



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 367 OF 2006

IN THE MATTER OF: THE ESTATE OF SALIM ISLAM SAADAN

AND

IN THE MATTER OF: AN APPLICATION FOR REVOCATION OF THE GRANT

A S1ST APPLICANT

A S2ND APPLICANT

K M3RD APPLICANT

VERSUS

S A MRESPONDENT

JUDGMENT

0. This is an application for revocation of Grant of Probate made with respect to the estate of a deceased Muslim man who died on 12th June 2006 and was survived by one wife, having divorced three others, and 18 children born of the four mothers. The Applicants, who are the widow and two children of the deceased by different mothers, have sued the respondent, a daughter of the deceased by another mother, who is the personal representative of the deceased by virtue of a Grant of Probate issued to her on account of her alleged appointment as an executrix by the deceased's Will dated 11th August, 2004.
0. The Summons for Revocation of Grant dated 2nd August 2008 seek revocation of grant and related orders, as follows:
 1. *That the Grant of Probate issued on 19th January 2007 and confirmed on 19th October 2007 be revoked.*
 2. *That the Respondent do provide Accounts of the properties and income of the estate since the demise of the demise of the deceased.*
 3. *That the costs of this Application be provided for.*
0. The application was based on the grounds that –
 1. *That the Deceased died Intestate and had no written Will.*
 2. *That the proceedings for obtaining the Grant were tainted with material non disclosure of vital information.*
 3. *That the Respondent is guilty of material non-isclosure as all the income from the properties of the estate has been concealed.*

4. *That none of the beneficiaries have been consulted on the issue of the Grant and the distribution of the estate.*
 5. *That the properties of the estate have been distributed to the beneficiaries without any valuations being done.*
 6. *That some of the beneficiaries of the estate are minors and it was unprocedural to obtain a Grant without their next friend.*
0. The application was heard on the basis of affidavit evidence supplemented by oral testimony of the applicants and the Respondent. Thereafter, written submissions were filed by counsel - Mr. Khatib and Mrs Ali who appeared respectively for the applicants and the respondents - and judgment was reserved. [On account of heavy workload and long absence from the court during the Election Petitions of 2013, it was not possible to deliver the judgment earlier and the delay is greatly regretted.]
0. The substance of the applicants' case is that the respondent has in purported implementation of executor's duty obtained grant of Probate of Will - which they denied existed - over the estate of their deceased Muslim father and proceeded to distribute the estate in accordance with the alleged Will without consulting the applicants and other beneficiaries of the estate and without valuation of the estate's assets. They contend that the alleged Will was, in any event, inconsistent with Islamic law as it purported to distribute substantial properties to some beneficiaries only instead of distributing all the properties according to Islamic Shariah Law. They also objected that the respondent had not administered the estate properly as some beneficiaries such as A, (the 1st applicant) who had been shown on the Statement as a having received a house and a tractor, and Atie (2nd applicant) had in fact not been given any property. The applicants also complained that no proper accounting had been given of the cash asset of ksh1,196,000/- in the deceased's two bank accounts and no receipting had been produced for monies alleged to have been used in funeral expenses, refund to one Wycliff and filing for Probate. The 1st and 3rd applicants, however, accepted that they received ksh.44,000/- and Kshs.100,000/-, respectively. The applicants contend that the deceased did not make a Will. The applicants, however, contend that the Codicil, which grants certain properties to the respondent and some of the children of the deceased, is, in any event, invalid for gifting, contrary to Islamic law more than one third (1/3) of the Estate and to children beneficiaries, while testamentary disposition in Islamic law is confined to bequests to third parties rather than beneficiaries who share the estate in accordance with Islamic Shariah.
0. The respondent's case was that the deceased had made a Will and Codicil, respectively dated the 11th August 2004 and 14th August 2004, gifting the immovable properties to some named beneficiaries including herself while leaving the rest of the assets of the estate to be shared out in accordance with Islamic law among the 18 children and widow. She testified that she had properly been appointed the executor of the Will after filing a petition in accordance with the procedures of the court without objection by any beneficiary and she had upon confirmation of grant of Probate faithfully executed the Will. She paid out to the deceased's beneficiaries estate amount of Ksh.1,136,000/- at Standard Bank and Ksh.60,000/- at Kenya Commercial Bank in the ratio of 1:2 for the female and male children according to Islamic law, and retained the entitlements of the minor children of the deceased as mandated by the Will. She claimed to have paid out Ksh.700,000/- to the beneficiaries but was not able to produce any receipts therefor. She conceded that one beneficiary, A, was not given any property, and that three others did not get the cash share because they had already taken a Honda Motor Bike belonging to the estate. She also stated that she had taken a loan for ksh.3,000,000/- on the property that she had been given together with other children of the deceased. She explained, without producing any receipts, that she had spent ksh.496,000/- for the refund of purchase money to a purchaser of one of the deceased's plots, payment of funeral costs, costs for the petition for grant and the statement of account. She denied that the houses at Lamu had during the deceased's life any tenants who paid any rental income. The respondent conceded that she had not kept contact with the minor children of the deceased of whom she was charged under the Will and that she had not paid the dues to such of them who had attained the age of majority at the time of the hearing.
0. The issue for determination is whether the grant of Probate issued to the respondent should be revoked or annulled on any of the grounds set out in section 76 of the Law of Succession Act as sought by the applicants. Section 76 of the Law of Succession Act is in the following terms:

