



REPUBLIC OF KENYA

IN THEN HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 85 OF 1997

In the Matter of the Estate of Gulam Mohamed (Deceased)

GULAM MOHAMMED NOOR.....PETITIONER/PETITIONER

Versus

BAHADUL NOOR MOHAMMED GULAM.....1ST RESPONDENT

HOME STRIDES HOLDINGS LTD.....2ND RESPONDENT

RULING

Administrator acquiring Estate property

[1] Before me is Chamber Summons application dated 27th July 2016. The significant orders sought in the application can concisely be stated to be:

- (a) **An injunction to restrain the Respondents from intermeddling with the estate of the deceased;**
- (b) **An order committing the Respondents to prison for intermeddling with the estate of the deceased;**
- (c) **An order reverting back the deceased's property known as MERU MUNICIPALITY BLOCK 11/107 to the name of the deceased for purposes implementation of the grant made by the court in the judgment delivered on 29th September 2011;**
- (c) **These orders to be served on the Land Registrar Meru for compliance; and**
- (d) **Costs to be borne by the Respondents jointly and severally.**

[2] The application is supported by the affidavit of the Applicant, the grounds set out in the application and others espoused in the oral submissions made by counsel for the Applicant on 21st November 2016. The Applicant argued that, by a judgment delivered on 29th September 2011, the court made a grant of representation to the Applicant and the 1st Respondent in respect of the estate of the deceased. The only property of the deceased is **MERU MUNICIPALITY BLOCK 11/107** which, according to the grant was to be registered in the joint names of the nine beneficiaries including the Applicant and the 1st Respondent. The Applicant averred that he made all efforts to have the grant implemented but he was frustrated by the 1st Respondent who kept on claiming that the whole

property ought to have been given to him. He stated that on 9th June 2016, he searched the property after the 1st Respondent threatened to sell it only to find that the 1st Respondent had already transferred the estate property to himself and obtained a lease in his name. In addition, the 1st Respondent started to issue notices to the management of the property and the tenants hence this application. He blames the daughter of the 1st Respondent as one of the chief architects of these illegal acts.

[3] Mr. Ndubi ably amplified the Applicant's case by making the following submissions. He submitted that the lease to the estate property had expired at the time of the judgment herein and so the court directed that the estate property be registered in the joint names of the nine beneficiaries. But, the 1st Respondent had the estate property registered in his name to the exclusion of all the others. Counsel for the Applicant stated that the daughter of the 1st Respondent who is not even a beneficiary of the estate wrote to the Registrar of Land through letter dated 26th June 2012 and claiming to be a beneficiary of the estate of the deceased requested the removal of caution that had been registered on the estate property. In a follow-up letter dated 22nd May 2015, she fraudulently stated that the 1st Respondent was the only surviving beneficiary of the deceased as per "the will". On the basis of these fraudulent misrepresentations, letter of allotment was issued and ultimately lease was issued in the name of the 1st Respondent. Therefore, there was non-disclosure of facts by the 1st Respondent.

[4] Counsel for the Applicant further submitted that it is not true that the caution registered by the Applicant in 1974 could have prevented the 1st Respondent from implementing the grant herein. This is mere excuse on his part. Ndubi also drew the attention of the court to the fact that the 1st Respondent was a joint administrator and if he had any complaint against the other administrators he ought to have raised it with the court. He did not do so instead he registered the estate property in his name. Counsel also took issue with the affiant of the Replying affidavit whom he said was not a party to these proceedings as the power of attorney allegedly relied upon as the authority to swear the affidavit had not been registered. Counsel wondered how counsel who acted for the parties herein in the succession cause could now turn back and state that there was no estate to distribute at the time of the judgment. He beseeched the court to allow his application.

1st Respondent opposed application

[5] The 1st Respondent opposed the application and filed a Replying affidavit. Mr. Otieno C counsel for the Respondents amplified the averments in the Replying Affidavit through his oral submissions. His major argument is that as at 29th September 2011, there was no estate property to distribute as the lease had expired and the property reverted back to the government. It was his argument that at that time the said property was available for allocation to any person who applied. He also urged that all the other beneficiaries went to slumber and did not bother to renew the lease. He told court that his client made efforts to renew the lease but in vain. Counsel submitted on the letters adverted to by Ndubi and said that they referred to the will and should be seen in that light. He defended the power of attorney which he said contrary to the allegations by Ndubi had been registered. For those reasons, he urged the court to dismiss the application herein.

DETERMINATION

[6] The facts of this case are quite perturbing. The 1st Respondent who is a joint administrator of the estate of the deceased caused the estate property to be registered in his name. His argument for doing so was that by the time of the judgment distributing the estate property to the nine beneficiaries, the lease to the estate property had already expired, and as such, the property reverted back to the government and was, therefore, available for allocation to any person who applied. I must state here that administrators stand in a fiduciary relationship with and bear fiduciary obligations towards the beneficiaries. One of these obligations is getting in, collecting, gathering, protecting and preserving the estate property. An administrator must therefore do all that appertains to that duty in order to preserve the estate property. On this, see *Halsbury's laws of England, 4th Edition Revised, Vol. 17(2) at para 377* that:

Getting in the estate

The personal representatives of a deceased person are under a duty to collect and get in the deceased's real and personal estate and administer it according to law. A personal should get in as speedily as possible all money of his testator outstanding upon personal security...'

