



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION APPEAL NO.1 OF 2019

NAZIR SHAH MOHAMED.....APPELLANT

-VERSUS-

GITHUI JOHN OF GITHUI & CO. ADVOCATES..... RESPONDENT

JUDGMENT

1. The respondent **John Githui** of Githui and Company Advocates filed this petition for Grant of Probate with written Will before the Kadhi's Court in respect of the estate of the deceased **SHAH MOHAMMED** who died on 23<sup>th</sup> August 2017. The Will is dated 19<sup>th</sup> August 2017. The Advocate attached the death certificate, a written Will and codicil and gave the full inventory of assets of the deceased set out as follows: -

a. Nakuru Municipality Block 12/54

b. Nakuru Municipality Block 5/293

c. Total estimated value of (a) & (b) above kshs 25,000,000

d. This appeal arise from ruling delivered by Hon. A. M Kadhi on 30th July, 2018 in respect to an application seeking to restrain the appellants Nazzir Shah Mohammed one of the sons of the deceased from collecting rent from tenants in Nakuru Municipality Block 5/293.

2. The application also sought to have money in Account No.[...] at First Community Bank in the name of the deceased be applied to pay accrued land rates. By ruling delivered on 30th July 2018, the trial Kadhi found that the appellants had no right above other beneficiaries to collect rent out of the estate. He was restrained from collecting rent from tenants in L.R. Nakuru Municipality Block 5/293 with effect from 30<sup>th</sup> July 2018.

3. The appellants being aggrieved by the said ruling delivered by Hon. A. M. Mohamed Kadhi filed this appeal on the following grounds: -

i. That the learned Kadhi's decision is contradictory, misconceived and contrary to the rule of law and natural justice;

ii. That the learned Kadhi erred in law and in facts by failing to take into consideration that the appellants through his own source constructed the building on NAKURU MUNICIPALITY BLOCK 5/293 which caused the registered owner to file a case against the appellants which case is still pending;

iii. That the learned Kadhi erred in law and in facts by failing to take into consideration that the appellants had been preserving the estate of the deceased **SHAH MOHAMED**;

iv. That the learned Kadhi erred in law and in fact by failing to consider that the will of the late **SHAH MOHAMMED** is contested; and

v. That the learned Kadhi erred in law and in facts by failing to consider the weight of the evidence presented by the appellants.

#### APPELLANTS SUBMISSIONS

4. The appellants submitted that he is the son to the deceased; that after his demise on 23<sup>rd</sup> August 2017, the respondent filed petition for grant of probate with a Will annexed. He submitted that the Will is contested.

5. He further submitted that in a ruling delivered in Nakuru HCCC No. 35 of 2015, the Court found that the appellant had developed land parcel Nakuru Municipality Block 5/293 with the authority of the deceased and therefore ordered them to appoint an agent to manage the rent from the premise. He stated that they agreed to share the profit from the collected rent as per an affidavit sworn by **Jackson Mwaluma** one of the managers of Lions Gate Commercial Agents.

6. That upon the demise of the **Shah Mohamed**, his family signed a consent appointing **Yusuf Shah** to collect rental income from Lions Gate Commercial Agents together with the appellant. The respondent acting for the executor of the deceased filed an application seeking to restrain the appellant from collecting rental income, and the orders were granted prompting this appeal.

7. The appellant submitted that the said ruling seems to determine the entire succession cause without taking into account the appellant is challenging the alleged Will, as the deceased did not have the capacity, not in the right state of health, to make any Will since he suffered from cancer and wrote the Will 3 days prior to his death. In the ruling the learned Kadhi stated that the appellant herein has no right above other beneficiaries, disregarding the appellant's and the deceased arrangement and the judgment of **Justice Mulwa** thus arriving at a wrong conclusion.

8. The appellant further submitted that the Kadhi also contradicted himself since his ruling delivered on 27<sup>th</sup> March 2018 ordered the agents to be releasing a sum of Kshs. 50,000/= to the widow, this is against the Islamic Law which the trial court heavily relied on as the widow was given special treatment above other heirs.

9. The appellant submitted that the trial court failed to appreciate the appellant was a creditor in the estate of the deceased as he had collected the said rental income together with the deceased since 2015 until the said orders were issued by the Court; that the Court also erred in allowing the respondent to be the executors of the Will in total exclusion of the heirs as per the Islamic Law. The appellant submitted the procedures in the Kadhi's Court was marred by irregularities and contradictions, thus the ruling of lower court should be set aside and the appellant allowed to continue collecting rental income from Nakuru Municipality Block 5/293 as prior to the death of their father.

### **RESPONDENT'S SUBMISSIONS**

10. The respondent submitted that the deceased was survived by 7 beneficiaries; 5 sons, 1 daughter and the widow; that he left two properties; Nakuru Municipality Block 5/293 (Zum Zum Plaza) and Nakuru Municipality Block 12/54 (family house); and during the hearing of the application the appellant did not raise the issue that he was a co-owner of the property or he participated in any manner in its development.

