



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 30 OF 1980

IN THE MATTER OF THE ESTATE OF ADBALLA SALIM BAKHSHUWEIN (DECEASED)

SALIM A BDALLA BAKHSHUWEINRESPONDENT

VERSUS

ALI BADALLA BAKHSHUWEIN

SAID ABDALLA SALIM

HUSSEIN ABDALLA SALIM.....APPLICANTS

RULING

1. From the onset, I must confess that this is one of the oldest files in the corridors of justice in Mombasa law courts. It has a long winding history with the beneficiaries frustrating the effort in completing the administration of the estate to serve their selfish interest. The urge to finalize distribution of the estate has lately been contributed by lack of interest to let go a cash cow which kept producing milk for the few among them the administrators more particularly the original administrator who stood to gain by managing and mismanaging the vast estate.
2. Due to the age of the file, some of the initial pleadings and court proceedings from 1980 when the suit was first filed could not be retrieved or found. I will hence endeavour to use the available record to make a determination of the pending application for confirmation of the grant and the protest arising therefrom.
3. Briefly, the deceased herein is said to have died testate on 5th May, 1980 while domiciled in Malindi. Prior to his death, he had executed a will on 10th January, 1968 in which he appointed Abdalla Salim Bakhshuwein his son the objector herein as the sole executor. According to the will, the deceased bequeathed his estate to his heirs/ beneficiaries and distribution to be done according to Islamic sharia.
4. Consequently, the executor petitioned for a grant of probate. The same was issued on 2nd July 1980. Before the grant could be confirmed, parties appeared before the Kadhi's court for determination of individual heir's or beneficiaries' share in accordance with Islamic law. Determination was done before the Kadhi Malindi on 10th and 16th December 1993.
5. The same distribution list order was later filed in the high court for use in distributing the estate during confirmation.
6. However, things remained silent and dormant without much action till 20th July 2020, when three of the beneficiaries namely; Ali Abdalla Bakhshuwein, Salim Abdalla Salim and Hussein Abdalla Salim filed summons for revocation of grant dated 17th July 2020 seeking revocation of the grant and a fresh grant of letters of administration intestate to issue to them, and that the executor to

give proper account of the estate.

7. The application was premised on grounds that the petitioner /executor had refused to distribute the estate to the beneficiaries. Further, that he had failed to give a proper account of the estate despite having been served with several demands to do so.

8. In reply, the petitioner filed a replying affidavit on 6th October, 2020 denying the claim of inability to administer the estate and that he had failed to account for the same. He averred that he had distributed a large part of the estate to the respective beneficiaries despite resistance from the applicants

9. In their rejoinder, the applicants filed a supplementary affidavit sworn on 22nd October, 2020 expressing the position that several plots had been sub-divided and beneficiaries given their shares save for plot 120 which the objector is reluctant to distribute.

10. When the matter came up for directions, the court directed parties to file submissions to dispose the application. On 22nd October 2020, the applicants filed their submissions. In a swift turn of events, the respondent lodged an application dated 25th November, 2020 seeking the court to review its orders in disposing the application through written submissions. He instead sought orders directing hearing by viva voce evidence and that parties be granted leave to file witness statements.

11. On 4th March, 2021 the applicants filed a Notice of Motion dated 3rd March, 2021 seeking;

a. That the applicants be and are hereby compelled to produce the documents particularized in the supporting affidavit of Salim Abdalla Bakhshuwein sworn on the 3rd day of March 2021.

b. That in default of such production the applicants be held accountable to the estate for every loss related thereto.

c. Costs of the application be in the cause.

