



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

SUCCESSION CAUSE NO. 380 of 2008

IN THE MATTER OF THE ESTATE OF HAJI MOHAMED (Deceased)

IN THE MATTER OF AN APPLICATION BY OMAR AHMED AND ALI AHMED

RULING

1. Before this Court is Summons dated 17.6.15 by Omar Ahmed and Ali Ahmed Mohamed seeking orders:-
 - a. Spent.
 - b. Spent.
 - c. That pending hearing and determination of this cause Abdi Satar Haji be restrained whether by himself, his agents, servants or representatives from in any manner meddling in the administration of the estate of the late Haji Mohamed Adam or any manner interfering with the estate or properties comprised thereof.
 - d. That Abdi Satar Haji be compelled whether by himself, his agents, servants or representatives to deposit in Court all the title documents which he is holding in respect of property forming part of the estate of the late Haji Mohamed Adam.
 - e. That Haji Plaza be placed under the management of a reputable estate management company to collect and account for the rent and other income of the property.
 - f. That Fatuma Mohamed and Asha Mohamed the Administrators be ordered to provide full, detailed and accurate accounts of the estate including all income and expenditure within 14 days.
 - g. That in default of providing accounts above, the administrators be held personally and criminally liable as by law provided.
 - h. That further in default of providing accounts as above, the grant of letters of administration to Fatuma Mohamed and Asha Mohamed be revoked and a new grant be issued to Omar Ahmed and Ali Ahmed Mohamed.
 - i. That the court do make such further orders as are appropriate.
 - j. The costs of the Application be provided for.

The Applicant's Case

2. The Application is supported by the grounds on the face of it as well as the Supporting Affidavit of Omar Ahmed sworn on 17.6.15 one of the Applicants on behalf of the Applicants. The Applicants are grandsons of the deceased herein by virtue of being the sons of the late Ahmed Mohamed Adam also known as Ahmed Haji Mohamed who was a son of the deceased. It is the contention of the Applicants that their father was named in the will of the deceased as one of the beneficiaries and hence his estate is a beneficiary of the estate of the deceased; that they are the Administrators of their father's estate.

3. The Applicants further state that on 12.7.00, this Court issued a Grant of Letters of Administration to Fatuma Mohamed and Asha Mohamed; that in spite of the will being very clear on the distribution of the estate, the Administrators have failed to properly and diligently distribute the same; that they have instead allowed Abdi Satar Haji (the Respondent) to intermeddle in the estate and subject the same to acts of mismanagement, wastage and pilferage; that the Respondent has been collecting rent from Haji Plaza but has not accounted for the same; that he even purported to enter into a lease with the National Social Security Fund over Haji Plaza; that he is holding title documents in respect of properties forming part of the estate of the deceased; that the Respondent filed summons for confirmation of grant yet he is not an administrator of the estate; that the income from the estate is being put to the personal use of the Respondent and the Administrators; that some of the beneficiaries purported to ask the Kadhi in Nakuru to distribute a portion of the estate;

