



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 380 OF 2008**

**IN THE MATTER OF THE ESTATE OF HAJI MOHAMED ADAM (Deceased)**

**RULING**

SAMSAM HAJI MOHAMED.....APPLICANT

VERSUS

ASHA MOHAMED (CO-EX ADMINISTRATOR)..... 1<sup>ST</sup> RESPONDENT

ISMAIL HAJI MOHAMED..... 2<sup>ND</sup> RESPONDENT

AMINA HAJI MOHAMED.....3<sup>RD</sup> RESPONDENT

IBATHO HAJI MOHAMED.....4<sup>TH</sup> RESPONDENT

ABDIFAISAL HAJI MOHAMED.....5<sup>TH</sup> RESPONDENT

FATUMA MOHAMED ..... 6<sup>TH</sup> RESPONDENT

ADAM HAJI MOHAMED..... 7<sup>TH</sup> RESPONDENT

AND

OMAR AHMED.....1ST INTERESTED PARTY

ALI AHMED MOHAMED.....2<sup>ND</sup> INTERESTED PARTY

**RULING**

1. Before me is an application dated 14.7.17 by Samsam Haji Mohamed (the Applicant) seeking the following orders:

**1. Spent.**

**2. THAT directions and/or an order do issue partition the Succession Cause hereof to two files being Succession Cause No. 380 'A' to cater for the first family of the deceased and Succession Cause No. 380 'B' to cater for the second family of the deceased as contained in the will of Haji Mohamed Haji Adam (Deceased) dated 15/8/1994 for easier administrative and disposal of the matter.**

**3. THAT upon granting of order No. 2 above an order do issue transferring the file to be known as Succession Cause No. 380 'B' of 2008 relating to the second family of the deceased be transferred to the Kadhis Court at Voi for hearing and disposal and for the final orders at Kadhis Court be noted in the pilot file Mombasa HC Succ No. 380 of 2008.**

**4. THAT in the alternative, an order do issue against Haji Adam and Amina Haji the beneficiaries of the deceased belonging to the second family and currently occupying the premises at Supaa Building LR No. 1956/409 situated at Voi Town clear**

*immediately their arrears and do vacate the said premises for easier administration of the property.*

**5. THAT costs of this application be provided for.**

2. The background of this matter is that the deceased **Haji Mohamed Adam died on 11.2.96. The deceased was survived by 2 widows and their children. The first family of the first widow, Fatuma Haji Yusuf consists of the following children:**

- (i) Ahmed Haji Mohamed
- (ii) Asha Haji mohamed
- (iii) Mohamud Haji Mohamed
- (iv) Ismail Haji Mohamed
- (v) Amina Haji Mohamed
- (vi) Naima Haji Mohamed
- (vii) Jawahir Haji Mohamed
- (viii) Ibado Haji Mohamed
- (ix) Safiya Haji Mohamed
- (x) Shamis Haji Mohamed
- (xi) Rahma Haji Mohamed
- (xii) Abdisatar Haji Mohamed

3. **The second family of the second widow Khadija Jamaa Dirir consists of the following children:**

- (i) Fatuma Haji Mohamed
- (ii) Adam Haji mohamed
- (iii) Hodhan Haji Mohamed – pre-deceased the father
- (iv) Abdifaisal Haji Mohamed
- (v) Amina (Ubah) Haji Mohamed
- (vi) Samsam Haji Mohamed

4. **The deceased left a will dated 15.8.94 in which he appointed his children Mohamud Haji Mohamed, Abdisatar Haji Mohamed, Fatuma Haji Mohamed, Adam Haji Mohamed and Abdifaisal Haji Mohamed as executors. A grant of probate was issued to Mohamud Haji Mohamed, Abdisatar Haji Mohamed and Abdifaisal Haji Mohamed on 24.6.97.** This grant of probate was however revoked on the application of Fatuma Mohamed on 12.7.00 and a grant issued to the said Fatuma Mohamed and Asha Mohamed. By an order of this Court of 29.9.17, the grant issued to Fatuma and Asha was revoked by this Court on the Application of Omar Ahmed and Ali Ahmed Mohamed. On appeal however, the said order of 29.9.97 was set aside by the Court of Appeal in Civil Appeal No. 51 of 2018 in its judgment of 8.11.18. Fatuma and Asha therefore remain the administrators of the estate of the deceased.

5. The Applicant contends that the intention of the deceased in his will was that the estate be divided into 2 parts and each family was to get a specific part thereof. The Applicant further states that the deceased left the estate in Voi to the 2<sup>nd</sup> family which is distinct from the part of the estate left to the first family. There is no dispute as between the 2 families as to what constitutes each family's part of the estate though there are squabbles within the 2 families. Within the second family, there is a recurring problem of her siblings Amina and Adam who occupy premises in Supaa Building, Voi but do not pay market rent and are in arrears, thereby occasioning loss of income to the other beneficiaries. She exhibited pleadings in Nairobi Kadhi's Court Civil Case No. 16 of 2014 which she filed against her siblings. To the Applicant, the partition of this succession cause and transfer of the part of the estate relating to the second family to the Kadhi's Court in Voi will ensure the expeditious disposal of the matter. She asserts that the Kadhi's Court has jurisdiction to hear and determine the matter and no injustice will be occasioned to the Respondents if the orders sought are granted.

