



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 449 of 2006

IN THE MATTER OF THE ESTATE OF MBARAK ALI GADIM (DECEASED)

MOHAMED ALI GADIM.....PETITIONER/APPLICANT

VERSUS

FATHIYA MBARAK GADIM

ZENAB MAHFUDH SALIM.....RESPONDENTS

RULING

1. Before me for determination is an Application dated 29.3.13 in which the Applicant herein seeks that Nagieb Omar Gadim (Nagieb) be made a party in the succession proceedings herein in place of Mohamed Ali Gadim who is deceased.

2. The facts herein are that Mbarak Ali Gadim, the deceased to whom the proceedings herein relate died on 27.3.05. He was survived by his widow, **Zenab Mahfudh Salim, his brother Mohamed Ali Hadim (Mohamed), daughter Fathiya Mbarak Gadim and sister Anisa Ali Gadim**. A grant of letters of administration in respect of his estate was issued to **his widow and daughter, the Respondents on 6.7.07. The grant was confirmed on 1.10.07 and the estate was to be distributed to the heirs of the deceased in accordance with Islamic law.**

3. By an application dated 23.6.08, Mohamed moved to Court seeking an order that the Respondents provide accounts of the estate and further that dealings with properties of the estate known as Title Nos. Msa/Block XI/978 and Msa/Block XXI/511 be restricted. Prior to the hearing and determination of that application, Mohamed died on 27.8.11 thus provoking the present application in which Nagieb seeks to be made a party in place of Mohamed. Nagieb obtained a limited grant of letters of administration *ad litem* in respect of the estate of Mohamed to enable him prosecute this matter. The Respondents opposed the Application by means of a replying affidavit sworn on 5.3.14 and a preliminary objection dated 4.3.14. The preliminary objection was however dismissed on 17.10.14.

4. The Respondents argue that the application to replace Mohamed was made out of time. Mohamed died on 27.8.11 and the application was filed on 29.5.15. The suit has therefore abated. They further aver that all beneficiaries of the estate including Mohamed have received their share of the inheritance and there remains nothing in the estate to be administered. The Respondents further state that Nagieb did not obtain necessary consent when he applied for the grant *ad litem*. He is not a direct beneficiary of the estate of the deceased and therefore lacks *locus standi*.

5. Parties filed their written submissions as directed by the Court which I have given due consideration. Nagieb has invoked the provisions of Order 24 of the Civil procedure Rules under which the Application has been filed. This however is a succession matter governed by the Law of Succession Act. Rule 63 of the Probate and Administration Rules provides:

Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

6. Order 24 which makes provision for substituting a party to a suit who dies during the pendency of a suit is not one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act by dint of Rule 63. The Law of Succession Act however has its very own provisions for substitution of a deceased party. Paragraph 14 of the Fifth Schedule provides:

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.

7. In the instant case, Mohamed is deceased. He had made an application seeking production by the Respondents of accounts of the estate of the deceased and a restriction of further dealings with certain properties of the estate. Nagieb has obtained a limited grant *ad litem* in respect of the estate of Mohamed. Although Paragraph 14 refers to an unwilling person or one who is unable to act, by analogy, Nagieb may nevertheless by virtue of the limited grant he holds be made a party to the suit herein for the purpose of representing Mohamed herein until determination of the matter.

8. It was submitted for the Respondents that Nagieb did not obtain the consent of all beneficiaries of the estate of Mohamed when he obtained the limited grant. Section 80 of the Act provides:

A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.

9. The limited grant issued to Nagieb took effect from 24.10.12, the date of the grant. Unless and until that grant is revoked, the grant remains valid. If there was any impropriety in obtaining the grant, the Respondents' remedy lay in seeking a revocation of the same in the cause in which it was obtained. The Respondents cannot seek to impugn the grant that Nagieb holds in these proceedings. .

10. For the foregoing reasons, this Court finds that the Application dated 29.5.13 has merit and the same is allowed. Costs in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 3rd day of May, 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner/Applicant**

..... **for the Respondents**

..... **Court Assistant**