



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION NO. 195 OF 2010**

**IN THE MATTER OF THE ESTATE OF ATHMAN ALI (DECEASED)**

**FAIZA NESHKA ATHMAN.....1<sup>ST</sup> APPLICANT**

**NEEMA NDESHITO ATHMAN.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**HALIMA ATHMAN.....1<sup>ST</sup> RESPONDENT**

**FAIZ ATHMAN.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased herein died intestate on 23<sup>rd</sup> October, 2009 leaving behind several survivors and assets comprising the estate. Consequently, on 18<sup>th</sup> August, 2010, Arafat Abdallah Athman and Faiz Kicherunde Athman Ali sons to the deceased moved to the High Court vide succession case No. 195 of 2010 seeking a special limited grant for purposes of defending Civil Case No 349 of 2002 then pending in court against the deceased (estate) as the interested party in respect of LR. No 75892/XX1II/54. On 9<sup>th</sup> September, 2010 the court granted a limited grant of letters of administration Ad Colligenda Bona.
2. Subsequently, Halima Athman and Faiz Athman also children to the deceased moved to the Kadhi's court vide Succession Case No 94 of 2013 seeking a full grant of letters of administration intestate.
3. Following beneficiaries' disagreements and objection filed regarding distribution of the estate, the matter went to full hearing. Finally, Hon. Kadhi Khamis Ramadhani delivered his judgment on 13<sup>th</sup> February, 2020 thus distributing the estate.
4. Aggrieved by the said judgment, Mwanaidi Mfumanze, Ali Nasser Athman, Tuba Sabra Athman and Arafat Abdalla Athman both of whom were respondents before Kadhi's court lodged an appeal at Mombasa High court being family appeal No 14 of 2020. The said appeal is to date pending hearing and determination.
5. While the said appeal is pending, Neema Ndehino Athman a daughter from the 2<sup>nd</sup> house filed a Notice of Motion dated 3<sup>rd</sup> August 2020. In this application which is the subject of this ruling, she sought orders for stay of execution of the judgment delivered in Mombasa Kadhi's court succession cause No 94 of 2013 pending hearing and determination of the application and that the said judgment be set aside and the case be heard denovo.
6. The application is based on grounds set out on the face of it and an affidavit sworn on 30<sup>th</sup> August, 2020 by the applicant. According to the applicant, succession No. 94 of 2013 before the Kadhi's court was irregularly filed by the respondents herein Halima Athman and Faiz Athman while fully aware of the existence of this succession file. She further averred that she was never informed nor consulted when succession cause No.94 of 2013 was filed.
7. She took issue with the exclusion of property known as Peleleza bar in Likoni and properties in Tanzania from the list of assets belonging to the estate.
8. In reply, Halima Athman filed a replying affidavit sworn on 11<sup>th</sup> September, 2020 opposing the application on grounds that, **the application herein is irregular the same having been brought under a succession cause file purposely filed to obtain a limited grant of letters of administration Ad Colligenda Bona which file was closed upon issuance of the said limited grant on 9<sup>th</sup> September, 2010.**
9. She averred that, the only option available to the applicant is to join the appeal already filed against the implunged judgment or approach

the Kadhi's court to set aside its judgment. She also stated that the applicants are not being truthful to the court as they took part in the proceedings which took place 7 years ago. Consequently, she sought leave of the court to cross examine the deponents on oath.

10. She expressed dismay on the prolonged period of 7 years it had taken the applicants to challenge the Kadhi's judgment while they were aware of the same since the date of delivery. She raised concern that the applicants have no intention in distributing the estate as the status quo is in their favour thus prejudicing the other heirs who have no objection. That the claim for property in Tanzania and that in Likoni cannot be a ground to delay distribution of the estate.

11. In their rejoinder, the applicants filed a supplementary affidavit sworn on 23<sup>rd</sup> September 2020 stating that the file used to issue a limited grant is properly used to file this application as they relate to the same estate. They argued that they could not move to the Kadhi's court as it had become functus officio. As regards the claim that they should have joined the pending appeal, they argued that the law does not allow them as they were not parties before the Kadhi's court.

12. When the matter came up for hearing of the application, the respondents were granted leave to cross examine Neema and Faiz on the veracity of their averments contained in their affidavits in support of the application.

13. On cross examination by Mwadzogo, Neema gave mixed answers. At some point she told the court that she was not aware of the case before the Kadhi's court and at another she admitted that they had earlier on gone before Musinga advocate for briefing over the proceedings of the succession case. She also stated that she appeared before the Kadhi's court.

