



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 39 OF 1943

IN THE MATTER OF THE ESTATE OF KHATOR BIN SALIM (DECEASED)

- 1. NAZRA SAID SEIBAN**
- 2. HASHIM AHMED KHATOR**
- 3. KHATOR RASHID KHATOR**
- 4. KHATOR MOHAMED KHATOR**
- 5. OMAR MOHAMED SAID.....APPLICANTS**

VERSUS

- 1. ABDULRAZAK KHALIFA**
- 2. TEOPISTA MKIWA MWAZIGHE**
- 3. MUNAWERALI JAFFER NOORALI DHANJI**
- 4. MUNIRA MOHAMED ABDALLA.....RESPONDENTS**

RULING

By way of the chamber summons dated 27th March, 2012 brought under certificate of urgency the applicants who are beneficiaries to the estate of the late **KHATOR BIN SALIM** (hereinafter referred to as the deceased) seek *inter alia* the following orders:

“2. **THAT** the sole administrator be restrained/stopped/barred and in all or any way restrained from holding himself as an administrator and from counseling or advising the beneficiaries or anyone to the estate to disobey court order and/or obstruct the operation of the order of this honourable court given on 5th November, 2011.

3(a) **THAT** the sole administrator of the Estate of the Estate [sic] of **KHATOR BIN SALIM** (deceased) be hereby ordered to produce accounts immediately for all the days he had been the administrator and to produce valuation of the assets of the Estate upto the year 2011.

3(b) **THAT** the sole administrator **ABDULRAZAK KHALIFA** be ordered stopped, barred or in any other way restrained to act as administrator of the estate of the [sic] **KHATOR BIN SALIM** or in any way to act as administrator by calling meetings on behalf of the estate or by signing any documents or in any way presenting himself as administrator to sell or in any way dispose of any property in the Estate of **KHATOR BIN SALIM** (deceased).

4. **THAT** this Honourable court do confirm the two persons named in the court order of 5th November, 2011 by this Honourable Court earlier to be administrators of this Estate of **KHATOR BIN SALIM** that is to say **NAZRA SAID SEIBAN** and **NASHIM AHMED KHATOR**.

5. **THAT** this Honourable court revokes the appointment of one **ABDULRAZAK KHALIFA** as one of the administrators of the SAID Estate and in his place appoint **IBRAHIM RASHID KHATOR**.”

The application was opposed. The estate in question is that of the deceased **KHATOR BIN SALIM** who died in Mombasa on 9th June, 1943. It is indeed unfortunate that almost 70 years down the line the distribution of this estate has not been finalized. Several factors including the death of the initial administrator in 1966 before completing distribution, the revocation of the Grant made to his successor as well as disagreement between the heirs and beneficiaries leading to numerous applications and motions in court all contributed to this delay. All this, despite the fact that on 8th August, 1994 the Chief Kadhi gave guidance by way of an elaborate distribution to the heirs in accordance with Islamic Sharia Law.

By this application the applicants namely **NAZRA SAID SEIBAN, HASHIM AHMED KHATOR, KHATO RASHID KHATOR and OMAR MOHAMED SAID** sought to compel the 1st respondent who is one of the estate administrators to produce accounts of the Estate from his tenure, to bar him from continuing to act and to revoke his appointment as administrator to the Estate. The applicants also want the court to replace the 1st respondent with **IBRAHIM RASHID KHATOR** and to confirm his appointment as co-administrator.

The 1st respondent **ABDUL RAZAK KHALIFA**, swore a replying affidavit on 13th April, 2012 arguing *inter alia* that:

- The present application is ‘*res judicata*’ given that the issues raised were determined by the ruling of the **Hon. Justice Leonard Njagi** delivered on 29th November, 2011.
- He appointment of the co-administrator was to be made upon consent between all parties and since no consultations have as yet taken place the prayer to approve and confirm a co-administrator is pre-mature.
- No property of the estate has been sold off without the sanction and consent of the beneficiaries and more specifically that Plot No. 187/III Mainland has not been sold as alleged by the applicants.
- The 1st respondent had not been served with/or made aware of the court order of 29th May, 2011 thus he could not comply with the same.
- The inactive administrator **MOHAMED BWANA BWANADI** (who travelled and remained out of the country between 2003 to 2010) cannot be removed without being heard and without accounting for his part in the administration of the estate. The 1st respondent further claims that this co-administrator owes the estates Kshs. 711,632/=.
- Aside from the applicants the other beneficiaries have no problem with the 1st respondent’s continued administration of the estate.
- The 2nd applicant and his family are intermeddling with the estate.

It is clear from the material before court that there is a split amongst the beneficiaries with some supporting the continuance of the 1st respondent as an administrator whilst others led by the applicants are calling for his dismissal. This does not augur well for the conclusion of distribution of the estate.

