



**In re Estate of Mehdi Haiderali Khimji (Deceased) (Succession Cause
53 of 2016) [2022] KEKC 4 (KLR) (Family) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEKC 4 (KLR)

REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)
FAMILY
SUCCESSION CAUSE 53 OF 2016
AH ATHMAN, J
JUNE 20, 2022
IN THE MATTER OF THE ESTATE OF MEHDI HAIDERALI KHIMJI (DECEASED)
BETWEEN
MURTAZA A. SOMJI PETITIONER
AND
HAIDERALI MEHDI KHIMJI APPLICANT

RULING

1. The summons dated March 9, 2022 seeks the following orders:
 1. That the application be certified urgent
 2. That the Honourable Court be pleased to remove the respondent Murtaza A. Somjias the administrator of the estate of the deceased herein
 3. That the Honourable Court be pleased to appoint Haiderali Mehdi Khimjias the administrator of the estate of the deceased herein.
 4. That the Honourable court be pleased to compel the respondent to deposit into court all the title documents which they are holding in respect of property forming part of the estate particularly LR. No. 209/152/2/1/5.
 5. That the Honourable court be pleased to compel the respondent to render a true and comprehensive account for their administration of the estate
 6. That the Honourable court be pleased to order the respondent to produce or avail in court the bank statements in respect of all the deceased's bank account from the date of appointment to date



7. That the Honourable court do issue an order suspending any further operations, management and activities by the administrator in respect of the estate of the deceased herein.
 8. That the Honourable Court be pleased to set aside the order issued on March 9, 2017 and all consequential orders and proceedings thereto.
 9. That should there be a finding of misappropriation of the accounts mentioned above, the respondents be ordered to reimburse the same to the estate of the deceased.
 10. That Costs of this application be in the cause.
2. The applicant deposed that the administrator intends to distribute the estate contrary to provisions of the will adopted by court in the confirmation of the grant. He averred that the respondent misled the court in his application dated August 18, 2016 by failing to include all the assets of the deceased, particularly LR. No. 209/152/2/1/5. He stated further that the respondent is unreasonably delaying the distribution of the estate to his benefit, and has demanded a stipend of Kshs 50,00.00 without any justification and that the respondent failed despite notice to give a full inventory and accounts of the administration.
 3. The application was opposed through replying affidavit dated April 6, 2022. The respondent deposed that he had been named by the deceased as executor of his will and had filed this cause to enable him distribute the estate according to the will of the deceased. He further averred that the court appointed him administrator vide the order given on March 9, 2017 and directed him to distribute the estate according to the will and has since been discharging his duties in accordance with the law. He deposed that the will set out the entirety of the assets and contrary to applicant's assertion the property known as LR. No. 209/152/2/1/5 is included in the list. He stated the applicant has deliberately distorted or failed to disclose material facts; that he expressed intention to purchase the said property. The respondent denied claims of delaying the distribution of the estate and asserted his efforts at winding down the administration have been hampered by intermeddling by the beneficiaries especially the applicant. He averred that the applicant collects rent from various estate properties but has failed to provide inventory, tenancy agreements and accounts for the same to enable him compile his accounts of the estate. He averred that it is inaccurate to claim there has been delay in distribution of the estate when, apart from Langata/ Dam Estate Block 106/241 all the properties of the estate, have been transferred to the widow of the deceased, Naeem Fatma Khimji, as the properties were jointly owned with her. He stated that there is a need of valuation of the remaining properties of the estate to determine the share for charity as the will provided for 1/3 of the estate should be given to charity.
 4. The other beneficiaries of the estate namely Naeem Fatma, Shabbarali, Sukaina and Aabidah Mehdi Khimji swore an affidavit in support of the respondent continuing as administrator of the estate. They deposed that save for one property (the Langata property), all the properties have been transferred to the widow. They averred that he has been discharging his duties and obligations in accordance with the law and that he neither mismanaged nor failed to administer the estate of the deceased herein.
 5. The application was disposed by way of written submissions. Conrad Law Advocates represented the applicant while CM advocates represented the respondent.

