



**REPUBLIC OF KENYA**

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

**PROBATE AND ADMINISTRATION DIVISION**

**SUCCESSION CAUSE NO. 1692 OF 2011**

**IN THE MATTER OF THE ESTATE OF KHADIJA AHMED alias KHADIJO ALI AHMED  
(DECEASED)**

**ABDO ALI AHMED AL-NAKHLANI.....APPLICANT**

**VERSUS**

**ADIL SALAH ALI AL-NAKHLANI.....RESPONDENT**

**RULING**

1. The deceased to whose Estate these proceedings relate is Khadija Ahmed Alias Khadijo Ali Ahmed, who died on 15<sup>th</sup> August 2006 while domiciled in Kenya. Letters of administration intestate of all her Estate were issued to Adil Salah Ali Al-Nakhilani, (hereinafter the Respondent), on 10<sup>th</sup> July 2012.
2. On 4<sup>th</sup> February 2014, Abdo Ali Ahmed Al-Nakhilani (hereinafter the Applicant), filed summons for revocation of the said grant in his capacity as beneficiary of the deceased's Estate on grounds that:
  - a. *the said grant was obtained fraudulently by the making of false statements and by concealment from the court of material facts;*
  - b. *the grant was obtained by means of untrue allegation of a fact essential in a point of law;*
  - c. *the person to whom the grant was made is not a beneficiary of the Estate herein and has purported and attempted to dispose of the assets of the Estate without due regard to the interest of the Applicant; and*
  - d. *that he has acted illegally with the Estate wasting it to the detriment of the Applicant.*
3. In his affidavit in support the Applicant depones that the deceased had no children of her own, but was survived by her brother the Applicant and Saida Ali Ahmed her sister; He avers that the Respondent has purported to dispose of the assets of the Estate without due regard to the Applicant's interests and that he did not obtain consent from all the persons of equal priority to apply for the said Grant/or confirmation thereof and particularly the Applicant. Further that the Respondent falsely represented to the court that the deceased was survived by only himself and one Muna Salah Ali al-Nakhilani as heirs, leaving out the Applicant and his sister.

4. The Applicant also avers that upon obtaining the Grant, the Respondent is using it to disturb the tenants in occupation of a property forming an asset of the deceased's Estate, namely Plot No.19 Section One – Eastleigh, Nairobi. That the Respondent has been using court Brokers and Police to intimidate the tenants to succumb to his illegal demands which are based on orders fraudulently obtained from a Magistrate's court in Nairobi.
5. It is the Applicant's averment that the Respondent and his sister Muna Salah Ali Al-Nakhlani, being children of one Salah Ali Ahmed who died in 1977 and Ms. Fatima Nasir Salah who lives in Yemen, are a nephew and niece of the deceased respectively and hence do not rank in priority to inherit the Estate of the deceased.
6. The summons was opposed by the Respondent's Replying affidavit, sworn on 11<sup>th</sup> June 2014 in which he deposes that the Letters of Administration issued to him on 10<sup>th</sup> July 2012 were not obtained fraudulently as the statements made in support of the petition were all truthful and no material fact was concealed. That he and his sister Muna were adopted by the deceased through custom and circumstances and therefore, did not require the consent of the Applicant to petition for letters of administration for her Estate. He asserts that the deceased left him and his sister as the sole beneficiaries of her Estate to the exclusion of all others and by virtue of having the grant he was fully entitled to engage and deal with the tenants living in any property owned by the deceased and make them account to the Estate. That therefore he was not interfering with the tenants as alleged.
7. The Applicant testified and called four witnesses, while the Respondent called no witness and relied on his sole testimony. Both Parties also filed written submissions.
8. Mr. Michael Daud submitted for the applicant on four grounds. First, he argued that the Respondent obtained the grant by making of a false statement, concealment of material facts and by means of untrue allegations of essential facts.
9. On this ground Mr. Daud submitted that the Respondent petitioned for and obtained a grant of letters of Administration over the Estate of the deceased (his aunt), in 2011 on grounds that he was the son of the deceased. He referred to paragraph 5 of the affidavit sworn on 4<sup>th</sup> July 2011 in support of the petition of even date and filed on 11<sup>th</sup> August 2011. Counsel pointed out that the Respondent also gave his age as 25 years in the said supporting affidavit, yet his father Salah Ali Ahmed died in 1977, 34 years prior to the 4<sup>th</sup> July 2011.
10. Mr. Daud further deposed that the Respondent did not set out in that affidavit, what he now alleges in his Replying affidavit, to wit, that the deceased had adopted him and his sister as her children and announced publicly that they were her sole heirs. Counsel stressed that without a doubt, this was indicative that there was deliberate concealment of material information in the said supporting affidavit.
11. On the second ground Counsel contended that the proceedings to obtain the grant were totally defective in substance, in two material aspects. First, that there was no evidence of gazettelement of the notice of the grant in compliance with **section 67(1) Law of Succession Act**. Second, that the Respondent failed to disclose the existence of the brother and sister of the deceased who are still alive, or to obtain their consent in line with **section 51(1)(g) Law of Succession Act**, since they stand in priority to obtain letters of administration of the Estate.
12. On the third ground Counsel asserted that the Applicant was not the son of the deceased, whether by fact, custom or law. He urged that the Respondent had made bare assertions that the deceased adopted him and his sister through custom and circumstances and that they are to be properly considered as the children of the deceased, but did not elaborate or provide evidence as to how adoptions are done under Somali custom.
13. Further that the Applicant did not adduce evidence to prove that there exists such a custom in

