



**REPUBLIC OF KENYA**

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

**SUCCESSION NO. 334 OF 2002**

**IN THE MATTER OF THE ESTATE OF ALI SHAMBI KIKUNO**

**BAKARI KHAMIS SHAMBI**

**FATMA SWALEH SHAMBI.....APPLICANT**

**VERSUS**

**SHAMBI ALI SHAMBI**

**RAJAB ALI SHAMBI**

**ESHA ALI SHAMBI .....RESPONDENT**

**RULING**

1. Ali Shambi Kikuno (“the Deceased”), died intestate on 31.3.93 at Kisauni. He died at the age of 69 years. 4.4.93 at Tudor Mombasa. The record shows that a Grant of Letters of Administration (the Grant) was issued to Shambi Ali Shambi, Rajab Ali Shambi and Esha Ali Shambi (the Respondents) sons and daughter of the Deceased on 18.1.16. The Grant was confirmed by this Court on 22.2.16. The Deceased was a brother to the father of the 1<sup>st</sup> Applicant Bakari Khamis Shambi and the father of the 2<sup>nd</sup> Applicant Fatma Swaleh Shambi.

2. By the Summons dated 20.1.17, and the Applicants seek revocation of the Grant on the grounds that:

i) the Grant was obtained fraudulently by listing as part of the estate of the Deceased, 2 houses on Plot No. 90/MN/II which belong late Swaleh Shambi the father of the 2<sup>nd</sup> Applicant and house on Plot No. 281/MN/I belonging to the 1<sup>st</sup> Applicant. .

ii) the Respondents concealed the existence of Kadhi’s Court case No. 179 of 2010 Rashid Ali Shambi v Shambi Ali Shambi where the Applicants had applied to be enjoined as interested parties.

iii) The Respondents failed and/or abandoned prosecution of their matter in the Kadhi’s Court after the Applicants were allowed to contest the Deceased’s alleged properties.

3. In his affidavits sworn on 20.1.17 and 1.4.17 on behalf of the Applicants, the 1<sup>st</sup> Applicant reiterated the grounds set out above. He annexed a copy of a motion dated 12.3.12 in Kadhi’s Court case No. 179 of 2010 and building plans for the said houses. The Applicants further assert that Plot No. 90/MN/II and Plot No. 281/MN/I belong to Swaleh Shambi, Ali Shambi and Khamis Shambi as per the annexed title. There are residential houses and shops on Plot No. 90/MN/II. 2 of the houses belong to Swaleh Shambi, the deceased father of the 2<sup>nd</sup> Applicant. Swaleh Shambi sought and obtained “proposed drainage works” to the house as per a letter exhibited. The other premises are let and the proceeds are deposited at KCB for annual distribution amongst the 3 families of Shambi Kikuno. The house on Plot No. 281/MN/I belonged to Swaleh bin Shambi but was given to the 1<sup>st</sup> Applicant after the mud house was ruined. Letters from the District Commissioner and a plan were annexed as proof of approvals to a build mud and wattle house. The Agreement produced by the Respondents as “RAS-1” should be disregarded as the same was not attested by anyone other than the alleged vendor and the purchaser. The Applicants further claim that they were not given an opportunity to raise their claims in the proceedings herein.

4. The Respondents oppose the Application by way of a replying affidavit sworn by the 2<sup>nd</sup> Respondent on 28.2.17. It is the Respondents’ case that the house on Plot No. 90/MN/II was bought by the Deceased in 1949. A copy of sale agreement and building plan was annexed. The Respondents claim that there are disparities in the building plan annexed by the Applicants which they claim is a forgery. They assert that the plan dated 20.3.48 refers to a house unknown to them. Though the Applicants refer to 2 houses on this plot, they have only annexed the plan for 1 house. The other house the Applicants refer to is on Plot No. 281/MN/I which belongs to the Deceased. Building plans were annexed.

5. As regards the 1<sup>st</sup> Applicant's claim over house on Plot No. 281/MN/I, the Respondents assert that the original building plan was issued to the Deceased on 12.10.92 and there has been no change of ownership in respect of the property. Copies of approved building plan and receipts by the County Council were annexed. There was no evidence that the 1<sup>st</sup> Applicant was given the property as a gift. The plan annexed in the Applicants' affidavit is indicated to have been certified 4 days before it was given. The Applicants were given ample time to respond to the confirmation of the Grant but failed to do so. The Respondents prayed that the Application be dismissed.