IS THE MATTER RES JUDICATA

The 1st respondent submits that this matter is *res judicata* since the issues raised were dealt with in the ruling delivered by **Hon. Justice Leonard Njagi** on 29th May, 2011. In this ruling the Honourable Judge dismissed the application brought by the applicants dated 22nd July, 2008 challenging the sale of Plot No. 189/III/MN which the applicants terms as irregular as it had not been consented to by all the beneficiaries. The doctrine of *res judicata* bars a court from hearing and making a determination upon a matter or question that has already been heard and determined by a competent court. In his ruling at page 6 the learned Judge found that the sale of Plot No. 189/III/MN was sanctioned by the court after having satisfied itself that all the beneficiaries had been served with the application to sell the said plot and none had opposed the sale and dismissed the application (to have said sale reversed). Therefore to this extent the question of the sale of plot 189/III/MN) the matter is indeed *res judicata* and this court will not make any pronouncement on this issue. Having said that a close reading of this ruling reveals that it did not specifically deal with the question of the propriety of the 1st respondent as administrator, thus this aspect is not *res judicata* and is properly before this court.

SHOULD THE GRANT OF ADMINISTRATION TO THE 1ST RESPONDENT BE REVOKED

The applicants have prayed that the Grant made to the 1st respondent be revoked as they are dissatisfied with his administration and further claim that the 1st respondent is incompetent and has mismanaged the estate. Section 76 of the Law of Succession Act does provide for revocation of a Grant for two reasons. Firstly that such Grant was improperly made and secondly that the estate is being mismanaged or is not being administered diligently. These questions can only be determined by hearing from the administrator through *vive voce* evidence and through the production of proper audited accounts of the administration of the estate. It is only in this way that the court would be able to make a determination of the true state of the estate.

Whereas the applicants had initially prayed to cross-examine the respondent, this prayer appears to have been abandoned. To take *vive voce* evidence before accounts are presented will only lead to greater confusion. In the ruling of 29th May, 2011 the learned Judge directed that the 1st respondent avail to the court full accounts in respect of the estate within thirty (30) days. This has not been done to date though the 1st respondent did annex a 'draft' statement of accounts to his replying affidavit. Nevertheless I am of the view that the 1st respondent cannot be held to have been in contempt of this court order for the following reason. In order for contempt to arise there must be evidence that the order in question was served personally on the 1st respondent. No such evidence exists. From the court record this ruling was scheduled to be delivered on notice. The notice issued to parties indicated that the ruling was to be delivered on 22nd November, 2011. However the copy of the ruling is dated 2nd May, 2011 indicates that it was delivered in the absence of the 1st respondent and/or his advocate. As such I find that the issue of contempt would not arise.

The 1st respondent pleads that upon later receiving service of the order he has been unable to comply firstly due to an interim injunction granted on 29th November, 2012 restraining him from acting as administrator and secondly due to the lack of cooperation and participation from some of the beneficiaries which is necessary to enable him prepare accurate accounts.

Finally, on this prayer to revoke the appointment as administrator my view is that the 1st respondent must be accorded an opportunity to defend his role as administrator. Such a prayer is best disposed of by way of an oral hearing at which evidence is adduced and parties be at liberty to cross-examine. This will also enable **MOHAMED BWANA BWANADI** the co-administrator to participate and establish his role in the administration of the estate. Before such a hearing it is essential that the accounts be filed in court. In view of the level of mistrust between the beneficiaries I direct that an independent certified accountant/auditor to be agreed upon by the parties prepare the accounts and establish the true value of the estate. The fee for such accountant/auditor to be paid out of the estate. I therefore lift the order

restraining 1st respondent from acting as administrator to enable him facilitate and participate in this exercise. Given the length of time this matter has taken to remove the 1st respondent as an administrator at this late stage would be counter-productive as it would take the estate back to square one. His involvement remains necessary to enable the estate to be concluded expeditiously. As such I do hereby dismiss prayers (2), (3a) and (3b) and (5) of this Notice of Motion.

APPOINTMENT OF ADDITIONAL ADMINISTRATORS

The applicants have prayed that the 1st and 2nd applicants be confirmed as administrators of the estate. The court had previously encouraged the beneficiaries to present a consent on the appointment of new administrators. This has not been forthcoming. There would have to be consensus before additional administrators are appointed. Therefore I decline to allow prayer (4) of the chamber summons.

Finally, as a court I would once again exhort the parties to seek consensus in this matter. As time goes on the management of this estate will only become more unwieldy and complicated. The number of beneficiaries appears to be evolving as the grand children of the deceased are now coming on board to claim a share either on their own behalf or on behalf of their parents. This will only further complicate the finalization of the estate. I have no doubt that all the parties wish to have this matter concluded in their lifetimes.

CONCLUSION

In conclusion this court finds as follows:

- i. Prayers (2), (3a), (3b) and (4) of this chamber summons are hereby dismissed.
- ii. Prayer (5) is to be disposed of by way of a *vive voce* hearing.
- iii. An independent accountant/auditor to be appointed with consent of all parties to prepare accounts and submit the same to court within forty (40) days of today's date. Such accountant/auditor's fees to be paid out from the estate.
- iv. The order restraining the 1st administrator from carrying out his functions is hereby lifted.
- v. Parties to seek consensus on conclusion of the distribution of the estate.
- vi. Each party to bear its own costs.

Dated and delivered in Mombasa this 14th day of February, 2014.

M. ODERO

JUDGE