



**REPUBLIC OF KENYA**

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

**SUCCESSION NO. 307 OF 2014**

**IN THE MATTER OF THE ESTATE OF MOHAMED KINANGO KITONYO**

**alias KINANGO KITONYO (deceased)**

JUMA MTEVU KINANGO KITONYO .....1<sup>ST</sup> APPLICANT /INTERESTED PARTY

SALEH SILA KINANGO.....2<sup>ND</sup> APPLICANT/ INTERESTED PARTY

ESTATE OF HAMED KINANGO.....3<sup>RD</sup> APPLICANT/ INTERESTED PARTY

AMIN MTINDA KINANGO.....4<sup>TH</sup> APPLICANT/ INTERESTED PARTY

SULEIMAN MUTEI KINANGO.....5<sup>TH</sup> APPLICANT/ INTERESTED PARTY

REHEMA MUTHIKE KINANGO.....6<sup>TH</sup> APPLICANT/ INTERESTED PARTY

AMINA MWIKALI MOHAMED

KINANGO KITONYO.....7<sup>TH</sup> APPLICANT/ INTERESTED PARTY

ABDALLA KITONYO KINANGO.....8<sup>TH</sup> APPLICANT/INTERESTED PARTY

**VERSUS**

HAMMAD MOHAMED KASSIM.....1<sup>ST</sup> RESPONDENT

FRANCISA MUTETHYA KILONZO.....2<sup>ND</sup> RESPONDENT

**RULING**

1. Before me for determination is a Summons dated 1.2.17 seeking the following:

- a) *That pending hearing and full determination of Kadhi's Court at Mombasa in Succession Cause No. 54 of 2013 the Honourable stay any confirmation hearing that may be presented in this matter of the Estate and status quo be maintained by all parties.*
- b) *That the grant of probate dated 18th September 2015 to Hammad Mohamed Kassim and Francisca Mutethya Kilonzo be revoked.*
- c) *That a valuation of the Full Estate of the Deceased be presented to Court within 30 days by the Executors.*
- d) *A declaration that the Will dated 21/12/11 is invalid and offends Sharia Islamic Law, ambiguous and not enforceable.*
- e) *That the Court appoint administrators to manage the Estate of the Deceased.*
- f) *That the Estate be distributed according to Islamic Sharia Law to all beneficiaries.*

*g) Any other order that the Honorable Court may deem just and expedient in the circumstances.*

*h) Costs of this application be provided for.*

2. The Summons relates to the estate of Mohamed Kinango Kitonyo alias Kinango Kitonyo (the Deceased) who died on 3.6.12 at the age of 70 years. The Deceased died testate having made a will (the Will) dated 21.12.11. Grant of Probate of Written Will (the Grant) was issued to the Respondents on 21.9.15.

3. The Applicants claim that the proceedings to obtain the Grant were tainted with material non-disclosure by the Respondents. The Grant was obtained without involvement of the Applicants who are children of the Deceased and therefore beneficiaries of the estate of the Deceased. The Applicants were also not informed when the Grant was issued. The Respondents did not disclose to this Court that Succession Cause No. 54 of 2013 to determine the heirs of the deceased and their respective shares is pending before the Kadhi's Court. The Applicants claim that the Will is ambiguous and riddled with untruths and purports to bequeath more than  $\frac{1}{3}$  of the estate of the Deceased contrary to Islamic law. Further that the Deceased was sickly and frail for a long time before his demise and died barely 6 months after making the Will. That the Applicants who are beneficiaries risk being disinherited if valuation is not done and distribution is not according to Islamic Sharia; that shares in Safaricom Limited, Bamburi Cement and National Bank Kenya Limited and bank account in National Bank were omitted; that one or two of the heirs are minors and it is unprocedural to make a grant without the appointment of a next friend.

4. The Respondents contend that the Application is a non-starter and the orders sought untenable as the Application does not disclose sufficient grounds for revocation of the Grant. It is the Respondents' contention that the Applicants are intermeddling with the estate of the Deceased and the Application is intended to delay the conclusion of the matter. The Grant was issued by a Court of competent jurisdiction and the correct procedure was followed. According to the Respondents, the objection by the Applicants is premature and ought to be raised at confirmation proceedings.

