



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

PROBATE AND ADMINISTRATION CAUSE NO. 375 OF 2010

**IN THE MATTER OF THE ESTATE OF SALEH SAID SHERMAN aka SALEH BIN SHERMAN
aka SWALEH NGURU (Deceased)**

AWADH SALEH SAID SHERMAN.....APPLICANT

VERSUS

- 1. OMAR SALEH SHERMAN**
- 2. BARIKA MOHAMED SHERMAN**
- 3. SUAAD MOHAMED SHERMAN**
- 4. ZAINAB MOHAMED SHERMAN.....RESPONDENTS**

RULING

1. Before this Court is Notice of Motion dated 15.5.15 filed under Certificate of Urgency on 19.5.15 seeking the following orders:
 - a. That this suit be consolidated with HC SUCCESSION CAUSE NO. 273 OF 2009 IN THE MATTER OF THE ESTATE OF SALEH SAID SHERMAN aka SALEH BIN SHERMAN aka SWALEH NGURU (DECEASED).
 - b. That the two suits HC SUCCESSION CAUSE NO. 375 OF 2010 IN THE MATTER OF THE ESTATE OF SALEH SAID SHERMAN aka SALEH BIN SHERMAN aka SWALEH NGURU (DECEASED) and HC SUCCESSION CAUSE NO. 273 OF 2009 IN THE MATTER OF THE ESTATE OF SALEH SAID SHERMAN aka SALEH BIN SHERMAN aka SWALEH NGURU (DECEASED) be heard and determined together.
 - c. That costs of this Application be provided for.
2. The Petition for Grant of Letters of Administration in High Court Succession Cause No. 375 of 2010 was filed by Omar Saleh Sherman (hereinafter Omar) a son of the deceased herein. In his Affidavit in support of the Petition sworn on 2.11.10, stated that the deceased died leaving a valid will in which he named Awadh Said Sherman (the Applicant herein hereinafter "Awadh") and Said Swaleh Said Sherman as executors but who had both failed and/or refused to take out a Grant of Probate. He further states that he cited Awadh who entered appearance in the Citation on 3.9.10 but failed to take out Grant of Probate. That the estate of the deceased remains unadministered and has been wasted by Awadh in the absence of any distribution to the heirs and beneficiaries of the estate. Grant of Letters of Administration intestate was issued to Omar on 19.4.11 but on 7.9.11, Awadh filed Summons for Revocation of the said Grant.

3. The Petition for Grant of Letters of Administration in High Court Succession Cause No. 273 of 2009 was filed by Zainab Mohamed Sherman (hereinafter “Zainab”) and Suaad Mohamed Sherman (hereinafter “Suaad”) (the 4th and 3rd Respondents respectively in Succession Cause No 375 of 2010) the granddaughters of the deceased. In an affidavit in support of the Petition sworn on 2.9.09 Zainab gave a list of the heirs of the deceased and stated that she had served the heirs who are alive with a Renunciation of right to apply for Letters of Administration but that none had responded thereto. She further stated that since the death of the deceased on 1.4.72, none of the surviving heirs had shown any interest in administering the estate as a result of which the estate of her late father Mohamed Swaleh Said Sherman, a son of the deceased herein had suffered prejudice. That 2 of the heirs of the deceased herein Awadh and Said Swaleh Said Sherman have obtained a Grant of Letters of administration to the estate of her late father Mohamed Swaleh Said Sherman and have been using the unadministered assets of the estate of the deceased herein to their personal profit without any legal right check or balance. That in fact there was pending litigation in this respect between her mother Barika Mohamed Sherman and the said Awadh and Said Swaleh Said Sherman.
4. By an Application dated 14.5.2012, Zainab and Suaad together with their mother Barika Mohamed Sherman sought to be joined as joint administrators of the estate of the deceased herein. The Application was opposed by Awadh in his Replying Affidavit sworn on 6.6.12. He stated that the Application was premature as it ought to await the outcome of his Summons for Revocation of the Grant issued to Omar. That Zainab and Suaad have petitioned for a Grant of Letters of Administration in High Court Succession Cause No. 273 of 2009 which is pending before this Court. That they cannot seek to be made co-administrators of the same estate in a different succession cause and must elect to either proceed with their own Petition or abandon it and join the present Petition herein.
5. The above is the background of the matter herein that has led to the instant Application for consolidation of the 2 causes.

