



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION CAUSE NO. 76 OF 2002**

**IN THE MATTER OF THE ESTATE OF HASSAN ALI (DECEASED)**

**RULING**

1. Hassan Ali, to whose estate this cause relates, died on 17<sup>th</sup> March 1976, according to the certificate of death on record, serial number 512490, dated 15<sup>th</sup> December 1999. Representation to his estate was sought by Mohamed Hassan Ali and Rehema Ali, in their purported capacities as children of the deceased, through a petition, dated 8<sup>th</sup> March 2002, and lodged herein on 11<sup>th</sup> March 2002. In the petition, the deceased was expressed to have had been survived by a widow, Aisha wa Uzile, and five children, being the petitioners herein, Mohamed Hassan and Rehema Hassan, and, Swaleh Hassan, Rukiya Hassan and Amina Hassan. He was also expressed to have been survived by seven grandchildren, whose names are not stated, being children of his three daughters, who had since died, that is to say Saumu Hassan, Fatuma Hassan and Tatu Hassan. He was said to have had died possessed of property known as LR No. 6827/II/MN. Letters of administration intestate were accordingly made to the petitioners, on 18<sup>th</sup> February 2004, and a grant duly issued, on 20<sup>th</sup> February 2004. I shall hereafter refer to the two as the administrators.

2. The filing of the cause herein was apparently prompted by Mohamed Hassan Ali and Rehema Hassan Ali, who had caused a citation to issue out of Mombasa HCSC No. 2 of 1999, addressed to Swaleh Hassan and Rukiya Hassan, both children of the deceased, requiring them to accept or refuse letters of administration. The citation was executed by the Deputy Registrar on 28<sup>th</sup> December 1999. The widow, Aisha wa Uzile, and Amina Hassan Ali, consented to the citors petitioning for representation, in an affidavit lodged in Mombasa HCSC No. 2 of 1999, sworn on a date that is not legible. From the record before me, it would appear that only one of the citees responded to the citation, Swaleh Hassan, through an affidavit that he filed in Mombasa HCSC No. 2 of 1999, sworn on 15<sup>th</sup> February 2000. The salient point made in that affidavit is that he had since applied for and obtained representation to the estate of the deceased in Mombasa HCSC No. 28 of 1992. He opposed a grant being sought by the citors on grounds that the court had already appointed administrators to the same estate, and a fresh cause would amount to duplicity. He said the citors were all along aware of the proceedings in Mombasa HCSC No. 28 of 1992.

3. I have not had the benefit of having sight of the files Mombasa HCSC No. 28 of 1992 and Mombasa HCSC No. 2 of 1999, for perusal, and therefore, I cannot say much on the orders made in them.

4. Anyhow, the citees in Mombasa HCSC No. 2 of 1999, Swaleh Hassan and Rukiya Hassan, filed a summons herein, on 13<sup>th</sup> April 2016, dated 12<sup>th</sup> April 2016, seeking revocation of the grant made on 18<sup>th</sup> February 2004 to Mohamed Hassan and Rehema Hassan Ali. I shall hereafter refer to the two as the applicants. The grounds upon which revocation is sought are stated on the face of the application, and are that the administrators had sworn a false affidavit to the extent that they misstated the date of the deceased's death, and that the administrators and other beneficiaries were unjustly enriching themselves from estate property and the other beneficiaries stood to suffer disinheritance. The applicants seek that, upon revocation of the said grant, a fresh one issues to Swaleh Hassan and Mohamed Hassan Ali. The affidavit in support was sworn by Swaleh Hassan, 12<sup>th</sup> April 2016. He accuses the administrators on relying on a forged certificate of death, to the extent that the certificate of death that he allegedly holds indicates that the deceased died on 28<sup>th</sup> March 1976, and not 17<sup>th</sup> March 1976, as indicated in the certificate presented in court by the administrators. However, even though he alleges to have attached a copy of the certificate of death which talks of 28<sup>th</sup> March 1976, no such copy is annexed to his affidavit of 12<sup>th</sup> April 2016, nor that of 15<sup>th</sup> February 2000 filed in Mombasa HCSC No. 2 of 1999. He accuses the administrators of having subdivided LR No. 6827/II/MN, and totally disinheriting them. He concedes that the deceased was survived by the individuals listed in the administrators' petition filed herein.