Background

6. The late Mehdi Haiderali Khimji, died testate on March 14, 2014. He was survived by one widow (Naeem Fatma), two sons (Haiderali and Shabbaarali) and two daughters (Sukaina and Aabidah). His will dated March 4, 2014, he appointed his friend, Murtaza Somji as executor of his will. He willed that



- one-third of his estate be given to charity and the remainder distributed to his heirs in accordance with the Islamic law of succession followed by Shia itnasheri school of thought.
7. The respondent moved court and was confirmed as administrator / executor of the estate pursuant to the deceased's will on March 9, 2017. The court distributed the estate pursuant to the will. The applicant is one of the sons of the deceased. He contends it has taken too long to distribute the estate, some of which have not been listed as estate properties and the administrator failed to diligently discharge his duties under section 83 of the [Laws of succession Act](#).
 8. Section 76 of the [Laws of Succession Act](#), Cap 160 Laws of Kenya allow for revocation on grounds of defective proceedings, if it were obtained on the basis of false statement or concealment of material facts or an untrue allegation of fact essential in point of law. It provides:

‘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 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...’
 9. In [John Mundia Njoroge & 9 others v. Cecilia Muthoni Njoroge & another](#) [2016] eKLR, the court cited with approval Koome J, (as she then was) in the matter of the estate of Murathe Mwaria – deceased, where she summarized the grounds for revocation of grant under section 76 as follows:
 - i. When the procedure followed in obtaining the grant is defective in substance
 - ii. When the grant is obtained fraudulently by making a false statement
 - iii. Making an untrue allegation of fact essential in point of law to justify the grant
 - iv. Or when the person who has the grant has failed to proceed diligently with the administration of the estate.
 10. The administrator in this case was a very close friend of the deceased herein to the extent that he preferred and chose him to be the executor of his will. The wishes of a deceased Muslim must be held in the highest regard as long as they are consistent with and not repugnant to the law. The respondent's position was further adopted and confirmed by the Court. I have read the application for revocation, affidavits and annexures thereto and I have struggled to find any evidence of lack of diligence on the respondent's duty as administrator or misappropriation of funds. The applicant is only one of five heirs of the late Mehdi Haiderali Khimji. The other four heirs hold contrary view. They confirm he has been doing a wonderful job in the administration of the estate and deny he misappropriated any funds. They further confirmed that most of the estate properties have already been transferred to the widow of the deceased.
 11. The applicant suggested the respondent deliberately omitted property. LR. No. 209/152/2/1/5 from the estate properties. He submitted at length that deceased's share in this property belonged to the estate because it was tenancy in common and not joint tenancy. A close look at the respondent's application for grant and orders issued thereto reveals it indeed was neither listed in the application nor in the order given by court. However, it is listed in the deceased's will on which the orders issued were



founded. The respondent alluded that the applicant expressed interest to purchase the said property and appeared to admit it was part of the estate. A dispute on what part of this property belongs to the estate is not sufficient to warrant revocation of the grant of letters of probate. It is something that is easily curable through review or correction of the list of properties.

12. The court in *John Mundia Njoroge & 9 others v. Cecilia Muthoni Njoroge & another* [2016] eKLR, further held:

‘under section 76, the court has discretionary power when faced with an application for revocation. It can make such orders as it considers fit in the circumstances. The court is not bound to issue revocation even where the case been set out under section 76. In *Kipurgat arap Chepsior and Others v Kisigut arap Chepsior*, the court declined to grant the prayer for revocation, but instead entered the names of the applicants in the grant as beneficiaries...’

13. The applicant cited property LR. No 1870/VI/131 as also being part of the estate. This property was not specifically pleaded in his application. It came up at the stage of submissions. It is trite law that parties are bound by their pleadings. Fresh issues not pleaded cannot be raised at the submission stage. I note, however that it is also in the list of properties in the will and that it is in the joint names of the deceased and his wife.
14. The applicant has a right to request for accounts and inventory of the administration. The respondent argued has been hindered to discharge this duty due to the applicant meddling in some of the estate properties. These are claims and counterclaims not sufficiently canvassed through affidavit evidence. It is the obligation of the respondent to render accounts as he is the one charged with the obligation by the court. He should do so at least within ninety (90) days from date of delivery of this ruling. He is at liberty to take legal action on any persons (s) hindering the discharge of his statutory obligation.
15. Save for the prayer for accounts, the application lacks merit and is dismissed. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 20TH JUNE, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of Ms. Judith Ndori, court assistant

