



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO. 22 OF 2012

OMARI ABUD.....APPLICANT

VERSUS

HAFUSA NDUTA KANYI.....RESPONDENT

JUDGMENT

The applicant herein filed a summons dated 12th October, 2012 seeking to annul or nullify the letters of administration apparently made to Hafusa Nduta Kanyi in respect of the estate of the late Sheikh Saleh Dorman alias Sheik Saleh Dorman who died intestate on 7th January, 1993. The grant is said to have been made in the **Murang'a Principal Magistrates Court Succession Cause No. 279 of 1999**.

It is not clear when the grant was made but the record from the subordinate court shows that on 6th January, 2000 the petitioner's counsel applied for what he called "temporary letters" on the basis that there was no objection to such an application. Soon thereafter, and in particular on the 7th January, 2000, counsel for the petitioner appeared in court again and applied for "confirmation of the grant" that had been made the day before; the basis of this application was that the petitioner was the sole beneficiary of the estate of the deceased and an objection to the grant was unlikely. The court allowed the application "as prayed" and so the grant of "temporary letters" was confirmed on 7th January, 2000.

It can only be assumed the so called "temporary letters" was the grant of letters of administration intestate and the confirmation which was made the day after was the confirmation of the grant of letters intestate made to the petitioner on 6th January, 2000. No reasons were given as to why the court found it was necessary to confirm the purported grant before the expiry of six months. Be that as it may, it is apparent at the outset that the manner the grant was made and subsequently confirmed leaves a lot to be desired though, as will be demonstrated in due course, there was more to it that should concern this court than worry about the speed at which the grant was made and confirmed.

On his part, the applicant has applied to have the grant and the confirmation thereof nullified on the grounds that the application for grant was made fraudulently by making of a false statement; that the said grant was obtained through concealment of material facts; and that the grant was made by untrue allegation essential in law to justify the grant.

The application was brought under **Section 76** of the **Law of Succession Act (Cap 160)** and **rule 44(1)** of the **Probate and Administration Rules**; it was supported by the affidavit sworn by the applicant on 12th October, 2012. On 9th November, 2012, the respondent entered appearance and filed a replying affidavit on 13th November, 2012. On 22nd November, 2012 parties agreed, inter alia, to have the applicant's summons determined by way of viva voce evidence; directions were accordingly taken that the summons

herein proceeds by way of oral evidence and pursuant to those directions the applicant and respondent testified in support of the respective positions they had taken.

When I retreated to write this judgment, I noted from the subordinate court's record that the estimated value of the deceased's estate was stated in **form P&A 5** to be **Kshs. 150,000/=**. This fact was not brought to the attention of the court by any of the parties yet it so fundamental to question whether the court in which the grant was made and subsequently confirmed had the requisite authority to make the grant and confirm it. While parties may have overlooked or deliberately chosen to avoid this issue this court cannot ignore it; to the extent that it goes to the jurisdiction of the subordinate court in all cases covered by the Law of Succession Act, I will address it as a preliminary point in this judgment.

The jurisdiction of the magistrates' courts vis-à-vis that of the High Court in all cases falling under the **Law of Succession Act, Chapter 160** Laws of Kenya is set out in **Sections 47 to 50** of that Act. **Section 48** thereof defines the extent of the magistrate's jurisdiction. That section provides as follows:

“48. Notwithstanding any other written law which limits jurisdiction, but subject to provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.”

It is apparent from this provision that the jurisdiction of the magistrate's court to entertain an application or determine any dispute or pronounce any decree or order is monetarily capped. How far the court may exercise its jurisdiction is determined by the value of the estate in respect of which the court may be called upon to determine a dispute, pronounce a decree or an order.

Under the same provision, a magistrate's court may also make a grant of representation as long as the value of the estate in respect of which a representation is made does not exceed Kshs. 100,000.

It is not in dispute that in the cause that was filed in the magistrates' court, the value of the estate of the deceased was Kshs. 150,000/=; it is therefore apparent that the extent of the estate was beyond the jurisdiction of the magistrates' court in which it was lodged whose limit, as noted, is set out in **section 48 of the Law of Succession Act**.

In my earlier decisions, whenever this issue has arisen, I have taken the position that the question of a court's jurisdiction is not a procedural issue that a court can perfunctorily dispense with and direct its focus on the merits of a particular case or what may be considered as more substantive issues. Jurisdiction goes to the competency of the court or the root of the authority of that court to determine or not determine a particular issue. Its gravity in decision making was put more aptly by the learned judges of the court of appeal, Nyarangi, Masime and Kwach JJA (as they then were) in the **Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd (1989) KLR 1**. The learned judges said of jurisdiction at page 14 of their decision as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The court went further to cast any doubt as to what jurisdiction means and quoted a passage from **Words and Phrases Legally defined, Volume 3 at page 113** where it is stated:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented before it in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of particular facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

Considering that subordinate courts do not have unlimited jurisdiction in succession matters governed by the Law of Succession Act, it was incumbent upon the magistrates’ court to inquire into its jurisdiction, as a preliminary step, before making any order of whatever nature in **Murang’a Principal Magistrates’ Court Succession Cause No. 279 of 1999**. If the court had taken this path it would certainly have realised that in view of the value of the deceased’s estate, it did not have jurisdiction to entertain the petition for grant of letters of administration.

I would follow the decision of the court of appeal in the **Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd** and conclude that since the subordinate court took upon itself jurisdiction which it did not possess, its orders or decisions amounted to nothing. For this reason no letters of administration can be said to have been validly granted or confirmed in **Murang’a Principal Magistrates’ Court Succession Cause No. 279 of 1999**. There is no grant to interrogate under **section 76** of the Act save to declare, and I hereby declare, the purported grant and the proceedings out of which it was made a nullity. Parties will bear their own costs. It is so ordered.

Dated signed and delivered in open court this 6th day of June, 2014

Ngaah Jairus

JUDGE