



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 174 OF 2006

SHEIKH ALI MOHAMED MWINZAGU.....APPELLANT

VERSUS

MOHAMED BASHEIKH ALI

SWAFIA MOHAMED ALI

OMAR MOHAMED ALI

FATUMA MOHAMED ALI

JILU MOHAMED ALIRESPONDENT

AND

HASSAN ABDULKADIR AZIZ.....APPLICANT

RULING

1. The Appeal herein arises from the judgment of the Hon. Chief Kadhi, Hammad M. Kassim delivered on 20.9.06 in Kadhi Civil Case No. 37 of 2003 (the original suit). Sheikh Ali Mohamed Mwinzagu, the Appellant herein and the 1st Defendant in the Court below, being dissatisfied with the said judgment preferred the Appeal herein. The Respondents, Mohamed Basheikh Ali, Swafia Mohamed Ali, Omar Mohamed Ali, Fatuma Mohamed Ali and Jilu Mohamed Ali were plaintiffs in the Court below.

2. By an application dated 7.8.18, the Applicant, Hassan Abdulkadir Aziz seeks to be enjoined in these proceedings. The grounds are that his deceased father Abdulkadir Hassan Aziz, was the 2nd defendant in the original suit. The Applicant holds a limited grant *ad litem* in respect of the estate of his deceased father. The Applicant avers that he is, by virtue of his father's interest in the estate of the deceased, a beneficiary thereof and a potential heir. According to the Applicant, the Appellant is not an heir of the estate of the deceased and if the orders sought are not granted, the lawful heirs of the estate will be disinherited.

3. The Respondents opposed the Application by their grounds of opposition dated 29.3.19. The grounds are that this Court has no jurisdiction to entertain the Application, by virtue of the provisions of Section 78 of the Civil Procedure Act. Further, Order 42 of the Civil Procedure Rules do not provide for joinder of a person who was not a party in the original suit. Such a person can only take part in an appeal if the record clearly shows that the person will be directly affected by the outcome of the appeal, which is not the case herein. The Respondents prayed that the Application be dismissed with costs.

4. In a replying affidavit sworn on 25.6.19, the Appellant averred that upon the delivery of the judgment in the original suit, the Applicant's father had a right to appeal against the same. Because the Applicant's father did not exercise this right, neither he nor the Applicant can seek to be enjoined as a respondent in the Appeal as in law, only the Respondents who were plaintiffs in the original suit can be respondents herein. No reason has been given by the Applicant for his or his father's failure to file an appeal. Since 20.9.06 when the judgment was delivered, the Applicant has been indolent and guilty of inordinate delay. He cannot therefore be entitled to the exercise of the Court's discretion in his favour. The grant of the orders sought would greatly prejudice the Appellant as it will result in further delay of the matter which was filed in 2006. In the interest of justice and fairness, the Application ought to be dismissed with costs.

5. The Applicant countered the Appellant's response vide his supplementary affidavit sworn on 28.6.19. He averred that he only became an

interested party after the demise of his father on 9.1.16 and after obtaining the grant on 19.5.16. He also did on 12.11.18 obtain a grant in respect of the estate of Aisha Said Nasib, the last surviving member of the Nasib family. He accused the Appellant of trampling upon the rights of the lawful beneficiaries despite not being a beneficiary himself. The Appellant obtained a restraining order on 22.11.12 in the present Appeal, in respect of Plots Nos. 430 and 431. He has also proclaimed himself administrator of the said properties and disposed of Plot No. 257/V/MI and does not pay land rates in respect of the same. According to the Applicant, the original plaintiffs and the 1st defendant failed to disclose to the Kadhi's Court that the donees Sheikh Khamis Ali and Fatuma Khamis Ali had benefactors on their paternal side namely Mohamed Nasib and Aisha Said Nasib. They only disclosed donees on the maternal side whose lineage they fall under. To the Applicant therefore, it is in the interest of justice that the application is granted so that the true beneficiaries are not disinherited.

6. I have given due consideration to the Application, the parties' rival affidavits and submissions. The only issue for determination is whether the Applicant should be enjoined in the proceedings herein.

7. For the Applicant, it was submitted that his father was a party in the original suit in the Kadhi's Court but was not enjoined in the Appeal herein. It was further contended that no one has challenged the Applicant's interest in the subject matter of the Appeal. The challenge to the Application is on mere technicalities. Relying on Order 41 Rule 22 of the Civil Procedure Rules, the Applicant submitted that the Court may at any time before hearing or on its own motion, adjourn a matter for the purpose of enjoining a party who is interested in the results of an appeal. It was also argued that the Applicant has a limited grant to represent the interests of the beneficiaries of Aisha Said Nasib. He further demonstrated that the Appellant continues to trample on the rights of the lawful beneficiaries and he is himself, not a beneficiary of the estate of the deceased.

