



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 455 OF 1996

IN THE MATTER OF THE ESTATE OF SADDIQ BHOLA

MOHAMMED SHABIR BHOLA.....ADMINISTRATOR

VERSUS

RASHID MUGHAL.....PROTESTOR

JUDGMENT

1. These proceedings concern the estate of the late Saddiq Bhola alias Mohammed Sadiq Bhola (*the deceased*) who died on 10th March 1996. A Grant of Letters of Administration Intestate was issued to his sons Mohamed Hanif Bhola (*now deceased*) and Mohamed Shabir Bhola on 7th August 1998 and later confirmed on 6th December 2000. The Grant was however later revoked by the Hon. Ouko, J (*as he was then*) by a Ruling made on 4th March 2011. The Judge ordered that, being an old matter, the surviving administrator should only file fresh summons of confirmation of the grant already issued to him which must comply with the law.
2. In compliance, the Mohamed Shabir Bhola (*hereinafter referred to as the administrator*) filed summons of confirmation of grant dated 25th March 2011. In support of the summons, the administrator swore an affidavit in which he set out the proposed mode of distribution and annexed to it a will dated 9th January 1994, two agreements 19th June 1996 and 24th January 1997, a letter dated 21st June 1998 by M.S Mughal and a consent to the confirmation of the grant dated 25th March 2011.
3. The Administrator explained in his Summons and Affidavit that the mode of distribution as proposed had been agreed upon by all the beneficiaries. It was premised on the Will dated 9th January 1994 and the further agreement between the beneficiaries dated 19th June 1996. The Administrators had already been given their share of the money as per the agreement and receipt thereof acknowledged. The remaining property should therefore be distributed in the manner proposed.
4. Rashid Mughal (*the protestor*) filed an affidavit in protest of the proposed mode of distribution. Whereas he had no objection to the appointment of the administrator, he objected to the proposed mode of distribution. It was his view that the property of the deceased should be divided equally among his six children. He also alleged that the administrator had not disclosed all the properties of the deceased namely, the parcel of land known as Block 5/125 (formerly I.R. 18897), the cattle, sheep and goats and some of the movable properties. He further alleged that the Will and the agreement upon which the Administrator relied in dividing the property had been regarded as invalid by the court's order of 4th March 2011. He was of the view that the issue of the agreement had already been adjudicated upon and was therefore *res judicata*. He therefore urged the court to divide the property equally amongst the deceased's surviving beneficiaries.

