



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION NO. 696 OF 1994

IN THE MATTER OF THE ESTATE OF LATE BASHEIKH

ABDULHAFIDH BASHEIKH STAMBULI (DECEASED)

KIMWANA KAZUNGU YERI.....1ST PETITIONER/RESPONDENT

FATUMA MAHMUD MOHAMED.....2ND PETITIONER/RESPONDENT

VERSUS

MOHAMED BASHEIKH.....1ST INTERESTED PARTY/APPLICANT

TWALIB NASSIR.....2ND INTERESTED PARTY/APPLICANT

SOOD ALI AWADH.....3RD INTERESTED PARTY/APPLICANT

KHAMIS ALI MOHAMED.....4TH INTERESTED PARTY/APPLICANT

RULING

1. The proceedings herein relate to Basheikh Abdulhafidh Basheikh Stambuli, (the Deceased) who died on 27.11.92 at Shariyani, Kuruwitu, Kilifi. A grant of letters of administration (the Grant) in respect of the estate of the Deceased was on 16.3.95 issued to his 2 widows Fatuma Mohamed Yeri *alias* Kimwana Kazungu Yeri and Fatuma Mahmud Mohamed (the Respondents). The Administrators by their Summons filed on 25.1.11 sought rectification of the Grant to provide for the full name of the Deceased which had been indicated in the Grant as Basheikh Abdulhafidh. The assets of the estate were to be indicated as Plots Nos. 102 and 94 instead of 102 and 104 and a shamba without land (sic) in Dar-es-Salaam. A rectified grant was thus issued on 9.3.11. The Grant was confirmed on 1.12.03 and certificate of confirmation of grant issued on 10.12.03. Thereafter a rectified certificate of confirmation of grant was issued on 9.3.11. The estate of the Deceased comprising of Plots No. 102/IV/MN and 94/IV/MN, Sharioani and Shamba without land in Dar-es-Salaam was distributed to his 3 widows, 4 sons and 1 daughter in accordance to Islamic law.

2. By a Summons dated 27.1.14 (the Application), Mohamed Basheikh, Twalib Nassir, Sood Ali Awadh and Khamis Ali Mohamed (the Applicants) seek the revocation and/or annulment of the Grant on the grounds set out in the Affidavit of the 1st Applicant sworn on 27.1.14. The other Applicants swore affidavits on even date associating themselves with the averments of the 1st Applicant in his Affidavit. The Applicants claim that the proceedings were defective in substance as no consent was obtained from heirs who also had a right to apply for the Grant. Further, the Grant was obtained fraudulently by the making of a false statement *to wit* that Plots Nos. 102/IV/MN and 94/IV/MN (the suit properties) belonged to the Deceased yet the same were owned by Ahmed Stambuli and/or Famau Ahmed Stambuli and Basheikh Stambuli. The Respondents also omitted Plots Nos. 95 and 274 Section IV Mainland North and 20 acres at Roka, Kilifi County. Following the confirmation of the Grant the Respondents have sold some portions of the estate of Ahmed Stambuli. The Applicants further claim that the 1st, 2nd and 3rd Applicants are the 5th generation from Ahmed Stambuli while the 4th Applicant and the Respondents are the 4th generation. The Applicants' wish is that a proper distribution of the estate of Ahmed Stambuli be done so that the portion thereof belonging to the Deceased herein can be determined and distributed to his lawful heirs. A copy of title and family tree and ID cards of available heirs were exhibited in the Affidavit.

3. In her Replying Affidavit sworn on 30.6.14, the 1st Respondent stated that she was aware that the Deceased came from Tanzania but he never took her there. Fatuma Nassoro Hemed one of the wives of the Deceased who resided in Tanzania gave her consent to the application for the Grant. During his lifetime, the Deceased never introduced any person to her as his siblings. He did however introduced to her Mirtaj Abdalla, Zubeda Abdalla and Amina Abdalla as the children of his brother Abdalla. In their application for the Grant, the Respondents disclosed the information within their knowledge with regard to family and they could not seek consent of people unknown to them. The

Respondents also disclosed the assets that were registered in the name of the Deceased. They are not aware that the Deceased also owned Plots Nos. 95 and 274/IV/MN. It is therefore unfair to accuse them of fraud and concealment of material facts.