12. However, upon negotiations by parties on a possible outside court settlement, parties reached a consent on 10th March, 2021. The said consent reads as follows;

i. The application dated 3rd March 2021 and filed on 4th March, 2021 be and is hereby marked as fully settled with each party bearing own costs;

ii. The administrator do sign and transfer all properties to the beneficiaries within thirty (30) days from the date hereof as per the Kadhi's court list of distribution to all beneficiaries dated 10th December, 1993 and 16th December, 1993 attached as annexure "SAB-1" to the petitioner's replying affidavit filed on 6th October, ,2020

iii. The administrator together with Ali Abdalla Bakhshuwein do sign transfers to all beneficiaries in respect of the whole of Plot No 120 Malindi as per the Kadhi's court distribution list dated 10th December, 1993 and 16th December, 1993

iv. That in full compliance with terms (ii) and (iii) above the succession dispute as relates to the estate of Abdalla Salim Bakhshuein shall be deemed as duly settled with each party bearing their own costs of the application;

v. That in default of compliance with the above then the summons for revocation of grant dated 17th July, 2020 and filed on 20th July, 2020 the same shall be deemed allowed in terms of prayer 3,4,5, and 6 as follows;

3. The grant of probate of the estate of Abdalla Salim Bakhshuwein granted to Salim Bakhshuwein on 1st July, 1980 be revoked and or annulled.

4. Letters of administration of the estate of the late Abdalla Salim Bakhshuwein be granted to Ali Abdalla Bakhshuwein, Said Abdalla Salim and Hussein Abdalla Salim

5. That Salim Abdalla Bakshuwein do give proper and accurate accounts of the estate of the late Abdalla Salim Bakhshuwein since 5th May 1993, to date.

6 Costs of the application be paid to the respondent.

13. Thirty days having expired without compliance by the respondent, the grant was automatically revoked and a grant of letters of administration intestate issued to the three applicants. Subsequently, the new administrators took charge of the estate. On 11th November, 2021, the administrators filed summons of even date seeking confirmation of the grant. They attached a proposed mode of distribution of the estate being a replica of the Kadhi's list of distribution (order). All beneficiaries including the applicants and the respondent signed the requisite consent before confirmation acknowledging that none of them was opposed to the confirmation of the grant and the proposed mode of distribution of the estate.

14. Despite that agreement having been executed through their respective consents entered before various advocates, Salim Abdalla Bakhshuwein the objector herein filed an objection (protest) by way of a replying affidavit sworn on 26th November, 2021 objecting to the manner in which plot No. 120 was proposed to be shared. He claimed that he and the 1st applicant were the owners of 2/3 of plot No 120.

15. He averred that he has been relegated to a low valuable side of the land yet the applicants /administrators had allocated themselves what is more valuable. He stated that some part of the land had been invaded by squatters and some of it is swampy and therefore not commercially viable. In his view, there is need to have equitable distribution by sharing both the trouble ridden and trouble free part of the land.

16. In their rejoinder, the applicants filed a replying affidavit sworn on 2nd February, 2022 in which the 1st applicant one Ali stated that he and the respondent bought the land using money realised from the estate hence holding plot No 120 in trust for the family (estate) and therefore each heir is entitled to a share. That the respondent (objector) has failed to account for the income generated from the estate since 1993 to date.

17. It was further averred that plot No 120 like other properties was distributed by the Kadhi to all beneficiaries including the widow who got 42 acres while sons got 24 acres each, daughters 12 acres each and some 30 acres reserved for utilities.

18. It was contended that the respondent cannot disown a consent he wilfully entered before Obaga his own advocate on 5th November, 2021. That having distributed all other properties in accordance with the Kadhi's distribution order issued in 1993, he cannot now say he was not part of the arrangement. He also stated that except for the respondent, the entire family members 15 in number have no objection. He expressed concern and disgust that 53 years down the line the respondent does not want to complete the administration of the estate.

19. When parties appeared for directions, they agreed to file submissions to dispose the application. Consequently, the applicants filed submissions on 4th February 2022 through the firm of Khatib and Co. advocates entirely adopting the content in the affidavit in support of the application and a supplementary affidavit.