5. By the consent of the parties, the matter was disposed by way of affidavit and *viva voce* evidence. The Administrator called two witnesses in support of his case and further swore the affidavit filed on 9th October 2013. It was his case that the deceased herein left a Will in which he expressed how he intended his property to be distributed upon his death. PW2 Dilipsinh Prabatsinh Mahida, an Advocate of the High Court and who was at the time practicing under the name and style of Jones & Jones Advocates told the court that the deceased called on him in his Chambers and gave him his handwritten Will dated 19th January 1994. He left this Will with the intention of giving final instructions on its preparation after his return from Pakistan. However he passed on before giving the instructions. Upon his death he called all the beneficiaries, Rashid Mughal, Rafiq Mughal, Saira Tanweer and Shabbir Bhola who had with him letters of authority from Hanif Bhola and Hazara Bibi and read the Will to them. He produced copies of the letter and its envelope as exhibits 2(a) and 2(b).
6. The Administrator alleged that the beneficiaries thereafter agreed to divide the property as per the wishes of the deceased. However the Protestor and Rafiq Mughal were not content with the property given to them by the deceased. As a result they entered into negotiations with the Administrators which resulted in the formulation of the agreement dated 18th August 1996. PW1, the Counsel who prepared this agreement on the instructions of the beneficiaries testified that Rashid Mughal and Rafiq Mughal agreed to waive their claims to the property upon being paid the money and property agreed upon.
7. The Administrator contended that the property had been distributed in terms of the Will and the agreement dated 18th August 1996. He explained that the money in the Bank had been distributed by their uncle M/s Mughal who had access to the account and referred to his letter dated 21st June 1998. He refuted the contentions that some of the beneficiaries had been left out and maintained that the distribution was carried out in accordance with the deceased's wishes and the family agreement. He further contended that upon the death of his co-administrator sometimes in the year 2007 he continued to administer the property as per the law.
8. In his Affidavit sworn in support of the Summons for Confirmation of the Grant, he proposed that most of the properties be divided between himself and the widow of his deceased co-administrator. The protestor and Rafiq Mughal received no additional properties other than that already given to them as agreed on 18th August 1996. In addition to the money already given to the two daughters of the deceased, he proposed that Samir Tanweer be given a whole house and half plot (*back side*) of the Maralal Plots and Hazri Bibi be given the Pepsi Farm L.R. No. 2616 and Pepsi Farm 3249.
9. On his part the Protestor filed an Affidavit sworn on 29th April 2013 in which he reiterated his proposition that the property should be divided equally among the surviving beneficiaries. He averred that the agreement produced by PW1 was no longer valid for the reasons that it provided for inequitable distribution of the properties to the exclusion of his two sisters, the administrators did not adhere to their undertaking as they did not make the specified payments within the stipulated time periods and the 200 acres out of the Rumuruti land had not been transferred to him as yet, and not all properties were included in the agreement.
10. Further he contended that the Will was not proven and by bringing these proceedings for issuance of a Grant of Letters of Administration Intestate, the administrator acknowledges that it was not valid. He also contended that PW2 stated in his evidence that the deceased wished to give further instructions on the preparation of the Will and the document therefore did not reflect his final wishes. Finally he averred that the administrator should be compelled to render a true account of the estate including, but not limited to, the proceeds of the sale of the property No. 5/125.
11. He annexed an affidavit "RM 2" sworn by Saira Tanweer confirming that neither she nor her sister had received any money or assets from their father's estate.
12. The Administrator filed submissions on 4th November 2014 in further support of his case. He deciphered that there were two issues arising for determination whether the wishes of the deceased should be upheld and whether the Protestor and other beneficiaries could deny the effect of the wishes of the deceased.
13. It was submitted on his behalf that Section 5(1) of the Law of Succession Act confers testamentary freedom on a person to dispose his property as he wished. This freedom could at the time of distribution of the property varied where for reasons of inadequacy or non provision of a

dependant by the deceased.

14. In this case, the deceased left his clear instructions on how to divide his property. His wishes should be respected and the proposed distribution by the administrator is neither illegal nor unreasonable.
15. On the second issue, it was submitted that the beneficiaries had benefitted from the Will of the deceased. It was proved that the money of the deceased had already been distributed to them. They cannot now deny that the handwritten wishes of the deceased have led to their benefit. Part of the property has been distributed in accordance with the Will and the rest should be divided in the same manner.
16. It was also argued that in considering the bequests of the deceased, the court should have regard to the provisions of Section 28 of the Law of Succession Act particularly the conduct of the dependant in relation to the deceased. The other beneficiaries did not have an amicable relationship with their father hence his decision to give the administrators a larger portion of his estate. The court was urged to invoke its inherent jurisdiction under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to make such orders to meet the ends of justice and prevent the abuse of its process.
17. The Protestor did not file any submissions on his part and relied on the already filed affidavit.
18. The issues for determination from the above are-

- a. Whether the deceased left a valid Will; and
- b. The manner of distribution of his property

1. There is no dispute that the document dated 19th January 1994 was written by the deceased on how he wanted his property to be distributed upon his death. This power is recognized by Section 5 (1) of the Law of Succession Act which provides that a person who is of sound mind and not a minor may dispose of all or any of his free property by Will, and may thereby make any disposition by reference to any secular or religious law that he chooses. However that freedom is expressed to be subject to the provisions of that part and part III. Section 11 thereof also then provides that a Will is not valid unless-

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

- c. ***the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.***

1. Therefore for a Will to have the force of law and be capable of being acted upon by the court, it must meet the requirements of a valid will provided for by the Law of Succession Act which is the law that governs the distribution and administration of the estate of a deceased person. Indeed a will is defined in Section 2 to mean ***the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil.***
2. It was not disputed that the Will produced in this proceedings did not meet the above requirements for it was not attested by witnesses. It is for this reason that the administrator petitioned this court for a Grant of Letters of Administration Intestate. In addition the court has already made a finding of lack of proper execution in its Ruling of 4th March 2011.
3. The contention that the court may nonetheless uphold the wishes of the deceased regardless of the fact that it is inconsistent with the provisions of the law is not sound. The case of **APELI VS**

