review or appealed the same. The Respondent further contended that the deceased left the Plot to him and he has settled his family thereon and each of his

siblings have their own portions of land. If the orders sought are granted, he and his family will be greatly prejudiced. He urged the Court to dismiss the Application with costs.

5. Directions were taken that parties file written submissions and timelines given. The Respondent did not file submissions as directed by the Court. The Applicant filed submissions which I have duly considered.

6. The Applicant's contention is that the Kadhi's Court lacked jurisdiction to entertain the petition filed by the Respondent in respect of the estate of the deceased, which had been determined by the High Court. It was argued that the beneficiaries of the estate being Muslims, had the option of moving to the Kadhi's Court to deal with the estate, but elected to submit to the jurisdiction of this Court.

7. Parties who profess the Islamic faith have the liberty to submit to the jurisdiction of the Kadhis' Courts or the High Court for the determinations of any issues in respect of a deceased Muslim's estate. In the cited case of Abdisatar Haji Mohamed & another v Omar Ahmed & another [2017] eKLR, the Court of Appeal had this to say of election by parties on the Court to deal with their matter:

Indeed, it is therefore sufficiently clear that the parties in this matter had the liberty to approach the court of their choice between the High Court and the Kadhi's Court for the determination of any rights or dispute over Haji's estate. This is what could have informed the decision of the appellant to petition the High Court in place of the Kadhi's Court. They cannot now turn around and claim that the respondent should have filed the application in the Kadhi's Court.

8. The deceased in the present case, died a Muslim. As such, the beneficiaries of his estate had a choice between this Court and the Kadhi's to determine the matter relating to his estate. They made an election in 1990, to move to this Court and not the Kadhi's Court. It was therefore not open for the Respondent to subsequently move to the Kadhi's Court, 27 years later in 2017. First, because an election on the Court had been made and secondly, because the matter had been heard and determined by this Court.

9. The record shows that indeed the Grant was issued to the Applicant and the late Omar Bakari on 10.2.92 and confirmed on 21.9.92. The affidavit in support of the application for the Grant indicates that the deceased was survived by 19 people. The Court notes that although the Respondent is listed as one of the beneficiaries of the estate of the deceased, there is no indication that his consent was sought and obtained. The remedy available to the Respondent for not being involved in the process, was to file a summons for revocation of grant in this Court under Section 76 of the Law of Succession Act.

10. It is to be noted that our Court system is established by Article 162 of the Constitution, which provides:

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

2. ...

3. ...

4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

11. The Courts established under Article 169 are the subordinate Courts, which include the Kadhis' Courts. As creatures of the Constitution, Kadhis' Courts must take their place in the hierarchy of the Court system, within which they operate. Section 4(3) of the Kadhis' Courts Act provides that each of the Kadhis' Courts shall be a court subordinate to the High Court. All Courts must operate within the hierarchical parameters set out in the Constitution and statute. In Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR, the Supreme Court had this to say of judicial hierarchy:

"Justice is sought and delivered within the set down legal parameters. This Court will not contravene the judicial hierarchy which is at the core of our judicial independence and competence in decision making...The powers of this Court have to be exercised within and in accordance with a specific jurisdiction as provided for in Article 163(3) of the Constitution. One cannot ask the Court to exercise its powers in a carte blanche manner.

12. The matter of the estate of the deceased has been dealt with, and concluded by the High Court in this cause. Consequently, the Kadhi's Court was devoid of the jurisdiction to entertain the same. By assuming jurisdiction over a matter that has been dealt with by a Court superior to it therefore, the Kadhi's Court violated the Constitution by contravening the judicial hierarchy set out therein. By dint of Article 2(4) of the Constitution which provides that any act or omission in contravention of this Constitution is invalid, the proceedings in the Kadhi's Court and the orders emanating therefrom are invalid.

13. The Applicant has prayed that the proceedings in the Kadhi Court matter be stayed. The record shows that the matter was concluded and the impugned order issued. As such, there is nothing to stay.

14. Can Kadhi Succession Case No. 167 of 2017 be transferred to this Court as prayed by the Applicant? The Court has found that the Kadhi's Court had no jurisdiction to deal with that matter. It is a settled principle of law that an order for transfer of a suit from one court to another can only be made if the suit was, in the first instance, brought to a court with the jurisdiction to try it. This principle was well articulated in the Ugandan case of Kagenyi -vs- Musiramo & Another [1968] EA 43 where Sir Udo Udoma C.J stated:

It seems to me that the suit having been instituted in a court without jurisdiction it would be incompetent for this court to have the suit withdrawn therefrom...it is difficult to see how a wrongly constituted suit could be transferred to another court for trial...

15. Similarly, in the case of Abraham MwangiWamigwi v Simon MbiririWanjiku& Another[2012] eKLR, Odunga, J observed:

... a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as "transfer". In other words, courts can only transfer a cause whose existence is recognised by law.

16. Kadhi Succession Case No. 167 of 2017 is a nullity for having been filed in a Court without jurisdiction. The matter is therefore not recognized in law. This being the case, the Applicant's prayer for transfer of that succession cause to this Court, must fail.

17. I now turn to the prayer for revocation of grant issued to the Respondent by the Kadhi's Court. It is trite that the Kadhi's Court unlike the High Court and the Magistrates' Court is not clothed with powers or jurisdiction to issue a grant of representation. A Kadhi's Court will only make a determination as to the estate of a deceased person, the lawful heirs and their entitlement to the estate and issue orders accordingly. As such, no grant of letters of administration was or could have been issued to the Respondent by the Kadhi's Court. Accordingly, the Applicant's prayer for revocation of the grant purportedly issued to the Respondent by the Kadhi's Court, is misplaced.

18. In the result, I am satisfied that the application dated 15.1.18 is merited in part. I hereby allow the Application in the following terms:

- i) The vesting order of 31.7.17 and all consequential orders issued in Kadhi Succession Case No. 167 of 2017 are hereby set aside.
- (ii) This being a family matter, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 10th day of July, 2020

M. THANDE

JUDGE

In the presence of: -

.....for the Applicant

..... for the Respondent

.....Court Assistant