6. Adam Haji Mohamed and Amina Haji Mohamed opposed the application by their joint affidavit sworn on 20.9.17. According to Mohamed and Amina, the Applicant has imposed herself as administrator of the estate and is the source of discord among the beneficiaries of the estate of the deceased and she is using malicious and uncanny means to take over all the property of the deceased thus frustrating the

expeditious disposal of this matter.

7. The Interested Parties Ali Ahmed Mohamed and Omar Ahmed in a replying affidavit sworn by Ali Ahmed Mohamed on 18.7.18 also oppose the Application. Their position is that the deceased in his will, which to date remains unchallenged, did not intend that the estate be divided into two parts. The will did not create two separate and distinct estates, all the properties comprise one estate and should be administered as such. According to them, dividing the estate into 2, with one portion being administered by this Court and the other by the Kadhi Court will result in more confusion. They further averred that the issue of transferring the said matter to the Kadhi Court is res judicata having been previously raised and determined by the Court of Appeal in Civil Appeal No. 54 of 2016.

8. Section 3 of the Law of Succession Act defines estate as the free property of a deceased person. When a grant of representation is issued to a person, it is issued in respect of the entire estate and not of a portion thereof. That is why under Section 51 of the Act, an applicant for a grant is required to provide information as to **“a full inventory of all the assets and liabilities of the deceased”**. The Act does not contemplate separation of an estate simply because there are disputes within the family.

9. The only separation of an estate envisaged in the Act is in the case of partial intestacy. The Act provides at Section 34 of the Act:

***A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.***

The proviso to Section 66 of the Act provides:

***Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.***

10. It is only in a situation of partial intestacy that the estate can be separated so that the assets provided for in a will are distributed in accordance with the will and those not so included are distributed in accordance with the law on intestacy.

11. Further, Section 83 of the Act lists the following as the duties of personal representatives:

***(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;***

***(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;***

***(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);***

***(d) to ascertain and pay, out of the estate of the deceased, all his debts;***

***(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;***

***(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;***

***(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;***

***(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;***

***(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.***

12. The duties of personal representatives are fiduciary in nature. Personal representatives are required to collect in all the assets, pay off all debts, distributed the estate and at various stages produce to the Court full and accurate inventory of the assets and liabilities as well as of the accounts. This can only be done if estates of deceased persons are dealt with by personal representatives as one unitary whole. In the present case, splitting the estate will make it impossible for the administrators herein to discharge their duties as required by law.

13. The Applicant has also prayed the transfer of a portion of the estate to the Kadhi Court in Voi. The Kadhi Court has jurisdiction to entertain inheritance matters of persons who profess the Muslim religion. Section 5 of the Kadhis' Courts Act provides:

***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 the 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.*

14. All persons who profess the Muslim religion have the liberty of choosing between the Kadhi's Court and the High Court for adjudication of their succession matters. Both Courts have jurisdiction. The only rider however is that once the jurisdiction of the High Court is invoked, the Court shall apply Islamic law. Section 2(3) of the Law of Succession Act provides:

*Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.*

15. In the present case, the parties herein elected to approach the High Court for the devolution of the estate of the deceased. In Civil Appeal No 54 of 2017 relating to the estate herein, the question of the jurisdiction of this Court was raised. The appellant therein had urged the Court of Appeal to find that the matter should be determined by the Kadhi's Court. The Court stated:

*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.*

16. From the holding of the Court of Appeal, it is manifest that the issue of the forum for adjudication of the dispute concerning the estate of the deceased was determined by the parties themselves when they elected to approach the High Court. The Court of Appeal settled this issue and there is now no going back. The horse has bolted.

17. The filing of this application is indicative of the frustration of the beneficiaries herein. The deceased died in 1996 and to date, the estate has remained undistributed. A child born in 1996 is now a 23 year old adult! There have been numerous applications herein with the matter going to the Court of Appeal, not once but twice. This notwithstanding, the estate of the deceased must be dealt with as one singular whole. There is no provision of law that allows the administration of the estate to be split into 2 as proposed. The remedy available to the Applicant is for expeditious confirmation of the grant and ultimate distribution of the estate.

18. In the premises, the Application dated 14.7.17 lacks merit and is hereby dismissed. I now make the following orders that are necessary for the ends of justice:

- i) The Administrators of the estate of the deceased shall file a summons for confirmation of grant within 30 days.
- ii) Mention for compliance on 28.10.19.
- iii) This being a family matter, there shall be no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 20<sup>th</sup> day of September 2019**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

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

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

..... **for the Interested Parties**

..... **Court Assistant**