The Respondent's Case

4. In his Replying Affidavit sworn on 9.7.15, the Respondent denies the allegations of the Applicants that the estate of the deceased is being wasted. He depones that he is one of the executors of the deceased's will and that he has the responsibility to administer the estate. He claims that the Applicants' father predeceased the deceased and therefore the Applicants are not entitled to the estate of the deceased; that this was confirmed by the Kadhi in Nakuru. He further states that the estate of the deceased has been distributed among the two families of the deceased in accordance with the will of the deceased and that the Applicants have themselves been allocated a portion of land where they have built a house.
5. The Respondent further denies that he has put the rents from any property of the estate to his personal use and that it is the Applicants who have refused to pay rent for the premises they occupy. He further confirms that as executor of the will he is indeed holding the original titles. He denies that his co-executors have delegated duties to him and insists that he is one of the executors of the will of the deceased.
6. The Administratrix filed Grounds of Opposition dated 24.7.15 in opposition to the Application herein. She contends that the Application is misconceived, bad in law and an abuse of the Court process. It is also flawed with no chance of success and offends the provisions of the Law of Succession Act.
7. In their rejoinder contained in a Supplementary Affidavit sworn on 15.7.15, the Applicants maintain that the estate has not been distributed; that the estate could not be lawfully distributed in the absence of a confirmed grant. They further claim that the Respondent has contradicted himself by on the one hand stating that the Applicants are not entitled to inherit from the deceased and on the other hand alleging that the Applicants have been allocated a portion of land and stalls. It is the Applicants' position that no portion of land was allocated to them but that the land in question L. R. No. 1956/508 is owned by Voi Concrete Limited a company in which their deceased father and the deceased herein were equal shareholders on 50/50 basis.
8. The Applicants further state that the Respondent is not an administrator of the estate as the grant to him and others was revoked for failure to lawfully administer the estate. The Applicants allege that the Respondent in total violation of the Court's order of 19.6.15 has commenced construction on a portion of Haji Plaza. That the Respondent has further violated the said Court order by invoicing and receiving payments from the National Social Security Fund in his personal name.
9. It is the Applicants' contention that the Respondent has intermeddled in the estate of the deceased. That though the Respondent was appointed executor of the deceased will, the Grant issued to him and others was revoked and a new Grant issued to Fatuma Mohamed and Asha Mohamed. They further argue that the power of attorney given to the Respondent does not give him any legal authority over the estate. In any event the said power of attorney was donated by one Asha Abdi Ismael who is not one of the Administrators in the Grant issued on 12.7.00.

Determination

10. I have considered the Summons, the Affidavits on record and the rival written submissions of the parties as well as the authorities cited. I have also considered the Grounds of Opposition.
11. The Grounds of Opposition filed by the Administratrix were not supported by any submissions. There is therefore no material upon which the Court can come to the conclusion that the Application is misconceived, bad in law and an abuse of the Court process as alleged. There is nothing to show that the Application is flawed with no chance of success. The Administratrix has also not demonstrated to this Court in what way the Application offends the provisions of the Law of Succession Act.
12. In their written submissions, the Applicants argue that as grandchildren of the deceased herein, they are entitled to a share of his estate as provided for in paragraphs 4 and 5 of the deceased's will. The Respondent on the other hand argues that under Islamic law the Applicants are not entitled to a share of the estate herein as their father predeceased the deceased. In this regard, the Respondent has cited the case of the Estate of Ismail Osman Adam, deceased, Noorbanu Abdulrazak v. Abdulkader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009 and also Sharia Law to buttress his argument that the applicable law in the High Court in relation to a deceased Muslim is the Muslim law. Whether the Applicants are beneficiaries of the deceased's estate or not is a matter that should be determined at the hearing of the Summons for Confirmation of Grant issued to Fatuma Mohamed and Asha Mohamed. To make any pronouncement at this stage on whether the Applicants are entitled to the estate of the deceased would be to preempt the outcome of the Summons for Confirmation.
13. Is the Respondent an intermeddler in the estate of the deceased as alleged? If so, should he be restrained from interfering with the estate of the deceased? Section 45(1) of the Law of Succession Act provides

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.

14. It is evident from the record that the Respondent was appointed as one of the executors of the will of the deceased. The record also shows that a Grant of Probate was issued to the Respondent and his co-executors on 24.6.97. This Grant of Probate was however revoked on the application of Fatuma Mohamed on 12.7.00 and a Grant issued to the said Fatuma Mohamed and Asha Mohamed. In view of the above, has the Respondent been authorized by the Law of Succession Act or by any other written law, or by a grant of representation to deal with the estate of the deceased? The answer is in the negative. The authority of the Respondent ended upon the revocation of the Grant of Probate issued to him and his co-executors.
15. The Respondent has argued that he is not disposing of the estate but managing the same by virtue of a power of attorney donated to him by the Administrators. He further claims that Asha Abdi Ismael, the donor of the power of attorney and Asha Mohamed is one and the same person, which fact is disputed by the Applicants. Even if this were so, the question that begs is whether administrators can delegate their power, authority and duty bestowed upon them by a Grant. The Respondent argues that there is no provision in the Law of Succession Act restraining an administrator from donating a power of attorney.
16. Kimaru, J. in In Re Estate of KRISHAN MURTI MAINI (DECEASED) [2011] eKLR had occasion to consider the issue of delegation of power bestowed by a Grant and had this to say