14. On her part, Faiza admitted that they instructed Musinga Advocate to file a succession cause and that she signed some papers which she did not understand although she had read the content. After cross examining the applicants, both counsel agreed to file submissions to dispose the application.

#### **Applicants' submissions**

15. Through the firm of Matata and Mwabonje advocates, the applicant's filed their submissions dated 14<sup>th</sup> September, 2020. Mr Mwabonje basically reiterated the averments contained in the affidavit in support of the application. Learned counsel urged the court to exercise its supervisory jurisdiction conferred under Article 165 (b) of the Constitution to set aside the orders and or judgment of the Kadhi's court in Succession Cause No. 94 of 2013.

16. It was counsel's submission that the applicants were not heard nor consulted in the case before Kadhi's court hence a denial of their Constitutional right pursuant to Article 25 and 50 of the Constitution by being condemned unheard.

17. According to Mr Mwabonje, the applicants were not enjoined as parties in the succession case before the Kadhi's court. In support of the argument that it is against the principles of natural justice for a party to be condemned unheard, counsel placed reliance in the holding in the case of **JMKV MWM and another (2015) E KLR** where the court held that;

**“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at”**

18. Further reliance was placed in the holding in the case of **Ilongo Tokole Jean V Pallet Logistics Limited & 2 others (2018) e KLR** where the court held that a matter conducted in violation of the principles of natural justice is null and void.

19. Concerning the question whether the suit herein was irregularly filed under a closed file as claimed by the respondents, counsel opined that it was logical to file the suit in an already existing file despite the fact that it was originally opened for a limited purpose. Counsel contended that there was no statutory requirement that an application under Article 165 (6) and (7) of the Constitution be filed under a new cause.

20. Concerning the respondent's claim that the applicants ought to have filed an appeal, counsel submitted that the applicants were not parties in the succession case before the Kadhi's court. Admitting that the applicants had the option of filing an application for review before the Kadhi's court, counsel submitted that his clients had the option also in filing their application under Article 165 of the Constitution.

21. Mr Mwabonje urged that the onus to prove that the applicants took part in the proceedings before the Kadhi's court lies on the respondents

#### **Respondents' submissions.**

22. The first respondent filed her submissions on 1<sup>st</sup> October, 2020 and further submissions on 18<sup>th</sup> December, 2020 through the firm of Mwadzogo and Co-Advocates. Mr Mwadzogo submitted on three issues;

**a. Whether the application is irregular;**

**b. Whether the respondents herein should be granted leave to cross examine the applicants;**

**c. Whether the orders sought herein are tenable.**

23. In addressing issue No. one above, Mr Mwadzogo submitted that, High court succession cause No. 195 of 2020 was brought purposely to obtain a limited grant and that the applicants were not the petitioners in the file in question. That upon issuance of the limited grant of Ad colligenda Bona, the file was deemed to have closed.

24. Learned counsel urged that the application was irregularly and unprocedurally filed under a closed file and through a wrong procedure under Article 165 (6) of the Constitution while ignoring clearly stipulated procedure of litigation. To fortify this argument, counsel relied on the holding in the case of **Moses Mwicigi and 14 others V Independent Electoral and Boundaries Commission and 5 others (2016) e KLR** where the court stated that, procedure is the hand maiden of justice and that where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant proceedings incompetent.

25. It was Mr Mwadzogo's submission that the applicants were aware of the proceedings before the Kadhi's court but opted to stay away and only to wake up after 7 years. That the allegation that they were not aware of the proceedings would only be determined by the Kadhi's court. That since the applicants did not seek the court to call for the Kadhi's court record for examination as provided for under Article 165 of the Constitution, this court has no benefit of knowing what transpired before the Kadhi's court for purposes of revision. It was counsel's submission that to reopen a file closed 7 years ago will amount to an injustice.

26. As to whether the orders sought are tenable, counsel submitted that the contested issue in the Kadhi's judgment is the exclusion of certain properties from the list of assets of the estate namely; Peleleza bar in Likoni which the court found belongs to one Mr Ali Shandala and properties in Tanzania which the court also found solely belonged to M/s Mwajabu Mwidadinow the first wife of the deceased (now deceased) and not the deceased.

27. According to Mr. Mwadzogo, there is family appeal No 14/2020 where same issues have been raised as grounds of appeal by some of the applicants' siblings. Therefore, it was Mwadzogo's submission that the applicants should seek to be enjoined in the same appeal.

28. Having sought leave to cross examine the applicants on the averments contained in their affidavits in support of their application, the court granted the same. Upon cross examination, Mr. Mwadzogo filed submissions on 18<sup>th</sup> December, 2020 purely addressing answers arising from cross examination.

