



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 121 of 1991

IN THE MATTER OF THE ESTATE OF ISMAIL OSMAN ADAM

NOORBANU ABDULRAZAK.....APPLICANT

VERSUS

ABDULKADER ISMAIL OSMAN.....RESPONDENT

RULING

1. The deceased to whose estate the proceedings herein relate is Ismail Osman Adam (“the Deceased”), who died on 25.3.91 in Mombasa. The record shows that the Deceased died testate having made a will dated 28.1.87 (“the Will”). He was survived by 7 sons and 3 daughters. In the Will, the deceased appointed his son Abdulkader Ismail Osman, the Respondent herein as the sole executor of the Will.

2. In the Will, the Deceased bequeathed his estate to his 2 sons Abdulkader Ismail Osman and Mohamed Hussein Ismail Osman in equal shares. According to the Will, the estate consisted of:

i) The Deceased’s share in Plot No. Mombasa/Block XVII/66 (“the Property”).

ii) The remainder of the Deceased’s real and personal estate after payment of all just debts and funeral expenses.

3. The record shows that Grant of Probate of Written Will was issued to the Respondent on 7.11.91 and confirmed on 14.9.92. The record further shows that on 5.2.01, Noorbanu Abdulrazak, a daughter of the Deceased and the Applicant herein, did file Succession Cause No. 50 of 2001 before the Kadhi’s Court in Mombasa protesting her exclusion from the Will which she alleged to be contrary to Islamic Sharia Law. The proceedings were however stayed by this Court in Judicial Review Miscellaneous Application No 61 of 2002 filed by the Respondent. On 11.3.05 the Applicant filed the present Summons for Revocation of Grant under Sections 26 and 76(a) and (c) of the Law of Succession Act. The Applicant subsequently filed a Notice of Withdrawal of Suit No. 5 of 2001 pending before the Kadhi’s Court on 20.6.05. The Application herein was heard by *viva voce* evidence before Odero, J. who on 30.7.09 delivered her judgement dismissing the same. The Applicant being dissatisfied with the decision filed Civil Appeal No 285 of 2009. In its Judgement of 5.12.13, the Court of Appeal allowed the Appeal and remitted the matter to the High Court for rehearing before a Judge other than Odero, J.

4. The Application dated 9.3.05 is premised on the grounds that there was non-disclosure of material facts and misrepresentation at the time of filing the petition for grant. The Applicant claims that she was neither informed about the Will nor about the filing of the petition for grant of probate herein. The Applicant further claims that the Will is not valid as it is not properly attested. She further claims that she is entitled to reasonable provision from the estate of the Deceased. It is the Applicant’s case that under

Islamic law, all children of the Deceased who have the right to inherit from the estate of the Deceased. She claims that the Deceased lived and died a Muslim and accordingly, he could not have made a will disinheriting some of his children. The Deceased was also very ill 3 years to his death and therefore did not have the capacity to make the purported will.

5. In his Replying Affidavit sworn on 9.6.05 the Respondent denies that the Deceased was incapacitated at the time of making the Will which he signed in the presence of an advocate. He avers that the Deceased's faculties were intact prior to his suffering a stroke in 1991. He states that upon the demise of the Deceased, he filed the petition for grant herein which was duly published in Kenya Gazette Vol XCIII of 4.10.91. No objection was filed by anyone not even by the Applicant. Grant of Probate was issued on 7.11.91 and confirmed on 14.9.92. He further avers that the Application herein is bad in law and abuse of the Court process.

6. The matter was heard before me by way of *viva voce* evidence. The Applicant testified that of the Deceased's children, only 4 sons and 2 daughters are alive. Their mother is also deceased. She opposes the Will because it only provides for 2 sons and has left the other children out. Her wish is that her father's estate be distributed per Islamic Sharia. According to her, when the Deceased purchased the Property around 1972, it had 3 flats. The Property now has 6 flats, a restroom, garage and vacant space that can be developed further. The Applicant's claim is for 1 flat out of the flats on the Property. She claims that the Deceased told her that he would leave to her 1 flat or in the alternative her brothers were to buy her another flat as the Deceased had money in the bank.

7. The Respondent denies the Applicant's claims. He stated that the Applicant was given cash and jewellery and was therefore not entitled to the estate of the Deceased. He however stated he does not know how much she was given. He avers that the Property was purchased by the Deceased and 5 sons. He stated that the Deceased was opposed to the Applicant's wedding and did not attend the same. That he (Respondent) paid all the expenses of the Applicant's wedding.

8. Mohamed Hussein Ismail Osman another son of the Deceased also testified on behalf of the Respondent. He stated that the Deceased owned 1 flat in the Property. He also stated that the Applicant was given jewellery and money as her entitlement. He too does not state how much the Applicant was given and did not witness the Deceased giving the Applicant the money and jewellery. Initially the Property had 3 flats but they built 3 other flats.

