



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO. 11 of 2019

MOHAMED AYUB KHANAPPLICANT

VERSUS

LAND REGISTRAR MOMBASA.....1ST RESPONDENT

LAND REGISTRAR KILIFI.....2ND RESPONDENT

SAIDA MOHAMED SWALEH 1ST INTERESTED PARTY

NASEEM NAZIR KHAN 2ND INTERESTED PARTY

RULING

1. Before me for consideration is an application dated 18.4.19 by the Mohamed Ayub Khan, the Applicant, seeking the following orders:

1. spent.

2. THAT all the properties registered in the joint names of MOHAMED AYUB KHAN and MOHAMED NAZIR KHAN being Land reference 978, 979, 989, 990, 991 Mainland North, Mtwapa and Land reference No. Mombasa/Block '1X/162,163,164 and 112 Tudor being joint tenants and MOHAMED NAZIR KHAN being deceased, the court directs the 1st and 2nd Respondents deletes the names of the deceased tenant from the register and new titles be issued in the names of MOHAMED AYUB KHAN.

3. THAT in the alternative the registration of the property in the joint name of MOHAMED AYUB KHAN and MOHAMED NAZIR KHAN be distributed as per the settlement agreement dated 30th July 2013 and the 1st Respondent be ordered to delete the deceased name in Mombasa/Block '1X/162,163,164 and 172 and issue a title in the Sole names of MOHAMED AYUB KHAN and this (sic) four properties to be excluded from the distribution of the estate of the deceased.

4. THAT upon granting prayer 3 above, the remaining properties being Land references 978, 979, 989, 990, 991 Mainland North Mtwapa be included in the distribution of the estate of the deceased since as per the settlement Agreement they had been already been (sic) distributed to the deceased - MOHAMED NAZIR KHAN but excluding the incomes gotten from the KHAN TRUST contained in para 13.1 of the settlement agreement dated 30th July 2013.

5. THAT the cost of the application be provided for.

2. The grounds upon which the Application is premised as set out therein and in the Applicant's affidavit sworn on 18.4.19 are that the Applicant and Mohamed Nazir Khan, the deceased, are brothers and joint owners of the properties listed in the Application. Following the death of the deceased, a grant of representation was issued to Naseem Nazir Khan, the 4th Respondent. The grant was however subsequently revoked, as the value of the estate of the deceased, exceeded the pecuniary jurisdiction of the Court that had issued the same. The properties herein had been listed as forming part of the estate of the deceased without disclosure that the same were co-owned with the Applicant. It is the Applicant's case that the doctrine of *jus accrescendi* states that joint property should not be available for distribution upon the demise of a joint owner but should become the property of the survivor. The intention of the joint ownership of the properties is contained in the settlement agreement. The Applicant urged the Court to recognise the settlement agreement which provided that Plots Nos. 162,163,164 and 172 and Shimanzi property should be registered in his name.

3. It is noted that other than the 2nd Interested Party, none of the other parties filed any response to the Application.

4. In her Replying affidavit sworn on 13.6.19, the 2nd Interested Party averred that she is the wife of the deceased who died on 16.8.17, and administrator of his estate. She further stated that the Applicant and the deceased co-owned properties including Plots Nos. Mombasa/Block

IX/162; 163; 164 and 172, Subdivisions Nos. 978; 979; 989; 990 and 991, Section III, Mainland North, Mombasa/Block I/393 and a temporary licence over Meru Land situated behind St. Augustine Primary School. These properties were owned by the Applicant and the deceased as proprietors in common in equal shares, as indicated in the exhibited transfers and title deeds. The Settlement Agreement severed the co-ownership of the properties. The 2nd Interested Party further averred that where the transfers and certificates of title do not show the nature of proprietorship, the Court ought to look at the intention of the deceased and the Applicant which in the Settlement Agreement shows was to own the properties as proprietors in common.

5. The 2nd Interested Party went on to state that *vide* the Settlement Agreement, the deceased agreed to transfer to the Applicant, his half share in Plot 162 (the Applicant's residential house, marine craft, boat repair and show room), Plot 172 and Plot 393, Shimanzi. On his part, the Applicant was to transfer to the deceased Plots 978; 979; 989; 990; 991 and Plot 163 (the deceased's matrimonial and family home). The Applicant and the deceased were to transfer to Khan Trust, which was to be formed by the Applicant and the deceased, Plot 164 including rental shops, gym, moorings, water sports (pedal boats and kayaks) but excluding the Applicant's restaurant and the hotel of the deceased. Also to be transferred to the Khan Trust was Meru Land. The said Trust was not created and the properties should be held by the Applicant and the deceased in common in equal shares.

6. The 2nd Interested Party further stated that the principle of survivorship does not apply in this case because the proprietorship is in common. This co-proprietorship was severed and the properties divided between the Applicant and the deceased, in terms of the Settlement Agreement. The Applicant and the deceased are bound by the Settlement Agreement and the Court ought not to rewrite the contract between them. The 2nd Interested Party urged the Court to give effect to the Settlement Agreement. She further averred that the Applicant has been collecting and receiving income from Plot 164 and should tender in Court a true and accurate account for the same for the purposes of succession.

7. The Applicant and both Interested Parties filed their written submissions which I have considered.

8. It is noted that at the time the Application was filed on 24.4.19, no grant of representation had been issued in respect of the estate of the deceased. The grant exhibited by the 2nd Interested Party Court was issued on 7.6.19, more than 1 month after the filing of the Application. As such, the Application is incompetent. The Law of Succession Act provides that only a holder of a grant of representation has the power to represent the estate of a deceased person. Section 82 of the Act provides:

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

9. In the case of Isaya Masira Momanyi v Daniel Omwoyo & another [2017] eKLR, the plaintiff had brought a suit on behalf of the estate of the deceased therein, without first obtaining a grant of representation. Striking out the suit, Mutungi, J stated:

It is trite law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person.

10. Further, the grant issued to the 2nd Interested Party was subsequently revoked by this Court on 5.5.2020. Consequently, there is no legal representative in respect of the estate of the deceased. No party can purport to make any representation, in respect of the estate of the deceased.

11. The orders sought by the Applicant, will affect the estate of the deceased. As matters stand, the estate of the deceased is without legal representation. It is a rule of natural justice that a party will not be condemned unheard. The right to be heard is an aspect of a fair trial guaranteed by Articles 25 and 50 of the Constitution of Kenya, 2010. The legal imperative of hearing a person who is likely to be adversely affected by a decision before the decision is made, cannot be overemphasized. In the case of J M K v M W M & another [2015] eKLR, the Court of Appeal observed as follows:

“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.”

12. Before considering the orders sought, the Court must hear the views of the duly appointed legal representative of the deceased. Anything short of that would be unjust and unfair to the estate of the deceased and also contrary to the principles of natural justice. Without even going into the merits of the Application, it would be irregular, nay illegal, for this Court to make the kind of orders sought, which are tantamount to the distribution of the estate of the deceased.

13. In the premises, this Court finds that the Application dated 18.4.19 is incompetent and the same is hereby struck out. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 17th day of July 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the 1st Respondent**

..... **for the 2nd Respondent**

..... **for the 1st Interested Party**

..... **for the 2nd Interested Party**

..... **Court Assistant**