4. According to the 1st Respondent, Plots No. 274/IV/MN is owned by Badi Ahmed and Ubba Ahmed Kassim who have built 2 houses thereon and also receive ground rent from tenants who have built thereon. The plot also has a mosque and a graveyard donated through a Wakf. Plot No. 95/IV/MN is owned by Ahmed Bin Stambul and others. From Plot No. 102/IV/MN, the Deceased in his lifetime sold 42 acres to Feisal Sharman and 11 acres to Fauzia Twaliq Zubedi. From Plot No. 94/IV/MN, the Deceased sold 12 acres to Rafiy and Salim. He reportedly sold 10 acres to Seif and Najat a separate process. The 4th Applicant, who had a power of attorney from Fatuma Nassor Hemed one of the widows of the Deceased, is the one who guided the Respondents in obtaining the Grant herein but has now turned against them. The Applicants have not shown their relationship with the Deceased and they have also not taken out a grant of representation in respect of the estate of Ahmed Stambul. The 1st Respondent cannot vouch for the family tree as she is illiterate and the particulars contained therein are unknown to her.

5. In her Replying Affidavit sworn on 30.6.14, the 2nd Respondent averred that she is not aware as to how the Deceased became the proprietor of the land upon which he established his homestead and no one challenged his title. The Respondents are not aware that the Deceased also owned Plots Nos. 95 and 274/IV/MN or 20 acres in Roka, Kilifi County nor do they know where the properties are located. She does not know the 1st, 2nd and 3rd Applicants nor does she know the relationship between them and the Deceased. The 4th Applicant is known to her. He used to visit the Deceased in hospital He had been appointed by Fatuma Nassoro Hemed (now deceased) one of the widows of the Deceased as her attorney to manage her affairs in Kenya s she had left for Tanzania. The 4th Applicant also assisted the Respondents pursue the Grant. He has now changed his stance yet he was holder of a power of attorney representing the interests of Fatuma Nassoro Hemed. The 2nd Respondent further averred that she has only dealt with 6 cares of Plot No. 102/IV/MN which was her share as a widow and her son's share. The Deceased dealt with most of the land. She denied knowledge of the alleged beneficiaries in the family tree.

6. In his evidence, Mohamed Basheikh the 1st Applicant informed the Court that he is a great grandson of Famau Ahmed Stambul. The property forming the estate of the Deceased belong to Famau. Ther Deceased is the son of Abdulhafidh Basheikh son of Bsheikh Stambul. Famau is the paternal uncle of the Deceased's grandfather. Though the Respondent says the properties belong to the Deceased, the title says that the properties belong to Famau and his 2 sisters Aisha binti Ahmed and Kanya binti Ahmed. According to the 1st Applicant, Famau inherited his sisters' shares as they were not survived by any children. Famau himself was not survived by any children. Famau's father and his father's brothers also predeceased him. Those entitled to inherit Famau were therefore his father's brothers' children listed in paragraph 2(c) of the 1st Applicant's affidavit sworn on 27.1.14. The Respondents failed to involve the other beneficiaries in the process of obtaining the Grant. The Applicants seek revocation of the Grant and issuance of a grant to themselves so that all heirs including the Respondents are involved in properties therefore in the properties as they were not survived by any children.

7. On cross examination, the 1st Respondent stated that entry numbers 5, 6 and 7 on the title which he produced in Court show that in 1977 the Assistant Public Trustee was appointed administrator of the estates of Kanya binti Ahmed, Aisha binti Ahmed and Famau. He does not know which of them died first nor does he have their death certificates. He further acknowledged that entry number 10 shows a transfer dated 19.11.79 to the Deceased as administrator of the estate of his brother Mohamed Abdulhafidh Basheikh Stambul. The Deceased became administrator of his brother's estate in Succession Cause No. 188 of 1977.