9. Counsel for the parties submitted before me extensively on their respective clients' positions which submissions I have considered together with the authorities relied on. The issues for determination are:

- i) Whether the proceedings to obtain the Grant of Probate were defective in substance.
- ii) Whether the 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.
- iii) Whether the Deceased being a Muslim could legally bequeath his estate to his 2 sons to the exclusion of all other children.

Whether the proceedings to obtain the Grant of Probate were defective in substance

10. The Application is expressed to be bought under Sections 26, 76(a) and (c) of the Law of Succession Act. Section 26 of the Act provides:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that

dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate”.

11. The Applicant seeks in the main revocation of grant of probate and not just for reasonable provision from the estate of the Deceased as a dependant. This was clearly stated by Githinji, JA. in his decision in Civil Appeal No. 285 of 2009:

“It is clear from the application that although the appellant cited section 26 of the LSA among other provisions of the law, her application was expressly an application for revocation or annulment of the grant under section 76 and not an application for reasonable provision from the estate under section 26.”

12. I shall therefore consider the Application for revocation of grant on the basis of the provisions of Section 76 (a) and (c) of the Act. Section 76(a) (c) provides:

“76 Revocation or annulment of grant

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) ...

(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;”

13. The law provides that a grant of representation may be revoked if the proceedings to obtain the same were defective in substance. The Applicant claims that she was neither informed about the Will nor about the filing of the petition for grant of probate herein. I have considered the process of applying for the Grant of Probate herein. In testate succession, it is the executor named in the will of a deceased person who petitions for a grant of representation unlike in intestate succession where any beneficiary in the order of priority provided for in Section 66 of the Law of Succession Act may petition for a grant. The Respondent, the executor named in the Will filed the Petition for Grant of Probate and annexed the Will of the Deceased as required. The Petition was duly published in Kenta Gazette Notice No. 4546 of 4.10.91 and no objection was filed. The Grant of Probate was subsequently issued to the Respondent. It would appear that the Respondent did all that was required of him under the law.

14. Rule 26 of the Probate and Administration Rules provides:

“26. Grants of letters of administration

(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.”

15. The above provisions require that notice of application of grant be given to every person entitled in the same degree as or in priority to the applicant. Such persons must also either renounce their right or give their written consent to the applicant before a grant is made to an applicant. The above provisions however relate to application for grant of letters of administration. There are no such provisions regarding

application for a grant of probate. It is therefore my finding that the proceedings to obtain the grant herein were not defective in substance as the Respondent followed due process.

16. Whether 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

Under Section 76(b) a grant may be revoked if the same was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. Although the Applicant cites Section 76(c), she has proceeded on the basis of Section 76(b). She claims that there was non-disclosure of material facts and misrepresentation at the time of filing the Petition for grant. She has not however stated what material facts were concealed or not disclosed nor has she produced evidence of any misrepresentation whatsoever. My finding is that the Applicant has not satisfied the Court that the Grant was obtained fraudulently.

17. The Applicant further claims that the Will is not valid as it is not properly attested. A look at the Will however discloses that the same was attested by B. T. Parkar, Advocate and by Stephen M. Mbwana. The Applicant does not state in what way the attestation was not proper. She further challenges the Will on the basis of her father's illness. She alleges that he was very ill 3 years prior to his death and therefore did not have the capacity to make the Will. It is trite law that he who alleges must prove. Section 109 of the Evidence Act provides:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The Applicant wishes the Court to believe that the Deceased was not in charge of his faculties when he made the Will due to illness. She has however provided no evidence to support her allegation. In the absence of any evidence to the contrary, the Deceased will be deemed to have been of sound mind when he made the Will.

18. Whether the Deceased being a Muslim could legally bequeath his estate to his 2 sons to the exclusion of all other children

Having considered the foregoing, I find that the real crux of the matter herein is that the Will has not made provision for the Applicant. It is the Applicant's case that the Will which made provision for only 2 of his children and disinherited the other children is not valid. It is not disputed that the Deceased lived and died a Muslim. The question as to the validity of the Will can only be answered by testing it against the provisions of Islamic Sharia. The Court of Appeal when remitting this matter to this Court for rehearing directed that the Judge shall have regard to the provisions of Section 2(3) of the Law of Succession Act which provides:

“2 Application of Act

(3) 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.

Subsection 4 provides:

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.”

19. It is clear that Section 2(3) of the Act precludes the application of the Act (save for Part VII thereof) to Muslims. Even where matters relating to the estate of a Muslim are filed in the High Court, the

applicable law shall be Muslim law. The devolution of the estate herein being of a Muslim, shall therefore not be subject to the Law of Succession Act but shall instead “be governed by Muslim law”. This was clearly articulated by Githinji, JA. in his decision in Civil Appeal No. 285 of 2009:

“... if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3), the law applicable in the High Court as to the devolution of the estate is the Muslim law and not the LSA. As an example, disputes relating to the validity of a will made by a Muslim and the ascertainment of heirs and shares will be determined in accordance with Muslim law.”

20. What does Muslim law say about testamentary freedom of Muslims? 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).