5. On 27.6.17 the date fixed for hearing, neither the Respondents nor their advocate appeared in Court. As no reason was given for their absence, the matter proceeded notwithstanding their absence. The Applicants called 1 witness Amin Mtinda Kinango (Amin) the 4<sup>th</sup> Applicant and son of the Deceased. Amin testified that the Applicants were not consulted on the filing of the Petition for the Grant. They were only aware of the matter in the Kadhi's Court. The Will is contrary to Islamic law which provides that only  $\frac{1}{3}$  of the estate may be bequeathed by will. Further, the Will has favoured 5 children out of 14 children while the rest of them have been left out. The Kadhi's matter has been pending for 5 years and there has been delaying tactics as the Respondents' advocate comes to Court on and off. There was no disclosure in the Kadhi's Court of this matter. The signature in the Will does not look like his father's and the language in the Will is certainly not his. Some assets were excluded namely shares in Safaricom, Bamburi Cement and account in National Bank. Although the Grant was issued on 18.9.15 the Applicants got to know about the same in December 2016. The Applicants' prayer is that the estate is distributed according to Islamic Sharia.

6. At the close of the Applicants' case, directions were given that submissions be filed within 14 days. On 12.7.17, the Respondents' filed an application seeking re-open their case on the ground that their advocate was unable to attend Court for the hearing as he had inadvertently travelled out of the country. On 3.10.17 however, the Respondents abandoned the said applications. Parties then filed submission for the Summons.

7. I have given due consideration to the Application, the rival affidavits, the oral testimony, the submissions as well as the authorities cited. The issue for determination is whether sufficient grounds have been placed before the Court to warrant the revocation of the Grant. The grounds upon which a grant may be revoked are statutory and are stipulated 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.***

8. It is not denied that the Applicants are children of the Deceased. It was therefore incumbent upon the Respondents to inform the Applicants of the filing of the present succession cause in relation to their deceased father's estate. Had they been made aware of these proceedings as children of the Deceased, they would have raised the objection they now raise at that point. The Court does note that consent of beneficiaries is not required to accompany a petition for grant where the deceased died testate. This fact however did not absolve the Respondents from the obligation to inform all heirs or dependants of the Deceased of the filing of the petition herein. I do therefore find that the Respondents obtained the Grant fraudulently by concealment from the court of something material to the case *to wit* that the Applicants being children of the Deceased were not aware of the filing of the petition.

9. Further, the Deceased died a Muslim and under the Law of Succession Act the law applicable in relation to his estate is Islamic Sharia. Section 2(3) of the 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.***

10. In Clause 2 of the Will, the Deceased states:

***“My sole surviving heirs under Islamic law are the aforesaid five (5) daughters and my other children from previous marriage(s) but whose mothers I have long since divorced. I have no other heir whatsoever under Islamic law.” (emphasis mine)***

11. The Deceased acknowledged in the Will that apart from the 5 daughters, he had other children with his former wives. In spite of this acknowledgement, he proceeded to provide for his 5 daughters and excluded his other children. Given that the Deceased was a Muslim, his testamentary freedom is limited to 1/3 of his estate. In the leading case of Saifudean Mohamedali Noorbhai v Shehnaz Abdehusein Adamji [2011] eKLR the Court of Appeal opined:

***“The limit on a Muslim’s testamentary freedom, up to one-third of one’s estate, is seen in Islam as a means to ensuring balance between a Muslim’s freedom in this regard and responsibility to his or her heirs. Deriving sanction from a Prophetic tradition, it reflects indications in the noble scripture that a Muslim may not “so dispose of his property by will as to leave his heirs destitute”. (Mulla, Ch, IX, Wills, p. 141).***

12. From the foregoing, it is clear that a Muslim is allowed by Islamic Sharia to dispose by will of up to 1/3 of his estate to third parties who are not heirs. This is to ensure a balance between giving his property to whoever he wishes and his obligation to his heirs. The heirs of a Muslim are assured of a minimum of 2/3 of his estate and any bequest exceeding 1/3 of a Muslim's estate is not valid. It is not possible to tell from the record without a valuation of the assets forming the estate whether the bequests made by the Deceased in his Will exceed 1/3 of his estate.