5. The applicants followed up their summons for revocation of grant with another application, a Motion, dated 23<sup>rd</sup> May 2016, in which the administrators have been named as respondents. The Motion seeks conservatory orders with respect to LR No. 6827/II/MN (Original No. 172/2), pending hearing and disposal of the revocation application. The applicants accuse the administrators of having taken steps to have the estate property subdivided, and have stated selling portions of it. They also accuse them of having engineered the removal of Swaleh Hassan as administrator in Mombasa HCSC No. 28 of 1992.

6. The administrators did not respond to the summons for revocation of their grant, but Mohamed Hassan swore an affidavit on 29<sup>th</sup> June 2016, in reply to the Motion, dated 23<sup>rd</sup> May 2016. He has given a detailed background, tracing how the estate of the deceased herein moved from the estate of his late father, Ali bin Nguma. He has also discussed the various succession causes which relate to the estates of the deceased herein and Ali bin Nguma, being this cause, Mombasa HCSC No. 28 of 1992 and Mombasa KCSC No. 158 of 2007. The gist of it is that the exercise of distribution of the estate of Ali bin Nguma has not been completed to pave way for the distribution of the estate herein

of his son, Hassan Ali, since the instant estate comprises of assets to be inherited from the estate of Ali bin Nguma. He has also detailed the troubles within the instant estate caused by beneficiaries who are getting impatient with the process.

7. From the record before me, it would appear that the summons for revocation of grant, dated 12<sup>th</sup> April 2016, and the Motion, dated 23<sup>rd</sup> May 2016, are still pending. During the pendency of the said application, the applicants in the Motion, dated 23<sup>rd</sup> May 2016, Swaleh Hassan and Rukiya Hassan, have filed yet another Motion, dated 17<sup>th</sup> June 2020, seeking orders similar to those sought in the Motion, dated 23<sup>rd</sup> May 2016, to restrain the administrators from doing certain acts with respect to LR No. 6827/II/MN (Original No. 172/2). The application dated 17<sup>th</sup> June 2020, is, for all practical purposes a replica of that dated 23<sup>rd</sup> May 2016. There is nothing on record to indicate that the earlier application was withdrawn to pave way for the filing or determination of the latter application. Curiously, Mohamed Hassan has, in his response to the application dated 17<sup>th</sup> June 2020, merely reproduced, word for word, his replying affidavit sworn on 29<sup>th</sup> June 2016, in response to the earlier application.

8. The parties in this matter ought to get serious. The whole cause is built on duplicity upon duplicity. The instant cause, Mombasa HCSC No. 76 of 2002, ought not to have been filed in the first place, since, at the time of its initiation, another cause in the estate of the same deceased person, was pending, being Mombasa HCSC No. 28 of 1992. Rather than commence these proceedings, the administrators ought to have moved the court in the existing proceedings, Mombasa HCSC No. 28 of 1992. The filing of the instant cause was, therefore, duplicitous. None of the parties have bothered to apprise the court of the current status of Mombasa HCSC No. 28 of 1992. Is it still pending or has it been withdrawn? It is important to know of its current status for there should not be more than one cause in the estate of the same intestate.

9. That duplicity is then repeated with respect to the applications dated 23<sup>rd</sup> May 2016 and 17<sup>th</sup> June 2020. The two applications are filed by the same applicants against the same respondents, based on the same facts, seeking the same orders. The initial application had been filed by an advocate who later passed on. It would appear that the advocates who took over the conduct of the matter opted to treat the initial application as having passed on with the advocate who had drawn it, hence the need to file a fresh one, even though the earlier one was still pending, for it had not been withdrawn nor struck nor marked as spent. It all means one thing, abuse of court process and wastage of judicial time.