29. Mr Mwadzogo contended that during cross examination, the applicants admitted having knowledge of the existence of the suit before the Kadhi's court. That the applicants admitted having visited the 1<sup>st</sup> respondents' advocates' offices in pursuit of pending proceedings before the Kadhi's court contrary to their claim in their respective affidavits. To that extent, counsel contended that the applicants' cross examination had exposed them as uncreditworthy witnesses who cannot be trusted hence the veracity of their testimony is in doubt and therefore cannot be relied on. To support this proposition, counsel relied on the finding in the case of **Law Society of Kenya V Faith Waigwa & 8 others (2015) e KRL** in which he fell short of quoting the citation nor attaching the authority itself.

#### **Determination**

30. I have considered the application herein, affidavit in support and the response thereof. I have also considered rival submissions by both counsel. Issues that emerge for determination are;

**i. Whether jurisdiction of this court was properly invoked under Article 165 of the Constitution**

**ii. Whether the application was regularly and properly filed under this file**

**iii. Whether the applicants were aware of the proceedings before the Kadhi's court.**

31. Since issues No. 1 and 2 are intertwined, I will consider them together. There is no dispute that succession case No 195 of 2010 the file under which the instant application is filed was opened for purposes of issuing a special limited grant of letters of administration Ad colligenda Bona which was used to collect and preserve the estate as well as defending a suit then pending against the deceased and misc. Civil Application No. 549/2002

32. The said limited grant was issued on 9<sup>th</sup> September, 2021 and the file closed. Ordinarily, a file opened for purposes of a limited grant can be closed or be used for subsequent acquisition of a full grant. In the circumstances of this case, this file was opened only for a special purpose because only the High court has jurisdiction to issue such special grant.

33. Since the deceased was a Muslim and the beneficiaries are Muslims, they properly moved the Kadhi's court for a full grant and subsequent confirmation and distribution of the estate. Had they opted to file the petition for a full grant before the High court which also has jurisdiction, they would have had an option of filing the same under the same file or open a fresh one which would then go the full process of probate proceedings.

34. Having opted to file a suit before the Kadhi's court, this file was naturally closed and could not be reopened for any other purpose other than for purposes challenging issuance of the special limited grant being the reasons for its opening. The key question pegging for an answer then is, is the current application properly filed in this file? To answer this question, the court needs to examine the law governing probate proceedings challenging decisions of the lower court among them the Kadhi's court.

35. This court has been moved and asked to invoke its supervisory jurisdiction over subordinate courts in this case the Kadhi's court under Article 165 (6) and (7) of the Constitution. For avoidance of doubt, I wish to reproduce the two provisions which provides that;

**“Sub Article 6 – the High court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function but not over a superior court.**

**Sub Article 7 – for the purposes of clause (6), the High court may call for the records of any proceedings before any person, body or authority referred to clause (6) and may make any order or give any direction it may consider appropriate to ensure the fair administration of justice.”**

36. There is no dispute that the High court has supervisory jurisdiction over subordinate courts and tribunals. However, the supervisory aspect does not override the otherwise clear provisions of procedure stipulated in the law. Article 165 (6) and (7) is not a standalone and omnibus provision substituting existing statutory provisions. That **constitutional** provision is enforced within the preview of other clear statutory provisions which then makes it relevant and operational.

37. In the case of Hon, **Benjamin Jomo Washiali Majority Chief whip National Assembly and 4 others Exparte Alfred Kiptoo Keter and 3 Others ( 2018) e KLR** the court held that;

**“ Para- 46-where the law provides for procedure to be followed, parties are bound to follow the procedure provided by the law before the parties can resort to a court of law as the court would have no jurisdiction to entertain a dispute”.**

38. Similarly, in **John Fitzgerald Kennedy Omanga Vs The Post Master General Corporation of Kenya and 2 others Nairobi HCMA No. 997/2003, and Republic Vs Ministry of Interior and Co-ordination of National Government and another exparte ZTE Judicial Review case No 441/2013** both courts held that;

**“An applicant will not be required to resort to some procedure if that other procedure is less convenient or otherwise less appropriate”.**

39. A party cannot avoid for instance filing an appeal, Review or revision proceedings under the relevant statutory or subsidiary provision of the law and hide behind the cover of Article 165 (6) (7). Where for instance a party is seeking revision of proceedings or decision, there must be allegations of something incorrect, irregular, illegal or improper. Therefore, Article 165 (6) and (7) is not a panacea to circumvent application of otherwise clear provisions of the law governing the subject at hand.