*“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or **of its own motion** —*

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

*(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or **has produced any such inventory or account which is false in any material particular; or***

(e) that the grant has become useless and inoperative through subsequent circumstances.”

8. There was no evidence that the respondent had in presentation of the petition for Probate concealed material facts or that the grant was fraudulently obtained. Although the applicants had contested the existence of the Will (and Codicil), they by the submissions of counsel, as shown below, do not oppose the Will which they find to be in accordance to the Islamic law but rather the provisions of the Codicil which they contend are against the Islamic law:

“The said Codicil is therefore in conflict with the Will in that whereas the Will purports to distribute all the properties according to Islamic Shariah, the Codicil has discriminated against some beneficiaries by giving out two major properties to some beneficiaries only. Secondly, the Codicil is completely against Islamic law as the same purports to distribute the two properties to only seven beneficiaries to the exclusion of all others.”

9. However, upon perusal of the application for Probate, from the affidavit of the respondent in support of the petition for Probate sworn on 24th July 2006 and filed on 24th August 2006 at paragraph 4 thereof the respondent asserts that **“the deceased died leaving a valid will dated 11th August 2004.”** It is the Probate of this will that the respondent sought and obtained on 19th January 2007. At the time of the application for confirmation of grant of Probate, by a Chamber summons dated the 13th June 2007, the respondent deponed at paragraph 4 of the affidavit sworn on 14th June 2007 in support of the application for confirmation that **“the identification of shares of persons beneficially entitled to the said estate have been ascertained and it has been determined that the male children of the deceased shall take 2/3^{rds} and the daughters 1/3rd and the wife 1/5th of the estate as prescribed under Islamic law.”** No mention is made in this application as in the initial application for grant of Probate of a Codicil of 14th August 2014. The first time the Codicil dated 14th August 2004 is introduced in the proceedings is by a further affidavit of the respondent sworn on the 10th August 2007. The respondent deponed in the said

'Further Affidavit' are as follows:

1. *THAT I am the executrix of the Will of the Late S I S (Deceased) and I am therefore competent to swear this affidavit.*
 2. *THAT further to my affidavit sworn on 14th June 2007 I aver that the deceased had left a Will, a copy of which I annex hereto and mark "A".*
 3. *THAT I wish the estate of deceased to be distributed in accordance with the wishes of the deceased as per the annexed Will.*
 4. *THAT I adopt the contents of my affidavit sworn on 14th June 2007 in toto as part of the affidavit.*
 5. *THAT the facts herein deponed to are true to me of my own personal knowledge save as were otherwise stated."*
10. If the applicant was aware of the Codicil at the time of filing the petition there is no explanation why the same was not indicated in the affidavit in support of the petition as the Codicil to the Will to be proved. If it was subsequently discovered after the filing of the petition and grant of Probate of the Will dated 11th August 2004, then the Codicil would have to be proved separately. To introduce the Codicil after grant of Probate of the Will dated 11th August 2004 has already been made and the matter is pending hearing of an application for confirmation of grant on the basis of the said Will, in my view, makes the proceedings defective in substance within section 76 (a) of the Law of Succession Act, as there was no grant of Probate with respect to the Codicil of 14th August 2004.
11. The Will dated 11th August 2004 and the Codicil dated 14th August 2004 are in material terms as follows:

THE LAST WILL AND TESTAMENT OF S I S DATED 11TH AUGUST 2004

1. *That I revoke any previous Wills and Codicils and any testamentary dispositions made before the execution hereof, I declare this to be my last Will and testament and ii render all my estate to be subject to this my last Will and testament.*
2. *That I am a Muslim.*
3. *That my estate and all my affairs shall be handled and conducted in keeping with Islamic law, that is sharia.*
4. *That I appoint my daughter S A M holder of ID card No.2212118 of P.O. Box 88936 to be the executor of this my las Will and testament.*
5. *That I direct that my executor shall ensures that my affairs are handled correctly and in keeping with the Islamic law.*
6. *That I direct that all that part of my estate which shall be bequeathed to my children who at the time of my death shall be below the age of majority, shall vest in the hands of my executor who shall hold the same in trust for the said children until they reach the age of majority.*
7. *That my executor shall do all that is in her power to ensure that the said minor children are taken care of and that their interest is preserved and or applied to their benefit.*
8. *That I devise and bequeath to S A M aforesaid my plot situated at Mpeketoni which is next to the property of NOOR MWALIMU, as gift and my plot at Mwamkanda, in Mkunumbi area, in Lamu District, next to the property of MOHAMED ANCHOMA, as gift.*
9. *That I transfer my piece of land (shamba) at Mwamkanda in Lamu district which I had sold to S A M aforesaid for the sum of Kshs.200,000/= which I have duly received, to the said S A M.*
10. *That the rest of my estate, I devise and bequeath to all my heirs and Dependants to each according to their entitlements under Islamic law including, but not limited to, all the houses in Lamu, and Mkunumbi, and all the plots and pieces of land in Mkunumbi, together with all the cattle, farm machinery and all my other movable and or immovable property, wherever situated."*

CODICIL TO THE WILL OF SALIM ISLAM SAADAN DATED 14TH AUGUST 2004

I SALIM ISLAM SAADAN ID NO. 2234949, of P.O. Box 57 Lamu, Kenya, being a male Muslim Kenyan domiciled in Kenya having on the 11th day of August 2004 executed my last will and testament, do hereby make the following provisions in the Codicil;