Entry Number 14 shows transfer to the Deceased of Plots Nos. 94 and 102 as beneficiary. According to the 1st Applicant, it is the 6 children of Basheikh Stambul who should have inherited Famau, Aisha and Kanya. The Public Trustee did not distribute their estates properly. He however stated that he never challenged the Public Trustee in respect of the aforesaid entries numbers 5, 6 and 7 on the title. The 1st Applicant stated that he had no evidence that the Deceased owned Plots Nos. 274/IV/MN and 95/IV/MN or 20 acres in Roka, Kilifi County.

8. The 1st Applicant then stated that the entries on the title do not show whether letters of administration were taken out in respect of the estate of the Deceased's father, Abdulhafidh Basheikh Stambul. Entry Number 14 does not show who transferred the suit properties to the Deceased. According to the 1st Applicant, it was not possible for the Deceased to inherit the estates of Famau, Aisha and Kanya before his own father. It is his opinion that the transfers shown in the entries on the title including the transfers of the suit properties to the Deceased were not done properly.

9. In her testimony, Fatuma Mahmud Mohamed the 2nd Respondent and 3rd wife of the Deceased reiterated the contents of her affidavit. In particular, she stated the Respondents obtained the Grant in a legal way with the guidance of Khamis Ali Mohamed. At the time she married the Deceased in 1989 the suit properties were registered in his name. She further stated that during his lifetime, the Deceased never introduced her to any of the people mentioned by the 1st Applicant in his testimony. She denied that the Respondents have dealt with the 1st Applicant's father's property which has nothing to do with the Deceased's estate. She denied knowledge of Plot. No. 95 and the 20 cares in Roka. Plot 274 was given to Khamis. She stated that although she had not filed the title with her petition, she confirms what the 1st Applicant stated in his affidavit that the Plots Nos. 102 and 94 belonged to the Deceased. The Applicants saw the title after filing the petition. Having been shown the various entries in the title, the 2nd Respondent stated that she did not know how the estates of Famau, Kanya and Aisha were inherited nor do they know their heirs. They do not also know how the Deceased got the suit properties. The 2nd Respondent further states that they did not include Plots Nos. 95 and 274 and the 20 acres in Roka as they did not know about them. Since they got the Grant they have sold portions of Plot No. 102. She further stated that the Deceased's estate was distributed to his 3 widows and children in accordance with Islamic Sharia.

10. Juma Mohamed Ngoto testified that he knows all the parties herein as the Deceased was his grandfather. The Deceased was a resident of Dar es Salaam until 1980s when he returned to Kenya. He was brought back to Kenya by the 4th Applicant to inherit the land Plots Nos. 102 and 94/IV/MN. Plot 274/IV/MN was inherited by other family members. None of the Deceased's brothers were deceased. Following the death of the Deceased, the 4th Applicant assisted the widows to file for inheritance at the Kadhi's Court. Nobody objected to the distribution of the estate. He stated that the family of Mohamed Basheikh to which he belongs did not inherit and he did not follow up as he did not know he was entitled to inherit. .

11. I have considered the Application, the evidence as well as the parties' respective submissions. The jurisdiction of the Court to revoke and annul grants of representation is contained in Section 76 of the Law of Succession Act (the Act) which provides:

“ 76 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) ...

12. In order to grant the orders sought, this Court must determine whether the statutory grounds for revocation or annulment of the Grant have been established. To begin with, the Applicants claim that the proceedings were defective in substance as no consent was obtained from heirs who also had a right to apply for the Grant. Rule 26(1) of the Probate and Administration Rules provides:

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

The degree of entitlement to a grant of representation is set out in Section 66 of the Law of Succession Act as follows:

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors

13. From the adduced evidence, the Applicants do not fall under any of the foregoing categories. As such their consent was not required.