A Muslim is barred by Islamic Sharia from disposing by will more than 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 to third parties is not valid.

21. It was submitted in defence of the Will that the same is in harmony with Islamic Sharia in that the Deceased made provision for the Respondent who suffered a permanent injury and damage to his arm and Mohamed Hussein Osman the youngest of his sons. The Saifuddin case (supra) was cited to buttress the submission:

The emphasis is thus, on the Muslim ethic of care and compassion for the weak and vulnerable, especially among one’s close relations. In Ch. XIX “Maintenance of Relatives”, p. 383, Sir Dinshah F. Mulla reinforces the above principle to say that, in Islamic teachings, a Muslim is not obliged to maintain adult sons unless they are disabled by infirmity or disease, or even a child who is capable of being maintained out of his or her own property.

In fact, therefore, this balancing of a parent’s responsibility of care of his or her issue with the latter’s ability to take care of themselves, underlines an established juristic maxim that, in interpreting a Quran-inspired rule of law, account should be taken of the Quran’s moral teaching as a whole.”

22. The submission on behalf of the Respondent is a misapprehension of what Sir Dinshah F. Mulla states above. He states:

a Muslim is not obliged to maintain adult sons unless they are disabled by infirmity or disease...”

My understanding is that the above principle envisages maintenance of adult sons during the lifetime of their father and not after his death. Further while it may be true that the Respondent did suffer a permanent injury to his arm, no evidence was adduced to show he was destitute or incapable of taking care of himself. Indeed in his testimony, he did inform this Court that he bought one flat in the Property from Hamida Asif Butt for Kshs. 2,200,000/= and also paid the Applicant’s wedding expenses. Surely the Respondent cannot be said to be a destitute man. As for Mohamed Hussein Osman, I am not persuaded that the fact that he is the youngest amongst the Deceased’s sons makes him incapable of taking care of himself to warrant a special consideration by the Deceased.

23. Under Islamic Sharia, and this is important in testing the validity of a will, a Muslim may not make a bequest in his will in favour of a legal heir. This is because Allah legislated fixed shares for legal heirs.

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".

24. 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."

25. It is clear from the foregoing that the Will of the Deceased dated 28.1.87 is contrary to Islamic Sharia not just for providing for only 2 of the Deceased's children to the exclusion of all other children but for providing for legal heirs whose share is already stipulated in the Holy Qu'ran.

26. Before making final orders, it is important to address the issue of what constitutes the estate of the Deceased. In the Will, the Deceased gave to his 2 sons the following:

- i) His share in Plot No. Mombasa/Block XVII/66
- ii) The remainder of his real and personal estate after payment of all just debts and funeral expenses.

27. It would appear that the Applicant's complaint relates only to the Deceased's share in the Property. She makes no reference to the residue of the estate. I shall therefore only deal with the Property which is at issue herein. Two titles were produced in Court. Although the evidence is that the Deceased purchased the property in 1972, the first title produced herein is dated 19.11.91. This title contains 6 names including that of the Deceased, his 4 sons, Hassan Esmail, Abulsatar Esmail, Abdulkader Esmail, Mohamed Husein Esmail and Hamida Asif Butt in respect of the share of another son Ahmed Ismail (deceased). The share of the 6 registered proprietors is not indicated on the title. In light of Section 91(2) of the Land Registration Act there shall be a presumption that they hold the interest as tenants in common in equal shares.

28. The second title dated 13.7.98 has 4 registered proprietors namely Hassan Esmail 1/6th share, Abulsatar Esmail 1/6th share, Abdulkader Ismail Osman 5/12th share and Mohamed Hussein Ismail Osman 1/4th share as tenants in common in undivided shares. It would appear that the reason the Deceased's name is missing on this title is because his share was divided amongst the Respondent and Mohamed Hussein Ismail Osman, the beneficiaries under the Will, while that of Hamida Asif Butt was purchased by the Respondent. In view of the foregoing, the estate of the Deceased that the Applicant claims a share in is 1/6 of the Property and not the whole. The estate of the Deceased shall be distributed amongst the rightful beneficiaries in accordance with Islamic Sharia.

29. In view of the foregoing, what is the fate of the Grant of Probate issued to the Respondent? It follows that the said Grant cannot stand. Consequently, I do make the following orders:

- i) The Grant of Probate issued to Abdulkader Ismail Osman on 7.11.91 be and is hereby revoked.
- ii) Grant of Letters of Administration in respect of the estate of the Deceased Ismail Osman Adam is hereby granted to Abdulkader Ismail Osman.
- iii) The Deputy Registrar is hereby directed to forward this matter to the Hon. Chief Kadhi for him

to guide this Court on the distribution of the estate of the Deceased in accordance with Islamic Sharia and file a report within 30 days of the date hereof.

iv) The matter shall be mentioned on 20.6.17 for further directions.

v) Each party to bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 12th day of May 2017

M. THANDE

JUDGE

In the presence of: -

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

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

..... **Court Assistant**