10. The other thing about the matter is that the property of the estate herein available for distribution is inheritance from the late father of the deceased herein, one Ali bin Nguma. It would appear that the survivors of the deceased herein rushed to obtain representation to the estate of the deceased herein before the process of distribution of the estate of Ali bin Nguma, from which the asset to be distributed in the estate of the deceased herein was to come, had been finalized. It amounted to putting the cart before the horse. No wonder no one has so far moved an application for distribution of the estate of the deceased herein, either herein or in Mombasa HCSC No. 28 of 1992, as it would appear that the exercise of administration of the estate of Ali bin Nguma is not yet over, suggesting that the property for distribution in the estate of the deceased herein is not yet available for administration and distribution in the estate of the instant deceased person. The cause herein is, therefore, premature. I say so since the causes in the estate of the deceased herein, that is to say Mombasa HCSC No. 28 of 1992 and Mombasa HCSC No. 76 of 2002, preceded the initiation of the cause in the estate of Ali bin Nguma at the Kadhi's court, in KCSC No. 158 of 2013.

11. Looking at both applications for conservatory orders, the applicants complain that the administrators are subdividing the property and selling it off. What I can see from the file of papers before me is that the administrators are yet to apply for confirmation of their grant, which would pave way for distribution. The applicants have not placed before me any document to show subdivision of the assets of the deceased herein, and disposal thereof to third parties. The subdivision they refer to appears to be in respect of the proceedings in KCSC No. 158 of 2013, in the estate of Ali bin Nguma, which is not before me, and in respect of which I cannot make any restraining orders as that matter is not before me and I have no appreciation of its current status. In any case, the applicants have not displayed any document showing that LR No. 6827/II/MN (Original No. 172/2) was ever transferred to the name of the deceased herein from that of Ali bin Nguma, and, therefore, making it amenable to subdivision and disposal in the manner alleged by them. Indeed, none of the parties have attached any documents of registration with respect to the current status of LR No. 6827/II/MN (Original No. 172/2).

12. Mohamed Hassan, in his affidavit, sworn on 10<sup>th</sup> July 2020, has exhibited a judgment that was delivered by Hon. Justice CK Yano, on 9<sup>th</sup> July 2020, in Mombasa ELC No. 59 of 2017, a suit between the administrators herein and three others, on the one hand, and the applicants and two others, on the other, over LR No. 6827/II/MN (Original No. 172/2) and LR No. 172/1. In that judgment the Environment and Land Court granted an injunction in favour of the administrators herein and the three others as against the applicants and the two others, restraining them from dealing with LR No. 6827/II/MN (Original No. 172/2) and LR No. 172/1.

13. For avoidance of doubt the orders in the said judgment read as follows:

*“a. A mandatory order of injunction is hereby issued compelling the defendants, either by themselves, their agents, employees or any other person claiming through them to vacate from or otherwise howsoever and do demolish and/or pull down to ground level the illegal structures and wall standing on and deliver vacant possession of plot subdivision No. 6827 (original No. 172/2) Section II Mainland North and Plot No. 172/1 Section II Mainland North within sixty (60) days from the date of service of the decree herein upon them.*

*b. In default of (a) above as aforementioned the plaintiffs shall be entitled to an order of eviction for forcible removal of the defendants whether by themselves, their agents, employees or otherwise howsoever from remaining on or continuing in occupation of the suit property and demolition of the illegal structures and walls standing thereon under supervision of an authorized police officer from the nearest police station.*

*c. A permanent injunction be and is hereby issued restraining the defendants whether by themselves, their employees, servants and/or agents or otherwise howsoever from encroaching, trespassing onto, remaining on or interfering with the plaintiffs' quiet possession and occupation of suit property...”*

14. The orders that the applicants seek in both applications are against the administrators, who are some of the plaintiffs in Mombasa ELC No. 59 of 2017, for conservatory or injunctive orders, with respect to LR No. 6827/II/MN (Original No. 172/2), to prevent alienation, disposal, sale, charging or otherwise encumbering that property. The orders sought, if granted, would be contrary to the orders that Hon. Justice Yano made in Mombasa ELC No. 59 of 2017, on 9<sup>th</sup> July 2020. The making of the orders, in Mombasa ELC No. 59 of 2017, clearly makes the applications before me completely untenable, for I cannot make orders whose effect would be to contradict orders that had been made earlier over the same property by my brother Judge, albeit in another cause.