20. In their oral submissions, Mr Mogaka advocate appearing together with Khatib advocate submitted that the respondent was being dishonest by disowning his own consent through which he agreed to the mode of distribution. That the estate having been shared in 1993 by the Kadhi and the respondent having executed the order by distributing the estate except plot 120, he cannot stand to oppose the mode of distribution out of which he has already benefitted.

21. On their part, Mr Angima admitted that the respondent is not opposed to the distribution of the estate according to the 1993 Kadhi's distribution arrangement but rather the quality of the part allocated to him and other beneficiaries. Counsel submitted that he does not object to the distribution of the estate in respect of the other assets except plot No. 120.

22. Learned counsel contended that plot 120 has three characteristics namely; land that is invaded by squatters; land that is swampy and trouble free and good land. He opined that the respondent and other beneficiaries have been allocated the squatter invaded and swampy parts while the applicants have taken the "choicest" part. According to Mr Angima, equity demands fairness by parties sharing the burden by each getting part of the good and bad land.

23. I have considered the application herein and objection thereof. I have taken into account submissions by both counsel. As stated earlier, it is a shame that a file of 1980 is still pending determination. Largely, it is the beneficiaries and more particularly the respondent who was the administrator for over 40 years to blame for not completing administration of the estate.

24. Indeed, litigation must come to an end in any fair judicial system. See **Patrick Gathenya Vs Esther Njoki Rurigi and another (2008) e KLR**. From the pleadings and parties' submissions, there is only one property that is in dispute. It's an indisputable fact that; the deceased died testate; the Kadhi's court Malindi determined heirs and distributed the estate in accordance to the Islamic law. It is also not in dispute that beneficiaries have since assumed possession of their respective shares of the rest of the properties except plot No 120.

25. What is the main contention in plot No 120" When the respondent was removed from the role of administrator, a fresh grant was issued to the applicants who moved promptly to seek confirmation of the grant. In support of the application they attached a schedule of distribution of assets which is in tandem with the distribution list of the Kadhi issued since 1993. Among, the documents attached are consents of all beneficiaries including the respondent/objector who signed his before his advocate Mr Obaga on 5th November, 2021.

26. When all beneficiaries appeared in court for confirmation of the grant on 31st January, 2022, the respondent did not appear. Everybody else supported the mode of distribution proposed by the applicants. The only reason adduced by the respondent for objecting the application for confirmation of the grant is that he and other beneficiaries have been relegated to less valuable parts of the plot. He however did not name those other beneficiaries as nobody else has complained.

27. From the consent signed by all beneficiaries in support of the confirmation application, each beneficiary was aware and indeed presumed to have understood the parts allocated to him or her. The respondent cannot turn round and say that he did not understand the consent document he signed before his advocate. When he signed the consent, his advocate must have duly understood what his client was signing. There is no allegation of fraud or misrepresentation of facts alleged in executing the consent.

28. The respondent has been enjoying the fruits of the estate for over 40 years without regard to completion of the administration of the estate. He should not be heard to complain over distribution of plot 120 yet it has been there since 1993.

29. As to being allocated a less valuable land, there was no proof by evidence that such a situation is prevailing. Secondly, nobody else has complained over similar ground yet he claims that he is not the only one affected by the proposed mode of distribution.

30. I do not find any merit in the objection/ protest. If there are any squatters, he is not the only one affected. In any event, the law will take its own course in dealing with the squatters.

31. Having dismissed the objection, I am satisfied that the application for confirmation of grant is merited and the same is allowed as prayed and the estate be distributed in accordance with the proposed mode of distribution in the affidavit in support.

32. I however need to correct an error in the grant of letters of administration intestate issued to be substituted to read a grant of letters of administration with written will annexed. This will take care of the fact that the estate was a testate estate but now without the original executor administering the estate.

33. As regards costs, this is a family dispute and each party to meet own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OF FEBRUARY, 2022

J. N. ONYIEGO

JUDGE



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