1. *THAT for the avoidance of doubt the piece or parcel of land known as plot number 582 section 1 Lamu, and plot number 1319 block 1 Lamu are not part of my estate, as I have previously given the same as gift as follows,*
(a) *Plot number 582 Section 1 Lamu to my children A S I B SALIM I, S S I, A S I, S AM, F A O AND M S I.*
(b) *Plot number 1319 section 1 Lamu to my children A S I, B A S I, S S I.*
2. *THAT this Codicil is made to specifically confirm that paragraph 10 of my last will and testament which I executed on 11th August 2004 aforesaid does not and should not in any way be deemed or construed to refer to the properties mentioned herein above, and to avoid any confusion which may arise thereby.*
12. While the Will dated 11th August 2004 directs distribution in accordance with the Islamic law, the Codicil, which is expressed to have been made only three (3) days later on the 14th August 2004 purports to set apart some two properties as being outside the estate of the deceased on the ground that the deceased had already gifted them to his named children to the exclusion of the others. Being in contradistinction of the Will the Codicil required to be proved in accordance with the Probate and Administration Rules, which require petition and deposit of the Will and Codicil in court. (See section 53 of the Law of Succession Act and Rule 7 (5) of the Probate and Administration Rules). The applicants and other beneficiaries cannot have been expected to lodge objections to the petition for Probate of the Codicil under Rule 7 (4) if it was not indicated in the petition and deposited in court in accordance with the Rules.
13. A grant of representation, whether or not confirmed as in this case, is liable to be revoked where as prescribed under section 76 (a) of the Law of Succession Act, ***'the proceedings to obtain the grant were defective in substance'*** and where the person to whom the grant is made, in terms of section 76 (d) (ii) and (iii) of the Law of Succession Act, has failed ***'to proceed diligently with the administration of the estate' or 'has produced any such inventory or account which is false in any material particular.'***
14. The statement of account on the Estate of the Deceased dated the 11th July 2008 and filed by the respondent on 22nd July 2008 is, to the extent that it shows that the 1st applicant A S. S received a house and tractor at item no. 1 thereof, false on the basis of the evidence presented before the court by the said respondent that the said beneficiary had not received any property.
15. There was no dispute that the deceased was a Muslim whose estate is, therefore, subject to Islamic law of inheritance, as indeed the deceased is shown to have directed by his Will dated the 11th August 2004. It is also clear from the list of assets of the estate set out in the respondent's affidavit in support of the application for confirmation dated 13th June 2007 and in the schedule of the confirmed grant of 13th November 2007, that the two plots in Lamu Nos. 582 and 1319 gifted by the Codicil to the respondent and her siblings is well above a 1/3rd of the estate primarily made up of movable property and livestock. In this regard, the Codicil, even if proved, would offend the Islamic law rule that a testator cannot gift more than 1/3rd of his estate by will. (See ***W.B. Keatinge v. Mohamed Bin Sief & 3 Ors.*** (1929 - 1930) 12 KLR 74 and ***Casebook on the Law of Succession***, by W. Musyoka, at p. 692, on the proposition that under Islamic law, and in accordance with the principles set out in the Koran, only a third of a Muslim's estate may be disposed of by will).
16. Moreover, the respondent accepted that she did not value the estate before the purported distribution and the question arises as to how she was able to allocate the proportions applicable to the beneficiaries in accordance with Islamic law without determining the value of the entire estate. It is conceivable in such distribution that some beneficiaries were allocated assets that were more or less than the correct proportion that should be inherited by them.
17. For the reasons that the proceedings for the grant and confirmation of grant of Probate of the Will

were defective in substance in that the Codicil was not disclosed in the petition for grant of Probate and was only produced after the application for confirmation of grant of Probate of the Will, so that the Codicil was not proved in accordance with the Probate and Administration Rules and therefore no opportunity was granted to the applicants to contest it by filing an objection to the petition; that some beneficiaries, namely, the 1st and 2nd applicant were not given any property in the distribution and the Statement of Account dated 11th July 2008 rendered by the respondent was therefore false; that the deceased could not, even if the Codicil were valid, by testamentary gift, in accordance with Islamic law, bequeath more than one third (1/3) of the estate; and further that the failure by the respondent to value the assets amounts to failure '**to proceed diligently with the administration of the estate**' so that the distribution to the beneficiaries accords to their exact ratios in accordance with Islamic law, the court is entitled to interfere with the grant of Probate to the respondent pursuant to section 76 (a) and (d) (ii) and (iii) of the Law of Succession Act.

18. The court is entitled on its own motion and, in this case justified by the applicants' summons for the revocation of grant herein, to revoke the Grant where the conditions set out in section 76 of the Law of Succession Act exist. The court will therefore revoke the grant of Probate herein issued on 19th January 2007 and confirmed to the respondent on the 19th October 2007. For purposes of accounting for the dealings with the estate so far the respondent executrix must give an account under section 83 (h) of the Law of Succession Act of her dealings with and distribution of the estate up to the date of account. The estate will then fall to be distributed in accordance with Islamic Shariah.

19. Accordingly, I grant the applicants' Summons for Revocation of Grant dated 2nd August 2008 herein as prayed. Each party will bear its own costs.

Dated, signed and delivered this 16th day of July, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Khatib for the Applicants

No appearance for the Respondent

Ms Linda Court Assistant