40. Besides, the applicants did not request for the lower court file for examination on allegations of illegality, incorrectness and or impropriety or irregularity of the proceedings therein. Whenever a party has an option of filing an appeal or review he or she should follow the governing statutory provision/s and not Article 165 of the Constitution. To allow such practice will be a keen to suspending all other provisions including principles and statutory provisions governing process of appeal, review or revision.

41. Having held as above, I am duty bound to find whether the application herein was regularly filed under this file.

42. I have already stated that succession file No 195/2010 determined upon issuance of a special limited grant and parties having opted to petition for a full grant before the Kadhi's court any other form of application challenging proceedings from the lower court /Kadhi's court could not properly be brought up under this file. This application and the entire proceedings were irregularly filed under this file.

43. The next question which requires an answer is, whether this court has jurisdiction to set aside the judgment of the Kadhi's Court. I am alive to the fact that this court has unlimited jurisdiction to hear and determine civil or criminal matters. That does not however mean that parties should over look statutory jurisdiction conferred upon lower courts.

44. When the Kadhi's court delivered its ruling, some of the beneficiaries decided to appeal against the decision basically challenging the Kadhi's finding in excluding two properties from the list of assets comprising the estate namely; Peleleza bar situated in Likoni and some property in Tanzania. These are the properties the Kadhi found belonged to some people and not the deceased. Vide Civil Appeal No. 94/20 the Kadhi's finding was challenged.

45. The subject of that appeal which is still pending is similar in form and spirit to the instant application. One will wonder why the appellants herein could not wait for the determination of the said appeal which was also filed around the same period this application was filed.

46. However, what remedy would the applicants have in challenging the Kadhi's judgment. Firstly, they had the option of seeking revocation of the grant confirmed before the Kadhi's court on grounds that their consent was not obtained pursuant to Section 76 Laws of Succession Act. Circumstances for revocation of a grant are clearly set out under Section 76 of the Laws of Succession Act which provides;

**1. A 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 from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

**(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-**

**(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or**

**(ii) to proceed diligently with the administration of the estate; or**

**(iii) to produce to the court, within the time prescribed, any such inventory or account or administration as is required by the provisions of paragraphs (e) and (g) of the Section 83 or has produced any such inventory or account which is false in any material particular; or**

**(e) that the grant has become useless and inoperative through subsequent circumstances.**

47. Where there is a claim that the applicants' consent was not sought nor disclosure of beneficiaries made if proven, amounts to concealment of material information hence a ground for revocation of the grant through an appeal.

48. Unlike ordinary civil cases where a party who never participated in proceedings before the court whose decision is being challenged cannot file an appeal, in succession cases, any party claiming to be a bonafide beneficiary but was not consulted or made aware of the existence of probate proceedings has a right to lodge an appeal before the High court under Section 50 and Section 76 of the Law of Succession Act challenging the issuance and confirmation of a grant.

49. I therefore do not agree with Mr Mwabonje that the applicants had no right of appeal by way of seeking revocation. Being beneficiaries in my view is sufficient enough to acquire locus standi to seek revocation by way of appeal/ revocation. The argument therefore that the applicants couldn't challenge the judgment which gave rise to the confirmation of the grant does not apply. Had they filed a revocation application before the High court by way of appeal, the court would have considered consolidating the case with appeal No 14/20.

50. The second option would be for the applicants moving the Kadhi's court for orders setting aside the judgment on grounds that as interested parties/beneficiaries they were not made aware of the proceedings. In any event, the applicants are not opposed to the entire judgment. Their contestation is only on properties excluded from the list of assets which is being taken care of in appeal No 14/20. I am persuaded to believe that the applicants herein and the appellants in appeal No.14/20 are working together and they are trying their luck through either process.

51. From the reasons stated above, this court has no jurisdiction to make or issue the prayers sought without following proper procedure and invoking proper provisions governing the prayers sought. In any event, the applicants' prayer will properly be dealt with in appeal No 14/20 where similar issues have been raised.

52. Regarding the question whether they were consulted before the probate proceedings commenced, it will be prejudicial for me to make a substantive determination in view of the holding that the court was not properly moved. To do so will also affect the proceedings in appeal No.14/20 which will mean starting the case denovo should this court uphold their contention. With that in mind, I do not want to make any comments on the answers given by the applicants on cross examination. To make a finding out of that cross examination will also mean that I would have dealt with the question whether the applicants had knowledge of the Kadhi's court's proceedings or not.

53. In a nut shell, it is my finding that the application is improperly before this court and the prayers sought incapable of issuance. For those reasons, the application is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26<sup>TH</sup> DAY OF MARCH, 2021.**

**J. N. ONYIEGO**

**JUDGE**