REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUS NO. 85 OF 1997

ESTATE OF GULAM MOHAMMED BAHDUR – DECEASED

BHADUR NOOR MOHOMMED GULUM.....APPLICANT

VERSUS

GULAM MOHAMMED NOOR.....ADMINISTRATOR/RESPONDENT

RULING

1. This ruling regards the application dated 14/9/2021 and 29/9/2021. The first application was partially compromised by the consent orders 22/09/2021 and what remains for determination now is the prayer 2 seeking an order that the grant be rectified to the extent that some three deceased beneficiaries (1st 5th and 6th beneficiaries) be substituted with their personal representatives and that their respective shares go to the said personal representative.

2. The application was supported by the affidavit sworn by Merjan Begum Noor Mohammed whose gist was that the three beneficiaries having died, the applicants sought and were granted limited grant of letters of administration *ad colligenda bona* for purposes of collecting and preserving the respective estates and for doing such other things towards preservation of the estate.

3. The application was opposed by the administrator and one Yvonne Munene. On the part of the administrator, the opposition taken in both grounds of opposition and the replying affidavit is that the application is a non-starter and bad in law on the face of the decision by the court dated 29/9/2020, that Zakka Baladur is a stranger to the estate, that the application is res-judicata and overtaken by events as some of the beneficiaries have received their shares in the estate, that the application is bad for inordinate delay and the fact that the applicant had been tainted with illegalities and not meriting the orders from the court. It was equally asserted that the limited grants were obtained secretly without the involvement of the administrator and are not in tandem with the prayers sought for being premature besides being vague and of no useful purpose. Additional reliance was placed on the affidavit of Yvonne Munene as raising weighty and substantive issues including infighting within the families of the 1st 5th and 6th beneficiaries and contending who should be substituted for the deceased beneficiaries. To the administrator, the matter needs to be handled with care to obviate breaking the three families but he asserts the desire to conclude the administration expeditiously and in the most transparent and peaceful way.

4. Yvonne Munene, who described herself as the forth born of Samya Zenab Ashraf, the deceased 6th beneficiary, opposed the application on the basis that the family had not sat to consent to the estate being administered by Michelle Kairuthi Richard who is accused of having appointed herself to be the administrator and in a secretive and fraudulent manner and therefore, she, Yvone, sought that the limited grant be set aside and she be appointed the administrator instead. She in the end proposed that the share of her late mother be released into account operated jointly between her and Michelle Kairuthi Richard. There was also grounds of opposition filed by and on behalf of Zulekhar Bahadar to the effect that the applicants were strangers, that the limited grant of no

use and that the application was a vexation.

ANALYSIS AND DETERMINATION ON FIRST APPLICATION

5. What is not disputed by all the parties to the application is the fact that the 1st 5th and 6th beneficiaries are dead and did die before their shares in the estate could be disbursed to them. The court take the view that as long as the said shares, which consist of money only, remain undisbursed, the completion of the administration cannot be realized.

6. While the ideal procedure would have been to wait and have a substantive grant sought and issued, it is not out of step for the three applicants to have sought and obtained the limited grants. I consider the limited grant *ad colligenda bona* to have been designed to meet the exigencies of meeting and addressing the urgent need to collect and receive a property of the estate. The mandate is limited to the duty to collect, receive in and preserve the estate pending full representation being granted. To that extent, a holder of limited grant *ad colligenda bona* receives the estate as a trustee with no right to alienate or distribute the received and collected property.

7. Accordingly, I do determine that the grants of letters of administration *ad colliganda bona* in the hands of 2nd 3rd and 4th applicant must be seen to be facilitative towards winding up the administration in the matter of the estate of Nargis Gulam alias Benna Nargis Gulam (deceased). I further hold and find that the application and its prayers being merely facilitative affronts on part of the consent order of the court dated 29/9/2020 but rather makes a big contribution towards the implementation thereof. I further find that there cannot be genuine application of the doctrine of *res judicata* to the facts of this case because all the applicants seek is not litigate afresh on the determined facts but to bring this file to a close. In effect, none on the grounds of opposition and resistance raised by the administrator, who had himself received his shares, has any merits nor *bona fides* and are thus not sustainable.

8. On the concerns by Yvonne Munene, a daughter to the 6th beneficiary that there was never a consent on Michelle being the administrator to their mother, I find the same to be plausible but largely based on the misconception and fear that an administrator acquire more rights over other beneficiaries. I reiterate that the office of an administrator whether upon a substitute grant or a limited one remains that of a trustee and an appointee of the court. The administrator has no will or whim of her own in dealing with the property of the estate. He or she has to resort to court before any dealing with the estate can be done lawfully. Michelle Kairuthi Richard remains such a trustee whose duty is to collect the asset of the deceased beneficiary from the administrator of the estate of Nargis Gulam Alias Benna Nargis Gula and to preserve same pending directions by the court. Her duty is to put the same together with any other assets of that beneficiary and distribute the same once a substantive petition of grant of letters of administration or probate is made to her either alone or with others. Accordingly, I do allow the application dated 14/9/2021 in terms of prayer 2.