13. The record shows that the Deceased was survived by 13 children. As stated above, the Will however provides for 5 out of 13 heirs of the Deceased. Further, under Islamic Sharia, a Muslim may not make a bequest in his will in favour of a legal heir. The basis of this is that Allah legislated fixed shares for legal heirs. Any Will that purports to exclude a legal heir or make a bequest to an heir is not valid under Islamic Sharia. Allah's Prophet (SAWS) said:

***“Allah has appointed for everyone who has a right what is due to him, and no bequest must be made to an heir. (Abu Dawud). Similar hadith is narrated by Abu Umamah (RA) and reported by Ibn Majah, Ahmad and others”.***

14. The appointed share of every heir is stipulated in the Holy Qur'an in Nisa 4:11:

***“Allah instructs you concerning your children [i.e., their portions of inheritance]: for the male, what is equal to the share of two females”***

Nisa 4:12 provides:

***“...And for them [i.e., the wives] is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave after any bequest you [may have] made or debt.”***

15. The Deceased stated in his Will that his heirs under Islamic law are his 5 daughters with his late wife Rukia Ali Abdalla Mohamed Will and other children from previous marriage(s) whose mothers he had divorced. The foregoing notwithstanding, the Deceased proceeded to make provision for his 5 daughters to the exclusion of the other 8 heirs which he acknowledged. This is contrary to Islamic Sharia. The Will also provides for legal heirs whose share is already stipulated in the Holy Qu'ran. It is clear from the foregoing that the Will of the Deceased dated 21.12.11 is contrary to Islamic Sharia and therefore invalid. Having so found, it follows that the Grant of Probate issued on the basis of an invalid Will cannot stand and has consequently become useless and inoperative as per Section 76(e) of the Act.

16. The Court notes that there are assets that were omitted in the proceedings herein. The omission of assets is not one of the statutory grounds for revocation of a grant stipulated in Section 76. The Court further notes that there are properties in respect of which no bequest was made though mentioned in Clause 3(d) - (j) of the Will thus falling into intestacy. Clause 4 of the Will is unclear. These observations are however no longer material as the Will has been found to be invalid. The direct consequence of invalidating the Will is that the Deceased died intestate. The impugned Grant was issued over 2 years ago on 21.9.15 and is yet to be confirmed. There is therefore need for this Court to appoint administrators in order to expedite the distribution of the estate herein.

17. The Law of Succession Act gives the Court wide discretion as to the person or persons to be appointed administrator of a deceased person's estate in the best interests of all parties. Section 66 provides in part:

***“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made...”***

In exercise of the Court's discretion by dint of the foregoing provision, I do find that in the best interests of all parties it is necessary for the Court to appoint one administrator from among the Applicants and one from among the Respondents.

18. There is a prayer for staying the proceedings herein pending the hearing and determination of the Succession Cause No 54 of 2013 before the Kadhi's Court. The issues before the Kadhi's Court include determination of the heirs of the Deceased and their respective shares. The record shows that the heirs of the Deceased are 13 and this is not disputed. As stated earlier in this ruling, the Deceased was a Muslim and by dint of Section 2(3) of the Law of Succession Act, his estate shall be governed by Islamic Sharia. This Court has jurisdiction to determine the estate in accordance with Islamic Sharia. In Saifudean Mohamedali Noorbhai v Shehnaz Abdehusein Adamji [2011] eKLR, the Court of Appeal stated:

***“Kenyan Courts have held in past judgments that every litigant, of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi's Court”.***

19. The Constitution of Kenya 2010 enjoins this Court to dispense justice without delay. Article 159 provides:

***“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—  
(b) justice shall not be delayed;”***

The matter herein was filed in 2014 while that in the Kadhi's Court was filed in 2013. This Court has formed the opinion that to stay this matter will only serve to delay the same. In the circumstances and in order to comply with the foregoing constitutional imperative, this Court shall proceed with the matter herein without further delay, to its logical conclusion.

20. For the foregoing reasons the summons for revocation of grant dated 1.2.17 succeeds. Accordingly, I make the following orders which are necessary to meet the ends of justice:

- a) The Grant of Probate issued to the Hammad Mohamed Kassim and Francisa Mutethya Kilonzo on 21.9.15 is hereby revoked.
- b) Hammad Mohamed Kassim and Amin Mtinda Kinango are hereby appointed joint administrators of the estate of Mohamed Kinango Kitonyo alias Kinango Kitonyo (deceased).
- c) Hammad Mohamed Kassim and Francisa Mutethya Kilonzo do produce to the Court a full and accurate inventory of the assets and liabilities of the estate of the Deceased and a full and accurate account of all dealings therewith from 21.9.15 up to the date of the account on or before 2.5.18.
- d) The Administrators do file summons for confirmation of grant on or before 2.5.18.
- e) The matter will be mentioned on 7.5.18 for compliance.
- f) This being a family matter, there shall be no order as to 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 Applicant**

..... **for the Respondent**

..... **Court Assistant**