8. On his part, the Appellant submitted that the Applicant has not shown what he intends to advance to the Appeal that will be helpful to the Court in the resolution of the main issues in the Appeal. He has also not shown what prejudice he of his father's estate will suffer if the orders sought are not granted. In contrast, the grant of the orders would greatly prejudice the Appellant. Further, the judgment, the subject of this appeal was delivered on 20.9.06 and the Appeal herein was filed the same year, yet no action was taken until now and no reason has been given for the delay. The Applicant's deceased father failed to exercise his right to appeal and slept on his right. The Applicant and his deceased father has been indolent and guilty of inexcusable and inordinate delay and therefore undeserving of the exercise of the Court's discretion in their favour. The Applicant seeks to prolong this matter unjustifiably.

9. It is to be noted that the Respondents did not file submissions despite being given ample opportunity to do so.

10. The Applicant in his submissions contended that his father, who was a party in the suit in the lower Court was not enjoined in the Appeal. He relied on Order 42 Rule 22 of the Civil Procedure Rules which provides:

Where it appears to the court at the hearing that any person who was a party to the suit in the court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to a future day to be fixed by the court and direct that such person be made a respondent.

11. It is not disputed that the Applicant's father Abdulkadir Hassan Aziz was the 2nd defendant in the original suit in the Court below, while the Appellant was the 1st defendant. I have taken time to look at the entire record before me. I note that although the Applicant's father was named as the 2nd defendant, he did not defend the original suit. In the defense filed by the Appellant, he did not state that he did so on behalf of both himself and the Applicant's father. Indeed, it was only after all the plaintiffs had testified that the Applicant's father did on 25.10.05, make an oral application to file his defence. He was directed to file a formal application, which he never did. That was the extent of the Applicant's father's participation in the proceedings in the lower Court and in the impugned judgment, there was no reference at all, to the 2nd Defendant. From the record, it is quite evident that the Applicant's father did not in any meaningful way participate in the original suit at all. The Applicant stated that the Appellant and the Respondents failed to disclose to the Court, all the beneficiaries of the estate. This is a rather curious assertion, given that his father was a party to the case in the Kadhi's Court and had opportunity to bring to the attention of the Court, any concealed information.

12. In the case of Attorney General v Kenya Bureau of Standards & another [2018] eKLR cited by the Appellant, the Court of Appeal had this to state about joinder of a party:

In our view, the circumstances must justify the joinder, in that the claim and defence before the Court must raise a doubt as to which of the parties is liable in the final outcome of the dispute. In this regard, it is clear that KEBS knowingly and intentionally left out the applicant from the arbitral and High Court proceedings. Again, it must be demonstrated that it would be desirable to add the applicant as a new party and that his presence would enable court to resolve all the matters in the dispute.

Another important consideration is whether the joinder is intended to vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings. It cannot therefore fall from the lips of the applicant to say that it would protect and promote public interest in this dispute. The issue of interest or liability between the parties can be sufficiently and conclusively determined without any to the applicant.

13. It is noted that the Applicant holds a grant in respect of the estate of his late father, thereby making him the duly appointed legal representative. If the Applicant's father had no interest in the original suit, it follows that his estate similarly, has no interest in the same. Given the fact that the Applicant's father did not participate in the proceedings in the lower Court, I find no justifiable reason to warrant the Applicant's participation in this Appeal. Further, the issue as to whether the Hon. Kadhi erred in his findings can, in my view, be sufficiently and conclusively determined without any input from the Applicant.

14. Even assuming the Applicant's father had fully participated in the original suit, the Applicant would still run into headwinds. This is

because while the Appellant, being dissatisfied with the decision of the Hon. Kadhi moved to this Court on Appeal, the Applicant's father did not do so. Notably, the impugned judgment was delivered on **20.9.06** and the memorandum of appeal was filed on 18.10.06. At the time the judgment was delivered and the Appeal was filed, the Applicant's father was still alive. The evidence shows that he died on 9.1.16, about 10 years later. The logical and reasonable conclusion to be drawn is that the Applicant's father was not aggrieved by the decision of the Hon. Kadhi. Had he been dissatisfied, he would have joined his co-defendant and filed this Appeal together.

15. Further, the limited grant *ad litem* that the Applicant holds in respect of his father's estate was obtained on 17.5.16. After the Applicant obtained the grant, it took him another 2 years to file the Application herein. It is a well-established maxim that equity aids the diligent and not the indolent. The Applicant is guilty of laches. No reason has been proffered for the delay in filing the Application. The Court will deny relief to a claimant who has unreasonably delayed in asserting a claim, when that delay will prejudice the party against whom the relief is sought. To grant the orders sought would, in my view, greatly prejudice the Appellant who has been pursuing this appeal since 2006, when the same was filed.

16. In the result and for the reasons stated, I decline to exercise my discretion in favour of the Applicant and accordingly dismiss the Application dated 7.8.18. Each party to bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 29th day of May 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Appellant**

..... **for the Respondents**

.....

Court

Assistant