



REPUBLIC OF KENYA



**In re Estate of Nassor Mbarak (Deceased ) (Succession Cause  
284 of 2010) [2015] KEKC 43 (KLR) (2 April 2015) (Judgment)**

*Nassir Mbarak Khubran v Abdulkarim Nassir & another [2015] eKLR*

Neutral citation: [2015] KEKC 43 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOMBASA**

**SUCCESSION CAUSE 284 OF 2010**

**AH ATHMAN, SPK**

**APRIL 2, 2015**

**IN THE MATTER OF THE ESTATE OF NASSOR MBARAK (DECEASED)**

**BETWEEN**

**NASSIR MBARAK KHUBRAN ..... PETITIONER**

**AND**

**ABDULKARIM NASSIR ..... 1<sup>ST</sup> RESPONDENT**

**FARAJ NASSIR ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner through his petition dated November 29, 2010 prayed for;
  1. Determination of the deceased's estate, heirs and their respective shares
  2. Distribution of the estate among the rightful heirs
  3. Any other relief the court may grant.
2. He claims the deceased is his father, that he was survived by ten [10] sons [three of whom are now deceased], five [5] daughters and one [1] widow. He claims the deceased left One 3 flat house at Majengo, one Swahili house at Majengo, a [36] acre farm at Mwakirunge, a Swahili house and plot at Shanzu and properties at Yemen. He claims the respondents are the only ones benefiting a lot from the estate and doing things without secretly without involving the other heirs.
3. The respondents through their defence dated December 17, 2010 deny the claims. They specifically deny that a [36] acre Shamba at Mwakirunge is part of the estate. They contend the administration of the estate of Nassor Mbarak is and has been conducted in a regular and lawful manner.



4. The petitioner was represented by Mr. Mohamed of M/ S Balala Abeid & Co. advocates while Mr. Asige Kaverenge represented the respondents.

### **Backgorund**

5. Mr. Nassor Mbarak died on October 29, 2000 at Pandya Hospital Mombasa aged [70] years. Mr. Asige filed a preliminary objection to the effect that the matter is res judicata as there is certificate of confirmation of grant by the High court in HC Succession matter No 146 of 2003 in the estate of the deceased herein. A ruling on the same was made on July 25, 2013. I found the estate had not been distributed and therefore the matter was not res judicata and could proceed. Parties requested for and were granted time to negotiate towards settlement on distribution of the estate. After diverse mention dates from February to April 2014, they could not reach settlement and hearings proceeded.

### **Issues**

6. There is no dispute on the heirs and estate. Dispute in this matter is on distribution of the estate.

### **Submissions**

7. The petitioner submitted that the respondents are administrators of the estate of the deceased herein but have neglected or refused to distribute the estate to the rightful heirs and have not provided accounts of the transactions done by them. He stated the respondent sold some properties to and construct a flat house at Majengo at a lower cost than the proceeds of sale of some estate properties but failed to account for the difference. He contends the flat issued to the petitioner be formally transferred to him as his share of the estate.
8. Mr. Asige for the respondent submitted the petitioner made no disclosure of why he seeks the orders sought against the respondents. He submitted further the petition is superfluous as the petitioner has already disclosed the heirs and the estate and that the High Court in Mombasa already granted certificate of confirmation of grant in Succession cause No. 146 of 2003 in the same estate. He contends the grant having described the estate, heirs and their respective shares, the estate has been distributed by the High court and the matter is superfluous and res judicata.

### **Analysis And Findings**

#### **Estate**

9. The petition listed four properties in Yemen and others Kenya. The properties in Kenya are:
10. The certificate of confirmation of grant lists ten [10] properties of the estate in Kenya. during the hearing, the petitioner stated the four are the remaining properties. The respondent stated by agreement they sold some properties and distributed some proceeds and used some proceeds to construct a flat house at Majengo. The respondents in their pleadings denied the farm at Mwakirunge being part of the estate, however it is in the certificate of grant and the respondent admitted it and the other three properties as part of the estate during cross examination, that they are the remaining properties of the estate. No evidence was given on the properties in Yemen. I cannot find them as part of the estate.
11. I find and hold that the four properties above are the remaining properties of the estate available for distribution.



## **Heirs**

12. The High court [Maraga, J] at Mombasa on June 8, 2004 in Succession cause No 146 of 2003, granted letters of administration in the estate of Nassor Mabarak to:
13. The grant was confirmed on December 6, 2005. It listed the properties of the estate, heirs and their respective shares. The shares of each heir was allocated under Islamic law. I cannot make any changes to the list or the shares therein. They are only reproduced herein for clarity.  
The heirs of the late Nassor Mbarak are:  
The share of the widow = 12.5%  
The share of each daughter = 4.375%  
The share of each son = 8.75%  
The 8.75% share of Yazid Nassir devolve to his heirs as follows:
14. The widow of the deceased has since passed away. Her share devolve to her heirs, the son getting twice the share of the female. The parties to confirm her heirs.

## **Distribution**

15. The High court in Succession cause No. 146 of 2003 did not distribute the estate. The application was for issuance of letters of grant, which were issued and confirmed. In my ruling in this matter, I found that there is a subtle difference between administration and distribution. The High court matter was for the former not the latter. The estate is being administered but has not been distributed. Under Islamic law, upon death of the principal, the estate automatically vests in heirs in specific shares. Any heir, is entitled to his share, on request and / or upon normal legal process. The heirs are co proprietors in specific shares in the estate properties. They can manage them jointly and share proceeds but whoever wants his share is entitled to the same. The estate be valued and the petitioner be issued his share accordingly.

## **Accounts**

16. The claim for account was not pleaded. It is also an issue of administration. It should be handled in the High court matter.  
Each party to bear its own costs.  
Orders accordingly.

**DATED AND DELIVERED AT MOMBASA ON 2<sup>ND</sup> APRIL, 2015.**

**ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

**In the presence of:**

Mr. Yusuf K. Abdulrahman, Court assistant

Mr. Mohamed for petitioner

Mr. Asige Kaverenge for respondents.