BULUKU [2008] 1 KLR (G&F) 873 to which this court was referred is distinguishable from the present case. In that matter the court was determining a burial dispute. It is recognized in law that there is no property in a dead body. Therefore the wishes of a deceased on the place he wants to be buried are not binding but should as far as possible be respected by court. The other two cases, **JACOB BLASTO OKUMU VS CLARIS OUMA [2014] eKLR** and **JOHN KINUTHIA GITHINJI VS GITHUA KIARIE & OTHERS NAIROBI C.A NO. 99OF 1989 [U/R]** were in regard to the inadequacy or unenforceable provisions of a Will.

4. The legal position then is that a Will which does not accord to the provisions of the Law of Succession Act is invalid. Its provisions remain null and unenforceable. In the circumstances, the deceased is deemed to have died intestate, without leaving a valid will, and his property must therefore be divided in accordance with Part V of the Law of Succession Act. Section 38 which is relevant to these proceedings provides-

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

5. Therefore the property of the deceased ought to have been divided equally among his six children, namely-

- a. Mohammed Rafiq Mughal
- b. Rashid Mughal
- c. Mohammed Hanif Bhola
- d. Mohammed Shabir Bhola
- e. Saira Bibi Tanweera
- f. Hazra Bibi

1. Notwithstanding this entitlement conferred by the law, a dependant or beneficiary may voluntarily denounce all or a part of their claim to their parent's properties. In this case, it was alleged that the beneficiaries agreed to adhere to the wishes of the deceased to distribute the property as per the Will. The money held at Barclays Bank was distributed in the manner provided for by the Will. There was produced a letter dated 21st June 1998 written to the beneficiaries by M. S. Mughal from London the alleged appointed executor informing them that the moneys bequeathed to them would be sent to their respective accounts.
2. There was no evidence adduced that the other provisions of the Will were accepted by the beneficiaries and particularly that they had conceded to only receiving this money from the assets of the deceased. PW2 only testified to the fact that the deceased handed to him his handwritten Will which he read out to the beneficiaries upon his death. Indeed in the consent to the proposed mode of the distribution of the property which it was alleged to be in terms of the Will, the Administrator did not annex a consent signed by all the beneficiaries. This was one of the reasons that informed the court's decision to revoke the Grant. In the subsequent proceedings filed for confirmation of the grant the Administrator annexed a consent to the proposed mode of distribution that was only signed by the two widows of the deceased administrator and one beneficiary It cannot be said that all the beneficiaries have consented to the adoption of the Will.
3. Further I note that the Administrator did not dispute the contention that the Summons for Confirmation of Grant did not list all the properties left by the deceased. For these reasons I hold that the mode of distribution as proposed cannot stand in so far as it provides for inequitable distribution of the property in terms of the Will and for not including all the properties of the deceased as per the direction of the court by the order of 4th March 2011
4. The Administrator also alleged that the distribution as proposed in his affidavit was also based on an agreement dated 8th August 1996 between the two administrators, the protestor and Mohammed Rafiq Mughal. By this agreement the protestor and Mohammed Rafiq Mughal agreed on the shares of the assets they would receive from the deceased's property. They agreed to forfeit any claim they have to the estate upon receiving the money and properties stated therein.
5. The protestor challenged the validity of this agreement on the basis that it provided for inequitable distribution of the properties, excluded the daughters of the deceased and more importantly it had

- been declared a nullity by the court. He proposed for equitable distribution of the property to the surviving beneficiaries.
6. The court in its Ruling did not find that this agreement was null and void and therefore of no effect. The court held that no distribution ought to have been undertaken by the Administrators before the Grant had been confirmed as provided for by Section 71 of the Act. It referred to Section 55 (1) of the Law of Succession Act which states-