6. In their submissions, the Applicants reiterate that the Respondents obtained the Grant by fraudulently including the 3 houses as part of the estate of the Deceased, which houses belong to the Applicants. The Respondents secretly moved to this Court during the pendency of the proceedings in the Kadhi's Court and the Applicants were not given an opportunity to prove their claim. The Agreement produced by the Respondents having been signed by the Vendor only contrary to the Contract Act, is of no effect. The same cannot be used as a basis of a claim.

7. For their part, the Respondents contend that upon confirmation of grant, the Court is *functus officio* as the Applicants have not sought the setting aside, variation or vacation of the said orders. To grant the orders sought, the Court would be sitting on appeal of its own orders. Further, the Applicants have not explained how they acquired the 2 houses. The Applicants admit that the properties belonged to their respective deceased fathers but have not annexed any grant of representation in respect of their respective fathers' estates. They therefore lack capacity to file this application. The Applicants have also not attached the proceedings in the Kadhi's Court to prove that the subject matter herein was for determination therein. It was further submitted that failure to raise objection proceedings during the 30 day gazette period estops them from seeking revocation of the Grant.

8. I have given due consideration to the Application, the rival affidavits and the submissions. The issue for determination is whether sufficient grounds have been placed before the Court to warrant the revocation of the Grant. The law relating to revocation of grants is found in Section 76 of the Law of Succession Act which provides:

***“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—***

***(a) that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.***

***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—***

***(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or***

***(ii) to proceed diligently with the administration of the estate; or***

***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***(e) that the grant has become useless and inoperative through subsequent circumstances.***

6. It is not disputed that Plots Nos. 281/MN/I and 90/MN/II belonged to Swaleh Shambi, Ali Shambi and Khamis Shambi in equal shares. The Applicants' complaint is that the Respondents obtained the Grant fraudulently by knowingly listing the 3 said houses as part of the estate of the Deceased when they knew very well this was not the case. I have looked at the building plans, photographs and letters exhibited by the Applicants all relating to Plot No. 281/MN/I. Annexure “B” is a copy of a plan for a proposed dwelling with a date 20.3.48 and the owner is indicated as Swaleh bin Shambi. Although the Applicants state that the plan relates to 2 houses on Plot No. 90/MN/II, the plan actually relates to Plot No. 281/MN/I. Further, the plan relates to 1 house and there is no indication that the plan was approved. Annexure “A” is a copy of a plan for a proposed residential building for Bakari K. Shambi approved on 11.7.89.

7. There are 2 letters relating to Plot No. 281/MN/I. Annexure “C2” is a letter is dated 7.4.48 from the Mombasa Municipal Board informing Swaleh bin Shambi to submit his application to erect a temporary dwelling on the plot to the District Commissioner as the plot is outside the municipality. Annexure “C1” is a letter dated 3.5.48 and addressed to Swaleh Bin Shambi by the District Commissioners Office, Mombasa. The legible words therein are ***“proposed mud and wattle building on Plot No. 281 Section I Mainland North. Your plan is returned herewith.”*** There is also a building plan which states the owner is Swaleh bin Shambi. The date of delivery is given as 20.4.48 and the plan No. is T/83/48 which number is contained in the letter dated 3.5.48. The space for the permit number on the plan is blank. There is therefore no indication that the plan was approved or that the house was indeed built. These letters and plan relate to proposed development on Plot No. 281/MN/I by Swaleh bin Shambi the father of the 2<sup>nd</sup> Applicant. However, the 2<sup>nd</sup> Applicant lays claim to the houses on Plot No. 90/MN/II. No evidence has however been produced in relation to Plot No. 90/MN/II.

8. There is yet another letter dated 3.2.93 from the Municipal Council of Mombasa addressed to the District Land Officer. It is copied to “Khamis Shambi & Others. The Applicants claim that the letter relates to the proposed drainage to the house on Plot No. 90/MN/II belonging to the 2<sup>nd</sup> Applicant's father. This however is not correct. The letter is clear that it is a provisional approval in respect of subdivision of Plot

No. 281/MN/I. It therefore has no bearing whatsoever on the claim in respect of the 2 houses on Plot No. 90/MN/II. Indeed no document has been produced by the Applicants in relation to Plot No. 90/MN/II. I have also looked at the photographs and I find that there is nothing to show that buildings therein are on Plot No. 281/MN/I or Plot No. 90/MN/II.