9. On the application dated 29/9/2021 (the second application)and seeking leave to appeal and enlargement of time to appeal the grounds put forth to premise that application are to the effect that the ruling of 27/7/2021 aggrieved the applicant who intended to file an appeal but was unable to do so due to sickness. She contends that she has an arguable point to pursue an appeal which ought not be shut out and lock out from the seat of justice. She make another assertion that some Kshs. 18,000,000 has been illegally and mysteriously withdrawn from the estate account and the estate will continue to be wasted by the administrator while the decision of the court is said to curtail the applicant's right to access justice in contravention of article 159 of the constitution for being inexplicable on both facts and the law on the banal principles of the law on administration of the estate. Those same grounds are echoed seriatim in the affidavit sworn by Zulekhar Bahadar which in addition set out the prayers in the dismissed application, annexed copies of the dismissed applications, the ruling of the court, medical records, a draft notice of appeal, draft memorandum of appeal and a bank statement of the estate account.

10. That application was also opposed by the administrator by the grounds of opposition dated the 5/10/2021 in which it is contended that the application has been overtaken by events bad for having been brought after inordinate and undue delay by an applicant whose conduct deserves not the discretion of the court in her favour and that the same is *res judicata*.

11. The application was argued orally at which sitting the advocate for the applicant put reliance on the affidavit filed and left it to court.

12. In their opposition, the counsel for the administrator took the positon that the applicant being a stranger to the cause had no right to seek and obtain the orders sought and that the application is in any event res judicata on the face of the decision of 27/7/2021

which dismissed an application seeking to set aside a consent order distributing the estate and also seeking the reinstatement of the applicant as an administrator. It was equally asserted and submitted that the applicant being a daughter to the first administrator, now deceased, but who has not sought to be substituted as a party cannot have the locus to seek court orders in the application. The same sentiments were shared and concurred with by Mr. Kaumbi for the 1st, 5th and 6th beneficiaries.

13. In his rejoinder, counsel for the applicant, submitted that the applicant cannot be termed as strangers to the cause because there is a pending application in the file dated 17/12/2019 by which the applicant has sought grant of letters of administration to the deceased beneficiary which application has not been opposed by any of the beneficiaries.

14. In my appreciation of the application by Zulekhar Bahadar only prayers pending determination are 3 & 4 which actually would amount to one prayer. I consider same to amount to one because if leave is granted time will start running form the date the leave is so granted.

15. The established principles for consideration by the court for such prayer is that the applicant must demonstrate an arguable case to justify being granted leave and that a mere fanciful and unrealistic argument on the merits and not disclosing public policy or interest or novelty surfaces not to merit grant of leave.

16. This court takes the learning that the right to appeal being statutory, it must be given in a statute or else it can only be exercised with the leave of the court. The application was to that extent in consonance with the law in applying for leave to appeal and challenge the decision dated 27/7/2021.

17. The ruling now sought to be challenged on appeal sought, in the main an order reinstating the applicant as an administrator and to disturb decision on distribution made after discussion with parties and to stay such order on distribution. The substraction of the ruling was that a decision made with consent of the parties has contractual underpinnings and cannot be disturbed in the absence of consent or vitiating factors. I consider that to be [1] a basic dictate of the law from which I think no arguable point can be crafted. I do find that the intended appeal may raise no more than fanciful and not realistic points for consideration. More importantly however is the fact that the estate only consisted of cash for distribution, after the only immovable assets was sold. Of the shares to the agreed beneficiaries the applicant was the first to get his share. With his share in the pocket he comes to stand on the way of the others from getting their own. The court must ask what justice is being sought to be served by such an order. Justice at its basic tenet must be even handed and a benefit to one must be good to all

18. I see none and therefore there cannot be any discernible realistic prospects of success in the proposed appeal. The court of appeal in Macharia Vs Mwangi (2002) KLR laid the consideration pertinent in such circumstances in the following words-:

“The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration.”

19. Of course apart from the prospects of success test, the court may also grant leave for the sake of addressing an important public policy or consideration or interest or just that the issue is a novel one. Here I find no explained circumstance to merit leave being granted. In addition Zulekha claims to the estate is not direct but through her father, Amerjan Begum Noor Mohammed, who is deceased. Her standing must be premised on being the personal representative to the deceased. It is admitted that she is yet to be made party and there is no evidence that she is a personal representative to the deceased beneficiary. She lacks the authority to litigate on behalf of that beneficiary as at today.

20. The upshot is that the application for leave and extension of time lack merit and the same is hereby dismissed.

21. On costs, I consider the application and conduct of the applicant to have been propelled by factor extraneous to the notions of

justice and the need to bring this cause to a conclusion and on that basis I direct that she shall pay the costs of the application to the administrator which I hereby assess at kshs.20,000/= to be paid within 30 days from today and in default execution shall issue.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 20TH DAY OF DECEMBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Ms. Kaunyangi for Kaumbi for applicant

No appearance for Ms Vivian Aketch for a beneficiary

No appearance for Mr. Ndubi for the administrator

Mr. Otieno C for the other applicant

PATRICK J.O OTIENO

JUDGE