No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71

7. The purport of this holding was not that the agreement was invalid. There is no bar to the beneficiaries negotiating and agreeing on the manner of distribution of the deceased's property prior to the taking out of letters of administration. What is prohibited by Section 55 is the distribution and division of estate property before the Grant of Letters of Administration have been confirmed in terms of Section 71 of the Act.
8. I agree that the distribution of the property before confirmation of the grant was illegal. But this did not negate the legality of the agreement. The agreement constituted a contract, *an action against an action*, between the parties and pertained to the specific properties referred to therein. In the circumstances, it was not necessary to list all the assets of the deceased or the beneficiaries. Further none of the other beneficiaries have raised any objection to this agreement or alluded that it conferred an unfair advantage to the parties. In my view, it would be greatly unjust to disregard this contract which was acted upon by the parties. The two beneficiaries were content for 9 years with their bequests. Although the protestor alleges that the moneys were not paid to him within the time stipulated therein, he does not deny that he received the same. His only allegation is that he has not received the 200 acres given to him. However there was produced an acknowledgement dated 20th March 2000 by which he accepted Kshs. 3,740,000/= from the administrator for his share of the land. As it stands there is no claim that the terms of the agreement have not been honoured.
9. In my view, they cannot now claim that it was unjust and seek an equitable division of the remaining properties. They cannot claim a further share of the assets of the deceased when that which they sought was given to them as agreed. They are bound by their undertaking not to make any further claims to the estate if the terms of the agreement are honoured, and were honoured.
10. In view of the above, neither of the proposals from the administrator nor the protestor can be upheld. The administrator's proposal provides for inequitable division of the property and the daughters of the deceased have without their consent, been given a lesser share of their father's estate contrary to Section 38 of the Law of Succession Act. On the other hand the protestor and Mohammed Rafiq Mughal have already received their portion of the estate, on which basis they willingly renounced their right to an equal portion of the rest of the assets.
11. In the circumstances I find that the interest of justice dictate that the remaining property be distributed equally between the four beneficiaries of the deceased. For those who are deceased, their shares shall be divided equally between their children, if any, that survive him. Regard shall be had to the assets already given to the beneficiaries after the death of the deceased. This proposal shall then be filed in this court for approval together with an account of all the assets of the deceased.
12. For all those reasons, I make the following orders -

(i) the net intestate assets shall be equally distributed to the following beneficiaries -

(a) Mohammed Shabir Bhola

(b) Azra Kausar – widow of the deceased co-administrator Mohammed Hanif Bhola

(c) Hazra Bibi

(d) Saira Bibi Tanweer

(ii) The assets to be distributed include all those listed in the affidavit of the Administrator sworn in support of the Summons for Confirmation of the Grant, namely -

- (a) Maralal plots
- (b) Nakuru Municipality Block 3/90
- (c) Rumuruti Farm L. R. No. 5130
- (d) Pepsi Farm L. R. No. 2616
- (e) Pepsi Farm L. R. No. 3249
- (f) Kshs 1,000,000/=
- (g) Toyota KAA 689C
- (h) KHL 469 Land Rover
- (i) Toyota Land Cruiser KUD 850
- (j) Peugeot KSF 065
- (k) Fly Land Cruiser KTY 912
- (l) Morris vehicle
- (m) Motor vehicle registration number KKG 735
- (n) Ford Vantage
- (o) Mazda Vantage
- (p) 3 Chevloret Vantages Registration Number T 9694, E-1302, F1304
- (q) Toyota Hilux
- (r) Machinery spare parts, generators and the shop and garage in Maralal

(iii) In addition the Administrator shall include the further properties disclosed in the affidavit of protest sworn on 26th May 2011 -

- (s) the cattle, sheep and goats that remain unsold
- (t) the guns – not surrendered
- (u) Mercedes Benz 280 S.E.
- (v) Ford Model “A”
- (w) Ford Perfect

(iv) Any unserviceable assets be sold “as is” and the proceeds be divided equally among the beneficiaries.

v. The Administrator to file a full and complete account of administration in terms of Section

83(g) of the Law of Succession Act within next six months of distribution of assets.

(vi) The parties shall bear their costs of the suit.

Dated, signed and delivered at Nakuru this 14th day of November, 2014

M. J. ANYARA EMUKULE

JUDGE