15. The applicants invite me to make an order of *certiorari* to quash the proceedings in KCSC No. 158 of 2013. Let me start by stating that the judicial review order of *certiorari* is not available as an interlocutory order, obtained in interlocutory proceedings. It is a substantive order, made in proceedings properly brought in a separate suit for judicial review, initially after obtaining leave in chambers, and subsequently filing a substantive Motion, in accordance with Order 53 of the Civil Procedure Rules. A party seeking a judicial review order must comply with the procedure set out in those provisions.

16. There is also an invitation to the court to call the administrators to account. The office of administrator is one trust, for the administrator holds property belonging to an estate for the benefit of the survivors, beneficiaries, heirs, dependants and creditors. He is bound to account to those persons, as well as to the court. Rendering of accounts is a statutory obligation, required by section 83 of the Law of Succession Act, Cap 160, Laws of Kenya. Indeed, under section 83(e), the administrator is obligated to render such accounts within six months of his appointment as such. Failure to render accounts, as and when required, is one of the grounds, in section 76(d)(iii), for revocation of grants of representation. The administrators herein were appointed on 18<sup>th</sup> February 2004. There is nothing on record to indicate that they ever complied with section 83(e), by filing accounts within six months from the said date. It is a mandatory requirement, and the applicants, being survivors of the deceased, and beneficiaries of the estate, are entitled to call them to account.

17. The applicants also invite me to order or direct the administrators to distribute the estate. I doubt whether that is tenable at this stage. Firstly, the administrators have never applied, under section 71 of the Law of Succession Act, for confirmation of their grant. There are, therefore, no orders on record on distribution of the assets. Such orders can only be made on the basis of a confirmation application. Secondly, the applicants have a pending summons for revocation of grant. Ideally, once a revocation of grant application is filed, no other substantive application can be entertained, because distribution is about confirmation of a grant. The question that arises is, why should a court proceed to confirm a grant when the said grant is threatened with revocation on account of the pending revocation application. Let the applicants decide first what they may want to do with their revocation application. They should either prosecute it to its logical conclusion, or withdraw it, to pave way for confirmation of the grant, otherwise nothing moves so long as it remains pending.

18. I believe that I have said enough. The following are the orders that I hereby make in disposal of the applications dated 23<sup>rd</sup> May 2016 and 17<sup>th</sup> June 2020:

**(a) That a case has not been made out for grant of injunctive or conservatory orders in view of the orders made in Mombasa ELC No. 59 of 2017, on 9<sup>th</sup> July 2020, by Hon. Justice Yano, and the prayers in relation to that are hereby disallowed:**

**(b) That as a consequence of (a) above, the interim orders made herein on 13<sup>th</sup> July 2020, are hereby discharged;**

**(c) That the judicial review order of *certiorari* is not available for granting in proceedings of this kind, and the prayer for that order is hereby disallowed;**

**(d) That the administrators are hereby directed to render an account of their administration of the estate of the deceased herein, from the date of their appointment, on 18<sup>th</sup> February 2004, to the date of this order, in affidavit form, to be filed within forty-five (45) days of the date of this order;**

**(e) That the applicants shall decide what to do with their summons for revocation of grant, dated 12<sup>th</sup> April 2016, for the estate herein cannot be distributed during the pendency of the said application;**

**(f) That the Deputy Registrar shall cause the files in Mombasa HCSC No. 28 of 1992 and Mombasa HCSC No. 2 of 1999 to be called for and put together with the file in the instant cause for the purpose of consolidation; and**

**(f) That each party shall bear their own costs.**

PREPARED, SIGNED and DATED at KAKAMEGA this .....28TH ...DAY OF .....SEPTEMBER ..... 2020

W. MUSYOKA

JUDGE

DELIVERED, SIGNED AND DATED AT MOMBASA THIS.....15TH.....DAY OF OCTOBER.....2020

E.O. OGOLA

JUDGE