The Applicants’ Case

6. The Application is supported by the identical Affidavits sworn by Barika, Zainab and Suaad on 13.4.15. According to them, the 2 suits share and revolve around the same set of and similar facts and involve similar questions of law which are yet to be determined in relation to the parties therein. They deponed further that Zainab and Suaad were the first to apply for Letters of Administration and that the subsequent suit (the suit herein) filed later in time by their uncle was not brought to their attention though the same relates to the estate of the deceased herein.
7. The deponents have averred that the rights and reliefs sought in both suits arise out of a similar set of transactions and involve the same advocates. That the consolidation of the same will save the parties herein, costs, time and effort and that no party will be prejudiced by the sought consolidation.

The Respondent’s Case

8. Awadh responded to the Application by filing a Statement of Grounds of Opposition on 7.9.15 to wit:
 - a. That Succession Cause No. 273 of 2009 is fatally defective, has no basis in law and an abuse of the process of the Court and cannot therefore be cured by consolidation with the cause herein;
 - b. That the Application is frivolous and vexatious.
 - c. That the Application has no merit.
9. At the hearing of the Application on 8.9.15. Mr. Taib, for the Respondents/Applicants submitted that this was a simple application of consolidation involving the same subject matter and the same estate and that no party would be prejudiced. Mr. Oluoch Wambi holding brief for Mr. Chacha for

the Applicant informed the Court that Mr. Chacha had filed Grounds of Opposition and sought to file written submissions. Mr. Mohamed and Mr. Oloo for the 1st Respondent and beneficiaries respectively for their part said that they did not oppose the application. Mr. Oloo however said he needed time to peruse File No. 273 of 2009.

10. The matter was mentioned before me on 22.9.2015 when Mr. Taib informed the Court that he would rely entirely on the contents of the Notice of Motion and the 3 supporting Affidavits. He further stated that other counsel are at liberty to file written submissions if necessary and requested 3.11.15 as Ruling date. Mr. Oluoch holding brief for Mr. Chacha, Mr. Ali and Mr. Oloo for the other parties were given the liberty to file written submissions within 14 days if necessary and Ruling was set for 3.11.15.

Determination

11. I have considered the Application and the Supporting Affidavits as well as the Grounds of Opposition. No written submissions were filed by any of the parties.
12. **I have perused the record in both suits. The subject matter in both is the estate of Saleh Said Sherman aka Saleh Bin Sherman aka Swaleh Nguru (Deceased). The issue in dispute in both pertains to the representation of the estate of the deceased. In the first suit, the Petitioners being Zainab and Suaad applied for a Grant of Letters of Administration intestate in respect of the estate of their grandfather, the deceased herein. Zainab states in her Affidavit in support of their Petition sworn on 2.9.09 that the reason for applying for the Grant is that since 1972 when their deceased grandfather died, none of his surviving heirs had shown any interest in administering the estate in spite of them being served with a Renunciation of Right to Apply. The failure by the heirs of the deceased to administer the estate herein, the estate of their deceased father, a direct heir of the deceased herein had been incapacitated and greatly prejudiced. The second suit on the other hand was filed by Omar a son of the deceased who also states in his Affidavit in Support of his Petition sworn on 2.11.10 that the executors named in the Will of the deceased, had failed and/or refused to take out a Grant of Probate in respect thereof in spite of being cited.**
13. **The broad principle of consolidation of suits was re-stated in the case of Stumberg and another vs. Potgieter (1970) EA 323 in the following terms:**

“Where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

The Court went ahead to state:

“The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matter be disposed of at the same time. This would mean that the suits are brought together with a view to disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously”.

In R M G v N G Interested Party S P Limited & M D Limited [2013] eKLR, on the principle of consolidation of suits, Musyoka J pronounced himself thus:

“The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matters be disposed of at the same time. This would mean that the suits are brought together with a view to disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be so disposed of

simultaneously".

14. Other than merely stating in his Grounds of Opposition that Succession Cause No. 273 of 2009 is fatally defective, has no basis in law and is an abuse of the process of the Court and cannot therefore be cured by consolidation with the cause herein and that the Application is frivolous, vexatious and has no merit, Awadh has not tendered any evidence in that regard. He has also not shown that the two suits filed in this Court are not worthy of consolidation.

15. It is clear from the record in both suits that the issues of law and fact for determination in the two suits filed in this Court are similar. The questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously. It is desirable that the questions of law and fact in both suits be disposed of at the same time. Consolidation of both suits will also ensure that there is no conflicting judicial decision relating to the matters in the two suits resulting to absurdity of court decisions.

16. In the result, the application by the Respondents to have the two suits consolidated is hereby allowed. The control file shall be High Court Succession Cause No. 375 of 2010. Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA THIS 3RD DAY OF NOVEMBER, 2015.

M. THANDE

JUDGE

In the presence of: -

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

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

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

..... **Court Assistant**