9. The Respondents on their part exhibited “RAS-1” an agreement dated 6.1.49 as evidence that their father Ali bin Shambi purchased the house on Plot No. 90/MN/II and a building plan approved on 22.8.50. I see no nexus between the agreement and the building plan. No evidence was produced to show that house no. KA/881 Kisauni Malindi Road is on Plot No. 90/MN/II. Besides, if the house was bought in 1949, how were the building plans approved in 1950? Annexure “RAS-2” is a letter addressed by the District Commissioner, Mombasa to Ali bin Shambi dated 6<sup>th</sup> July but the year is not indicated as the same appears to have been cut off in the process of photocopying. The letter states “I return herewith your temporary plan duly approved.” There is a plan for a shop and dwelling house on the same plot. It has a date of 10<sup>th</sup> May but the year is not legible. The plan however has no name. It is therefore not clear who submitted the same. Annexure “RAS-3” consists of receipts dated 7.10.92 and 12.10.92 for submission and approval of building plans together with plan for a residential building on the plot for Ali Shambi Kikuno which plan was approved on 24.11.92.

10. At the time of confirmation of the Grant, the Court was well aware that the estate of the Deceased consisted *inter alia* of  $\frac{1}{3}$  of Plots Nos. 281/MN/I and 90/MN/II. This is reflected in the Certificate of Confirmation of Grant dated 22.2.16. The dispute between the parties over the 2 houses on Plot No. 90/MN/II and the house on Plot No. 281/MN/I has to do with the occupation of and title to land. This claim falls outside the jurisdiction of this Court by dint of Article 165(5) of the Constitution of Kenya 2010 which provides:

**165(5) The High Court shall not have jurisdiction in respect of matters—**

**(a)...**

**(b) falling within the jurisdiction of the courts contemplated in Article 162(2)**

Article 162(2) provides:

**“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**

**(a) ....**

**(b) the environment and the use and occupation of, and title to, land.**

9. The competing interests between the Applicants and the Respondents over the houses on the 2 plots can only be interrogated and determined by the Environment and Land Court established by Parliament pursuant to Article 162(2) of the Constitution. This Court lacks jurisdiction over the said interests and may not assume jurisdiction over a matter where none has been conferred upon it.

10. The Applicants contend that the Grant was obtained by the concealment from the Court of the existence of Kadhi Court’s Civil Case No. 179 of 2010. Annexure C is the notice of motion dated 12.3.12 filed by the Applicants in the Kadhi’s Court seeking joinder as interested parties therein and contend that the Respondents came to this Court with unclean hands. It is not clear whether the orders sought were granted. Further other than the notice of motion exhibited, it would have been helpful for the Applicant to produce the petition in the Kadhi’s Court for the Court’s consideration. As it is the Court does not have sufficient material to make a finding one way or the other on this ground.

11. The Respondents argue that the Court became *functus officio* upon confirmation of the Grant. The Respondents contend that to grant the orders sought, the Court would be sitting on appeal of its own orders. This argument is not based on law. Section 76 provides:

**“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion...” (emphasis mine).**

The foregoing provision makes it abundantly clear that a grant may be revoked at any time before or after confirmation. I need not say any more.

12. It was submitted that the Applicants have no capacity to sue on behalf of their late fathers. The Applicants seek revocation of the Grant *inter alia* because the 2 houses on Plot No. 90/MN/II belong to the 2<sup>nd</sup> Applicant’s deceased father. It is trite law that any action brought on behalf of a deceased person by an applicant who is not a holder of a grant of representation is incompetent and bad in law. This was the holding in Virginia Edith Wambui Otieno vs Joash Ochieng Ougo [1982-88] 1 KAR 1049, where the Court of Appeal observed-

**“But an administrator is not entitled to bring an action as an administrator before he has taken out letters of Administration. If he does, the action is incompetent at the date of its inception...”**

And in Trouistic Union International & Another CA Civil Appeal No.145 of 1990, Apaloo, C. J. held:

**“To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to Section 82 (a) of the Law of Succession Act. That Section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, Section 3, the interpretative Section, provides an all inclusive**

*answer. It says "personal representative means executor or administrator of a deceased person".*

13. The Applicants have not brought the present Application in their capacity as administrators of the estate of Swaleh Shambi. No Grant of representation in respect of that estate was exhibited. Without a grant of representation in respect of the estate of Swaleh Shambi the Applicants have no capacity to bring an action in respect of the 2 houses allegedly owned by Swaleh Shambi. Their claim is therefore rendered incompetent for want of a grant of representation.

14. In the premises therefore, having evaluated the evidence and the relevant law, I am not persuaded that any of the circumstances warranting the revocation of the grant stipulated in Section 76 of the Law of Succession Act obtain in the matter herein. Accordingly, I find that the Summons for Revocation of Grant dated 20.1.17 lacks merit and the same is dismissed. This being a dispute between family members, I order that each party bears own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 2<sup>nd</sup> day of March 2018**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicants**

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

..... **Court Assistant**