Somali tradition, that allows a person to adopt children whose parents are still alive, neither were those parents and his sister called to testify that such adoptions had taken place.

14. Lastly, on the dispositive orders that ought to be made on the application, Mr. Daud prayed that the grant be revoked on the stated grounds, that the Respondent be ordered to render to the court a true account of the Estate of the deceased and his administration thereof, from 10<sup>th</sup> July 2012, and that Abdo Ali Ahmed Al-Nakhlani, brother of the deceased be appointed sole administrator of the Estate and a fresh grant issued to him.
15. Learned counsel Mr. Kimandu Gichohi filed submissions on 27<sup>th</sup> May 2015 and submitted for the Respondent that the deceased herein took care of her brothers children (who include the Respondent) and publicly declared that upon her demise her share was to devolve to the Respondent and his siblings. He contended that in Somali tradition, children can be adopted even if their parents are alive, especially when the family from which the children come is very poor and not able to provide for their needs. That such children can also inherit property from their adoptive parents. That it is on this basis that the Respondent is claiming customary adoption by the deceased hence his right to benefit from her Estate as her dependant and survivor.
16. Mr. Gichohi urged that the Respondent came from a poor family, and that the Respondents' father who was a brother to the deceased had been disinherited and had not received his lawful share from the Estate of his brother Ahmed Ali Ahmed because he was dead by the time Ahmed Ali Ahmed's Estate was devolving to its heirs who included the Objector. That the share that should have lawfully been inherited by the Respondent's father and his family was taken by the Applicant in addition to his own portion of the Estate.
17. In essence counsel was saying that the Applicant illegally and unlawfully received two portions of the Estate of Ahmed Ali Ahmed while one such portion should have gone to the Respondent's father and his legal heirs. That therefore the Applicant had not come to Equity with clean hands having "Grabbed property that should have been bequeathed to the Respondent and his family....." Counsel dwelt at length on the provisions of **Article 27** of the **Constitution** which provides that everyone has equal protection and equal benefit of the law and **Article 10** of the **Constitution** on the national values and principles of governance.
18. Mr. Gichohi also submitted that both the evidence in the Replying affidavit sworn on 11<sup>th</sup> June 2014, and the oral evidence of the Respondent given in court, showed that the Respondent was adopted by the deceased according to Somali culture. That he had lived for many years with the deceased as mother and son and she had provided for him for over twenty years until her demise.
19. Counsel contended that nobody disputed that the Respondent had lived with the deceased who had been providing for him for all the time they lived together as her son. That the Respondent continued to carry out the Responsibilities that would be expected of him as a son up until the deceased died and the Respondent settled her funeral expenses.
20. Counsel urged that the Applicant's witnesses, in their oral evidence, admitted that the deceased had categorically stated before her death that her share of the Estate would go to the Respondent and his siblings upon her death. That one of the Applicant's witnesses also consented to the Respondent's appointment as administrator of the deceased's Estate, despite her denial in court and her signature was appended on the consent form attached to the petition for letters of administration.
21. Counsel asserted that the Respondent had proved that he did not obtain the grant fraudulently as he was legally entitled to inherit the Estate of the deceased. Further, that the Respondent is aware that the grant is yet to be confirmed and transmission to the beneficiaries has not been completed, thus he has no legal capacity to dispose of the Estate. That the Respondent has acted for the Estate and legally so, because he has letters of administration, and he faithfully collected proceeds from the Estate and remitted them to the beneficiaries thereof for a period of more than ten years, until

the Applicant colluded with one tenant to divert the proceeds.

22.Mr. Gichohi relied on **High Court Succession Cause No. 198 of 2002** at Meru in the Estate of **M'richuni alias M'murumera M'rinchuni** and **High Court Succession Cause No. 1094 of 2007** at Nairobi in the Estate of **Sarah Njeri Ngathu**. He however did not expound on the findings in the foregoing authorities, nor how they aided his client's cause. He asked the court to find that the Application is not meritorious and dismiss it with costs.

23.Upon careful consideration of the pleadings, the oral evidence adduced in court and the rival submissions of the counsels on record, the court finds that the issues for determination are:

- i. Whether the impugned grant was obtained by making a false statement and concealing some facts that were material to the case.
- ii. Whether the proceedings leading to the making of the grant being fatally defective.
- iii. Whether the Respondent was adopted by the deceased.