“It is therefore clear that when a court issues letters of administration or grants a probate of written will, such letters or grants are issued personal to the person applying to administer the estate of the deceased. The person applying for letters of administration or

grant of probate cannot on his part delegate the powers granted to him by the court to someone else to administer the estate (in the case where the deceased died intestate) or to execute the will (in the case where the deceased left behind a written will) on his behalf.”

17. In his book “Law of Succession” Law Africa at page 246, Musyoka, W. M. writes on the power of delegation thus

“The extent to which personal representatives can delegate their duties is the same as for trustees and is governed by the Trustee Act. Under the said Act, personal representatives may employ an agent to transact any business or do any act in the administration of the estate and may remunerate such agent out of the estate. Under Section 24 of the Trustee Act, the personal representative can engage an advocate or a bank to arrange the collection of the assets of the estate, discharge of debts and other liabilities, and distribution of the estate. It can also be used to employ an estate agent to sell land forming part of the estate, or to engage a stockbroker to value or sell shares. The provision does not allow personal representatives to delegate any discretion in matters relating to the administration of the estate. The decision making power of the estate remains with the personal representatives and not the appointed agent. The creation of a power of attorney may lead to a delegation of decision making power.

18. It is clear from the above that the law does not allow personal representatives to delegate any discretion in matters relating to the administration of estates. The power of attorney donated by the Administrators herein to the Respondent has led to the delegation of decision making power. Indeed the Respondent has himself stated that as he served as executor of the estate herein, he is best placed to assist the executors in managing the properties. The power of attorney from the Administrators to the Respondent has no backing in law and is therefore of no effect. Consequently this Court finds that the R Respondent is indeed an intermeddler in the estate herein within meaning of Section 45(1) of the Law of Succession Act. He must therefore be restrained from interfering with the said estate.

19. The Applicants have prayed that the Administrators Fatuma Mohamed and Asha Mohamed provide accounts within 14 days. This is quite in order as Section 83(g) of the Law of Succession Act provides the duties of personal representatives are *inter alia*:

“to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings herewith up to the date of the account.”

20. It is in the interest of the estate and of the beneficiaries thereof that an account is produced to this Court given that the Grant of representation was issued to the Administrators way back in the year 2000. This Court is also keen to know how the estate has been managed and dealt with since the said Grant was issued.

21. The Applicants also pray that in default of the Administrators producing the account as directed, they should be held personally and criminally liable as by law provided and further that the Grant of Letters of Administration be revoked and a new grant be issued to the Applicants. It is my view that it would be preemptive and premature for this Court to make such an order.

22. On the prayer that Haji Plaza be placed under the management of a reputable estate management company to collect and account for the rent and other income of the property, this prayer shall abide the outcome of the production of the account.

23. In the result, I find that the Summons herein has merit and is allowed in part. I hereby make the following orders:

- a. That Abdi Satar Haji be and is hereby restrained whether by himself, his agents, servants or representatives from in any manner meddling in the administration of the estate of the late Haji Mohamed Adam or any manner interfering with the estate or properties comprised thereof;
- b. That Abdi Satar Haji be and is hereby ordered by himself, his agents, servants or representatives to deposit in Court all the title documents which he is holding in respect of property forming part of the estate of the late Haji Mohamed Adam;
- c. That Fatuma Mohamed and Asha Mohamed do produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith from 12.7.00 up to the date of the account within 60 days of the date hereof;
- d. That this matter be mentioned on 24.5.16 to confirm compliance and for directions;
- e. That costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 11th day of February 2016.

M. THANDE

JUDGE

In the presence of: -

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

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

..... **for the Administrators**

..... **Court Assistant**