11. The respondent further submitted that **Order 43 of the Civil Procedure Rules** provides for appeals which lie to the High Court as a right and Appeals from the Kadhi's Court don't lie to the High Court as a right and the appellant ought to have sought leave of Court to file this appeal, thus the appeal is incompetently before Court.

12. The respondent submits as per **Order 2 rule 11** the appellant failed to traverse the facts deposed in the affidavit supporting the application. The appellant had the opportunity of filing a replying affidavit and attach supporting documents but he opted to file grounds of opposition therefore all the information in the application and the supporting affidavit were not controverted and the same were deemed to having been admitted.

13. In regard to HCCC No. 35 of 2015 the respondent submitted that the suit already abetted one year after the demise of their father as the appellant did not take any step in prosecuting the case. The matter was not concluded and the appellant has only cited sections that are favorable to his case and just statements made in Court. There is no legal basis raised by the appellant that the Kadhi failed to consider the appellant and his father had both developed the property.

14. The respondent submitted the appellant was not preserving the estate of the deceased using his own resources and if he was, this issue was raised for the first time in the appeal. The said ground ought to be dismissed.

### **ANALYSIS AND DETERMINATION**

15. This appeal is in respect to ruling delivered on 30<sup>th</sup> July 2018 in respect to application dated 28<sup>th</sup> May 2019 that sought to restrain the appellant from collecting rent from tenants in Nakuru municipality Block /293 and for money held in the deceased's Account no [...] in First Community Bank be used to pay land rates. I will limit my determination to this ruling. I have perused and considered submissions by the parties herein and find the following as issues for determination: -

*i. Whether the appellant ought to have sought leave before filing this appeal*

*ii. Whether Trial kadhi erred in failing to consider that appellant had right to collect rent*

#### **i. Whether this appeal should be dismissed for failure to seek leave**

16. Respondent submitted that appeals from orders issued by Kadhi's Court do not lie to the High Court as of right as it is excluded in **Order 43 of the Civil Procedure Rules**. There is no doubt that Kadhi's Court is one of the subordinate courts as provided in **Article ...of the Constitution**. Appeals from the Kadhi's Courts therefore lie in the High Court. **Order 43 of the Civil Procedure Rules** however set out orders which lie as of right to the High Court and for any other not listed, the appellant is required to seek leave of the Court.

17. I note that the orders appealed against herein is an order for injunction issued to restrain the appellant from collecting rent from the deceased's property. Under **Order 43 of the Civil Procedure Rules**, an order for injunction do not require leave of the Court for aggrieved

party to file appeal. From the foregoing this argument cannot stand.

**ii. Whether Trial kadhi erred in failing to consider that appellant had right to collect rent**

18. From perusal of the record, I note that a dispute existed between the deceased and the appellant over collection of rent from tenants in L.R. Nakuru Municipality Block 5/293. I note from ruling dated 28<sup>th</sup> May 2018 by **Justice Mulwa** in HCC No.35 of 2015 in respect to property Nakuru/Municipality Block 5/293, Zumzum Plaza. The appellant who is the son of the deceased **Shah Mohammed** had been given power of attorney to manage the above property which is registered in the name of the deceased. In the proceeding in HCC No.35 of 2015, I note that the appellant admitted that the money used for construction was sourced from the bank and the deceased's property was charged to secure the loan. **Justice Mulwa** in her ruling on whether to have the appellant restrained from managing the property and collecting rent from the tenants, found that the role played by the respondent in helping the deceased construct the property with his authority did not give the appellant ownership rights over the property; she however stated that if the appellant spent his money in the construction, he should render accounts of what he contributed personally.

19. Whereas the agent confirmed that both the deceased and the appellant would collect rent, he did not bring out clearly the arrangement that existed between the deceased and the appellant. On perusal of the record, the respondent did not demonstrate clear reason as to why he should have been allowed to continue collecting rent in exclusion of other beneficiaries while awaiting distribution of the estate of the deceased.

20. The appellant stated that the Will is challenged reason being that it was made 3 days before the deceased's death and that he was suffering from cancer. This I believe would be determined if the appellant pursue objection to petition for grant of probate with written Will. That's way the appellant would have an opportunity to prove his contribution to the construction of the building in issue for the Court to factor in his contribution while distributing the estate of the deceased.

21. The appeal is on ruling delivered on 30<sup>th</sup> July 2018. I will limit myself to that. From my analysis above, the trial Kadhi did not err in restraining the appellant from collecting rent from LR NAKURU/MUNICIPALITY BLOCK 5/293, ZUMZUM PLAZA. I see no merit in the appeal herein.

**22. FINAL ORDERS**

1. This appeal is hereby dismissed.
2. Costs of the appeal to the respondent.

**Judgment dated, signed and delivered via zoom at Nakuru This 26<sup>th</sup> day of November, 2020**

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**RACHEL NGETICH**

**JUDGE**

Court Assistant – Jenifer

Mr. Ndichu counsel for appellant

Ms. Kiama counsel for respondent