It was, therefore, the duty of the 1st Administrator as a joint administrator to do all that is expected of him and all that he can in order to bring in, protect, preserve and secure the estate property. He must also show that he employed the best effort with diligence and circumspect to bring in, collect, preserve, protect and secure the estate property, In this case, the lease to the estate property had expired and the 1st Respondent knew this. As one of the administrators, the first obligation and priority was to apply for its renewal and follow through on all the processes involved to have it renewed. I say this fully aware that at the time of judgment the land still stood in the name of the deceased and a matter of policy, the original lessee ordinarily gets priority and preference in renewal of lease. The 1st Respondent averred that he made efforts to have the lease renewed but in vain as the other beneficiaries were not cooperating. He also blamed the caution registered in 1974 as the reason why the renewal was impeded. But, these are stealth arguments contrived to justify his actions of causing the lease to be issued in his name. When he set out through his daughter to renew the lease, he first applied- albeit in most fraudulent manner- for removal and caused the removal of the caution he is saying prevented him from applying for renewal of the lease in favour of the estate. It is, therefore, a lie that the caution prevented him from applying. Again, he did not exhibit anything or letter to show that he applied for renewal of the lease in favour of the administrators of the estate of the deceased or for the removal of the caution to enable renewal of lease in favour of the administrators of the estate. He did it for himself.

[7] I have also perused the entire process of renewal of the lease herein and it is tinged with complete dishonesty and stealth maneuvers by the 1st Respondent and his daughter. The letter dated 26th May 2015 stated that the 1st Respondent was the beneficiary of the deceased as per the will which he attached. The latter did not, however, disclose the other beneficiaries of the deceased. Again, the alleged will was not produced in court and I think this is a matter which would require further investigation to obtain copy of the alleged will which allegedly named him as the only surviving beneficiary of the deceased. That is not all. From the letter dated 22nd May 2015 by the daughter of the 1st Respondent, it became clear what his intention were in removing the caution on the land: it was to have the renewal of the lease to the estate property in his name. Contrary to the facts, the letter contrived a more assuring way to get renewal of the lease by stating that he was the only surviving beneficiary as per 'the will'. As these proceedings testify, the 1st Respondent is not the only beneficiary of the deceased- there eight others. The facts of the case and the actions by the 1st Respondent and his daughter reveal an ominous ambition of doing all possible hurt to their fellow beneficiaries which is the great cement of the their avowed design of achieving the mischief herein.

[8] The 1st Respondent was doing all these things when he was an administrator of the estate of the deceased. The question is; whether he is entitled to do what he did? In law, an administrator, if he is a beneficiary is only entitled to the share identified by the grant to belong to him. Administrators also bear altruistic fiduciary obligations imposed by the law, so that they cannot exploit their position for their own benefit or to harm the beneficiaries or dissipate the estate property. The 1st Respondent, being a joint administrator was not entitled to use the information he obtained as an administrator to convey the entire estate property to himself contrary to the grant of representation issued to him. In this case, the 1st Respondent obtained renewal of lease through fraudulent means. He made serious misrepresentations to the Registrar of Land that he is the only beneficiary of the deceased- but as these proceedings testify there were eight others. It bears repeating that the 1st Respondent had the estate property registered in his name to the exclusion of all the others. These actions by the 1st Respondent were not authorized or backed by the law and were clearly in breach of the duties of an administrator of an estate as well as his fiduciary obligation to the other beneficiaries. He cannot therefore escape liability. One, the acquisition in his name was illegal and nullity. In law, when such breach occurs, the administrator or trustee in breach will be

ordered to restore the property back and also pay any other loss which may have ensues upon the estate and the beneficiaries. These principles and remedies were settled long time ago in equity and you may see the case of **NOCTON vs. ASHBURTON [1914] A.C. 932.**

Orders

[9] Accordingly, there has been blatant breach of statutory as well as fiduciary obligations by the 1st Respondent in obtaining title to the estate property in his name. That action was to deprive the other beneficiaries of their entitlement in the estate property, and the estate of its property in a fraudulent manner. As such, his registration is full of festering water; and so, the most apt remedy is for him through re-conveyance to restore the property back to the estate for distribution in accordance with the law. The argument by Mr. Otieno C that there was no property for distribution as the lease had expired is just another attempt to justify what was clearly illegal and a means to perfect and clothe the transaction with some form of legality. The conduct of the 1st Respondent would even warrant removal as administrator but I will not so order since that request was not put to the court. The upshot of my analysis therefore is encapsulated in the following orders:

(a) I find and hold that **MERU MUNICIPALITY BLOCK 11/107** is the estate property and shall accordingly revert into and be registered in the name of the deceased for purposes of administration of the estate in accordance with the judgment of the court delivered on 29th September, 2011. The two administrators shall be registered by transmission for the benefit of themselves and all the beneficiaries of the estate that were identified in the judgment of 29th September 2011 to wit:

- i) Amina daughter of Gulam Mohamed Bahadur**
- ii) Bahadur Noor Mohammed Gulam**
- iii) Gulam Mohamed Noor**
- iv) Yusuf Mohamed Noor**
- v) Benna Nargis Gulam**
- vii) Samiya Zenab Ashraff**
- vii) Zaitun Mohamed Noor**
- viii) Amirjaan Begum Khaki**
- ix) Shenaz Noor Moahmed**

The relevant registrar of land shall immediately give effect to these orders.

(b) That the administration of this estate shall be completed within 30 days and the administrators shall file full and accurate account of the completed administration.

(c) The 1st Respondent shall pay costs of the application dated 27th July 2016. It is so orders.

(d) Given the nature of these proceedings and the events which have intervened, any of the parties concerned is at liberty to apply.

Dated, signed and delivered in open court at Meru this 19th day of January 2017

F. GIKONYO

JUDGE

In the presence of:

Carlpeters advocate for Ndubi advocate for applicant

Otieno advocate for respondent

F. GIKONYO

JUDGE