



REPUBLIC OF KENYA

IN THE HIGH COURT FAMILY DIVISION

AT MOMBASA

FAMILY APPEAL NO.41 OF 2018

IN THE MATTER OF THE ESTATE OF HALIMA RAMADHAN (DECEASED)

HAMISI RAMADHAN NANGO.....APPELLANT

VERSUS

SHUKURU RAMADHAN BANDARI

REHEMA RAMADHAN BANDARI

AMANI RAMADHAN BANDARI.....RESPONDENTS

(Being an appeal against the entire ruling of Hon. Abdullah M.Salim (SR)Kadhi

in Mombasa Succession cause No.178 of 2016 delivered on 26th September 2018)

JUDGEMENT

1. The deceased whose estate these proceedings relate died intestate on 5th July 2015. She was however not blessed with any child nor was she married by the time she died. Vide Mombasa Kadhi's court succession case No. 178 of 2016, one Hamisi Ramadhan (petitioner) claiming to be a step brother and the sole survivor to the deceased with whom they shared a father, petitioned for determination of legal heirs and their shares according to Islamic law. The property listed as comprising the estate is a house without land in Bomu Magongo.
2. The petitioner named one Shukuru Ramadhan Bandari as a respondent accusing her of having taken possession of the deceased's property without involving him. He claimed that the respondent was a cousin to the deceased whom the deceased raised since childhood given that the deceased had no children hence has no right to inherit any property.
3. During the pendency of the proceedings, Rehema Ramadhan Bandari a cousin to the deceased filed a notice of motion dated 19th August 2016 seeking to be enjoined together with Amani Ramadhani Bandari as the 1st and 2nd interested parties respectively. She further sought an injunction against the intended 2nd interested party restraining him from collecting rental income from the house the only asset comprising the estate.
4. According to Rehema, the petitioner was a paternal brother to the deceased whose property was from the maternal side. That the second interested party had taken over possession of all ownership documents of the property in question and that he was enjoying rental income from the property to the exclusion of other beneficiaries.
5. In her affidavit sworn on 19th August 2016 in support of her application, Rehema averred that the property in question belonged to her grand-mother Rehema Khatib who was survived by two children among them her father Ramadhani Bandari and Maembe Bandari the deceased's mother who registered the property in her name thus the contradiction Halima Ramadhan the deceased herein.
6. On their part, the respondent and interested parties filed a replying affidavit sworn on 13th October 2016 in response to the petition thus denying that the petitioner was a step brother to the deceased hence not a heir to the deceased. They claimed that the genuine beneficiaries to the estate were; Rehema Ramadhan Bandari, Bi. Juma Ramadhani Bandari, Amani Ramadhani Bandari, Twalib Ramadhani Bandari, Biasha Ramadhan Bandari, Shukuru Ramadhani Bandari and Juma Ramadhani Bandari.
7. After hearing the evidence from both sides viva voce, the hon. Kadhi delivered his judgment on 7th June 2018 finding that there was no evidence challenging the position that the petitioner was a brother to the deceased hence the survivor to the deceased. As to the existence of

the property, the hon. Kadhi found that there was no sufficient proof that the deceased owned the property. He therefore held that, he had no jurisdiction to determine the issue of ownership and advised parties wrangling over ownership to file the dispute before the relevant court.

8. However, nobody filed any appeal challenging the Judgment. Instead, via a notice of motion dated 12th July 2018, one Tausir Athman Musa sought the court to review its judgment on grounds that there was discovery of new evidence being a letter written by the land lord to the deceased confirming that the deceased was her tenant paying ground rent of a house on his plot No. 813. The said undated letter was attached in support to the application.

9. In reply, Rehema Ramadhani challenged the application through a replying affidavit sworn on 25th July 2018 arguing that the deceased did not own the house which was built in 1949 when the she (deceased) was a young girl. She also stated that the landlord failed to disclose the person who bought the house and that the letter was written after the judgment had been delivered hence an afterthought.

10. The honourable kadhi dismissed the application for review on grounds that the purported discovery of new evidence was not convincing as the letter relied on was not dated and that it was not clear whether it was prepared after judgment or not. The hon. Kadhi found that the applicant had failed to prove the conditions for review as set under O45 rule1.

11. Aggrieved by the ruling of 26th September 2018, Hamisi Ramadhan moved to this court vide Memorandum of Appeal dated 11th October, 2018 citing the following grounds:

- a) **That the Honourable Kadhi erred in law and in fact by dismissing the appellant's application dated 12th July 2018.**
- b) **That the Honourable Kadhi erred in law and fact by ruling that the appellant's application for review dated 12th July 2018 is not meritorious.**
- c) **That the Honourable Kadhi erred in law and fact by holding that the new evidence brought to the court was not sufficient.**
- d) **That the Honourable Kadhi erred in law and in fact by not considering the overwhelming and undisputed evidence brought by the appellant during the trial that the suit property being house without land on Plot Number 813 Changamwe belonged to the deceased.**
- e) **That the honourable court failed to review its judgement delivered on 6th June,2018 despite documentary evidence and oral evidence by the owner of the plot number 813 Changamwe ,that the house belonged to the deceased.**
- f) **That the Honourable Kadhi erred in law and in fact by allowing unsubstantiated oral evidence of the respondent.**

12. The appellant urged the court to allow the appeal, set aside the entire ruling of **Hon.Abdullah M.Salim SR Kadhi** delivered on 26th September 2018 and declare that the house without land on Plot Number 813 Changamwe Mombasa, forms part of the estate of the deceased. When the matter came up for hearing, counsel agreed to canvass the appeal through written submissions.