24.The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession**. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

25.A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. See - **Matheka and anor v Matheka [2005] 1 KLR pg 456**. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

26.The undisputed facts of the evidence given to the Court, are that the deceased died intestate on 15<sup>th</sup> August 2006 in Mogadishu, and at the time of her death she was neither married nor did she have any children; the Applicant seeking revocation, Abdo Ali Ahmed Al-Nakhlani, is a brother to the deceased. The father of the Respondent and his sister, Muna Salah Ali Al-Nakhlani, Salah Ali Ahmed, died in 1977. He was a brother to the Applicant hence, the Respondent and his sister are a nephew and niece respectively, of the Applicant.

27.The Respondent petitioned for and obtained a grant of administration over the Estate of the deceased (his aunt) in 2011, on grounds that he was a son of the deceased, as stated in his petition dated 4<sup>th</sup> July, 2011 and the Affidavit in Support of the Petition sworn on even date. Additionally, he stated his age as 25 years as at 4<sup>th</sup> July 2011 in the Affidavit in support of the Petition sworn on 4<sup>th</sup> July, 2011. It was stated by the Applicant and not denied by the Respondent that his father died in 1977 – over 34 years prior to 4<sup>th</sup> July 2011.

28.The said Petition and the Affidavit in Support of the Petition did not set out the facts now disclosed in paragraph 9,10 & 14 of his Replying Affidavit, in opposition to the Revocation application and in his submissions. That is that through custom and circumstances the deceased adopted the Respondent and his sister as her children and the only known beneficiaries and/or dependants; or that the deceased had publicly declared that they were to inherit her share in the property. The Respondent also failed to disclose that the Applicant who is a brother to the deceased and one Saida Ali Ahmed a sister to the deceased were both alive.

29.I therefore find and hold that the Respondent was guilty of making a false statement and concealing some facts that were material to the case.

30. On the issue of the proceedings leading to the making of the grant being fatally defective, I observe that first, there was no evidence of any gazette notice in compliance with **section 67(1)** of the **Law of Succession Act** which provides that:

**“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period.....”**

It is evident that the provisions of the said section are couched in mandatory terms and parties petitioning for grant must comply with them.

31. Second it is also noted that the Respondent, did not give notice or obtain consents of parties with priority for applying for the grant. These would have been the Applicant and his sister. **Section 51(1)(g)** of the Succession Act as read together with **Rule 26(1)** of the **Probate and Administration Rules**, provide that:

**“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.”**

Accordingly, I find and hold that the grant was obtained contrary to the provisions of the foregoing laws.

32. On the issue of the Respondent being the adopted son of the deceased the Respondent averred that the deceased had adopted him through custom and publicly declared that he and his sister were to inherit her share in the property when she died. He however did not provide any witnesses to the said declaration. His assertions were disowned by his own sister, who was supposedly adopted alongside him. She testified that she was not aware of any such adoption.

33. None of the applicant's witnesses, in their evidence, stated or admitted that the deceased had categorically stated before her death that her share would go to the respondent or his sibling Muna as stated by Mr. Gichohi in his submissions. The fact that he was managing the building under the authority of the Applicant, does not par-se confer on him a legal right, entitling him to share the Estate as a son of the deceased or at all.

34. I had recourse to the decision of Makau J in **Japheth Kithinji Muguna vs Julia Kanana Mwiti & Anor [2014] eKLR** which did lend credence to my view on this issue. I find as did Makau J in the foregoing case that the Respondent having embarked on proving that he was adopted under customary law by the deceased, he was duty bound to prove his allegation on a balance of probability.

35. Mr. Daud also referred me to the case of **Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR** in which the case of **Kimani v Gikanga [1965] EA 735** and **Gituanja v Gituanja (1983) KLR 575** were quoted with approval. In **Kimani v Gikanga** at pg 739 Duffus JA pronounced himself as follows on customary law:

**“To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”**

The Respondent's petition for grant of letters of administration for the Estate of the deceased having been founded on his alleged status as the adopted "son" of the deceased and that the said adoption was done under Somali custom, the onus was on him to prove that such custom exists and further that such adoption took place. I find that he has not done so.

36. In the premise I find that the orders that best lend themselves to the circumstances of this cause are as follows:

- i. The summons for revocation dated 4<sup>th</sup> February 2014 and filed in court on 5<sup>th</sup> February 2014 is allowed.
- ii. The Applicant Abdo Ali Ahmed Al-Nakhlani is hereby appointed as the Administrator of the Estate of the deceased.
- iii. The Respondent is hereby ordered to render a true and accurate account of the Estate of the deceased under his administration from 10<sup>th</sup> July 2012 to date.

It is so ordered.

**SIGNED DATED and DELIVERED** in open court this **6<sup>th</sup> day of October 2015.**

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**L. A. ACHODE**

**JUDGE**