14. The Applicants further accuse the Respondents of obtaining the Grant fraudulently by the making of a false statement, namely that the suit properties belonged to the Deceased yet the same were owned by Ahmed Stambuli and/or Famau Ahmed Stambuli and Basheikh Stambuli. The copy of title exhibited and relied on by the Applicants clearly shows at entry number 12 that the Deceased was registered as the administrator of the estate of Mohamed Abdul Hafidh, registered in 1979. Entry number 13 is a deed of partition of the Plot No 274 on the one hand and Plots Nos. 94 and 102 on the other, registered in 1980. Entry No. 14 is a transfer of Plots Nos. 94 and 102, the suit properties, to the Deceased as beneficiary, registered in 1984. The 1st Applicant acknowledged this fact in his testimony. The available and undisputed evidence is that the suit properties were transferred to the Deceased in 1984 and therefore constitute the estate of the Deceased. These are the properties listed in the Respondents' application for the Grant as the assets of the estate of the Deceased. These are the same properties listed in the Certificate of Confirmation of Grant issued on 9.3.11 for distribution to the Deceased's beneficiaries in accordance with Islamic Sharia. In view of the foregoing, I find nothing to persuade me that by listing the suit properties as the estate of the Deceased, the Respondents acted fraudulently.

15. The Applicants contend that the Respondents obtained the Grant fraudulently by the omission of Plots Nos. 95 and 274 Section IV Mainland North and 20 acres at Roka, Kilifi County. The Respondents have stated that the only assets they were aware of are the suit properties. They are not aware that the Deceased owned Plots Nos. 95 and 274 Section IV Mainland North and 20 acres at Roka, Kilifi County as alleged. It is trite law that he who alleges must prove. This principle is firmly embedded in Section 107 of the Evidence Act which stipulates:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

16. The Applicants produced no evidence to prove their allegations that the 3 properties belonged to the Deceased. The Applicants thus failed to discharge the burden of proof placed upon them by the Evidence Act.

17. The Applicants are aggrieved that the suit properties ended up in the name of the Deceased. To them, estates of Famau, Kanya and Aisha were not properly administered. The Public Trustee as the administrator of the estates ought to have distributed the states to Mohamed Basheikh, Amina Basheikh, Mwamgeni Basheikh, Bimkubwa Basheikh, Fatma Basheikh, and Abdulhafidh Basheikh but erred in failing to

do so. As a succession Court, this Court is required to satisfy itself that the suit properties are owned by the Deceased whose estate the proceedings herein relate and that the listed beneficiaries are the legal heirs of the Deceased. These 2 facts are undisputed. The fact is, the administration of the estates of Famau, Kanya and Aisha is presently not before me for determination. Nor is that of Mohamed Abdul Hafidh in respect of which the record shows the Deceased was administrator and beneficiary. To my mind these are the succession causes in which the Applicants ought to have raised their claims. It is not the proceedings herein that vested the suit properties in the Deceased. Revoking the Grant herein will therefore not divest the Deceased of the suit property.

18. The Court further notes that by their Application, the Applicants in effect are asking this Court to interrogate the process by which the Deceased acquired the suit properties. To do so would be to delve into the realm of title to land of which this Court is devoid of jurisdiction by dint of Article 165(5) of the Constitution of Kenya which provides:

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

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

19. In my view, the proper forum for litigating the Applicants' claim is the Environment and Land Court established pursuant Article 162(2) of the Constitution to hear and determine disputes relating to the use and occupation of, and title to, land.

20. Given that the suit properties belong to the Deceased and the listed beneficiaries are the true heirs of the Deceased, I find no evidence to support the allegation that the Respondents obtained the Grant fraudulently by the making of a false statement or by the concealment from the Court of something material to the case. The statutory grounds for revocation of the Grant have therefore not been established.

21. In the result, I find that the Application dated 27.1.14 lacks merit and the same is dismissed. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 14th day of December 2018

M. THANDE

JUDGE

In the presence of: -

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

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

.....**Court Assistant**