Appellant's submissions

13. The appellant through his advocates Birir and company advocates filed their written submissions dated 28th November, 2019 contending that the appellant had met the grounds for review as provided for under O 45 Rule (1) & (2) of The Civil Procedure Rules. The appellant submitted that even after attaching a letter from the landlord to confirm ownership of the suit property, the Honourable Kadhi dismissed his application without any justification.

14. The appellant further stated that the letter by the landlord was sufficient proof that the deceased was the owner of the suit property and that the trial court erred in disregarding this overwhelming evidence. It was further submitted that there was overwhelming evidence at the trial that the suit property was owned by the deceased.

15. That the trial court failed to exercise its discretionary powers fairly by failing to consider the evidence tendered before it for determination at the trial. It was contended that the court's failure to determine house ownership amounts to abdication of its mandate. In conclusion, the appellant submitted that the subject property belonged to the estate of the deceased.

Respondents' submissions

16. The respondents through their advocate Mwarandu and company advocates filed written submissions dated 30th July, 2019 contending that the learned Kadhi did not err in law by holding that there was no evidence during the trial to prove that the appellant owned any property as alleged. That the new evidence brought was not sufficient because the document was an afterthought hence doctored.

17. That the documentary and oral evidence did not prove that the house belonged to the appellant. Further, that the trial court properly exercised its discretion and arrived at a fair ruling hence the appeal should be dismissed with costs.

Analysis and determination

18. I have considered the record of appeal and rival submissions by both counsel. As stated earlier on, there is no memorandum of appeal

challenging the judgment of 7th June 2018. The issue regarding determination of heirs was therefore resolved in the said judgment by recognizing the petitioner as the survivor. With that judgment, the only heir recognized is the petitioner. The court however failed to find any evidence connecting ownership of the property with the deceased.

19. The only issue I find commending itself for determination in this appeal is whether the court properly exercised its jurisdiction by rejecting the review application based on what was referred to as discovery of new evidence. The hon. Kadhi was moved by one Tausir Athman musa who sought review of a finding made in the judgment to the effect that, the court had no jurisdiction to determine issues over a dispute on land ownership. Curiously, and from the record, one Tausir was not a party in the main proceedings.

20. I do not understand when and how Tausir became a party to be able to file an application for review. It is trite that parties are bound by their pleadings hence a person who is not a party to the proceedings cannot emerge at the appeal or review level unless first enjoined as an interested party. I am inclined to find that, the application of 12th July 2018 was from the word go incompetent and an abuse of the court process as the applicant had no locus standii.

21. Turning onto the rejection of the review application, it was incumbent upon the applicant to prove the conditions set out under order 45 (1) of the civil procedure rules which provides;

“ Any person considering himself aggrieved- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record ,or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the decree or order may apply for a review of the judgement to the court which passed the decree or made the order without unreasonable delay.”

22. The application of the above principles was succinctly echoed in the case of Smartkar Enterprises & another v Mary Kemunto Ogendo [2021] eKLR where the court stated as follows;

“It is now settled that for courts to review their decision they must do so in compliance with Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Mativo J in Nasibwa Wakenya Moses v University of Nairobi & Another [2019] eKLR observed that;

“Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay...”

23. However, to grant or not to grant an order for review is purely a matter of discretion judiciously exercised by the presiding judge or magistrate. In the case of Johnstone Ndege & another v Joseph Kang’ethe Mbugua & another [2021] eKLR the court had this to say;

“It is settled that the court’s discretionary powers must always be exercised judiciously and not capriciously.

24. Similarly, In Patriotic Guards Ltd. v James Kipchirchir Sambu[2018] eKLR it was held as follows;

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

25. The application for review in the instant case was anchored on discovery of new evidence which is an undated letter attached to the application indicating that the deceased Halima Ramadhan was a tenant of the late Mohammed Ali Bashir. According to Mohamed, the deceased was the one who was paying the ground rent of the house on Plot No.813 at Changamwe area.

26. The question which begs for an answer is, when was the discovery of the alleged new evidence made? There is no dispute that when the hearing was being conducted, the land lord was in existence. Why was he not call as a witness?

27. The court must be satisfied that the undated letter was in existence but could not be produced after exercise of due diligence. Who had the letter? When was it discovered? When was it authored? If it was authored after judgment, then, it would amount to fishing of new evidence without giving the respondent an opportunity to challenge the same on oath.

28. In any event, why would the land lord testify through a letter after the close of the case yet he was all along available. I am in agreement with the hon. Kadhi that the letter does not meet the requisite condition to be termed as discovery of new evidence. It was intended to defeat the interest of justice by introducing new evidence through the back door

29. Regarding the issue of ownership of the subject house, the Kadhi found that there was a dispute over ownership and that he had no

jurisdiction to determine issues of ownership on land. This holding was not challenged on appeal. To sneak the whole issue on land ownership will amount to introducing a main appeal through the back door. The claim that the hon. Kadhi did not properly interpret the law that he lacked jurisdiction to determine an issue on land dispute is aground of appeal and not review.

30. I do not wish to delve on the merits or findings of the Judgment when there is no appeal challenging it. The upshot of it is that, the Judgment is still intact as it remains unchallenged. To argue appoint which ought to be urged as a ground of appeal in an application for review is erroneous. See Abasi Belinda v Fredrick Kangwamu and another(1963)E.A.557 where the court held that;

“appoint which may be a good ground of appeal may not be a good aground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”

31. It is trite law that a review is not a substitute to an appeal. See Pancras Tawi Swai Vs Kenya Breweries Limited(2014)eKLR where the court held that;

“...if parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction”.

32. In view of the above finding, it is my holding that the finding of the hon.Kadhi in dismissing the application for review was correct and that the appeal herein has no merit hence dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF DECEMBER, 2021

J.N.ONYIEGO

JUDGE