



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL NO. 7 OF 2018**

**HABIBA GUYO .....APPELLANT**

**VERSUS**

**ALI MOHAMMED MAGAGAJA.....RESPONDENT**

**AND**

**SHABAN MOHAMMED MAGAGAJA.....INTERESTED PARTY**

**RULING**

1. The appeal herein arises from the judgment of the Hon. Kadhi delivered on 7.2.18 in Kwale Kadhi Succession Cause No. 40 of 2017 in respect of the estate of Hamisi Mohammed Magagaja, deceased. Habiba Guyo, the Appellant being dissatisfied with the said judgment preferred the appeal against Ali Mohammed Magagaja, the Respondent. Shaban Mohammed Magagaja (the Interested Party) has filed this application dated 26.9.18 seeking to be enjoined in these proceedings.

2. The Interested Party avers that he has moved to Court on behalf of the beneficiaries of the estate of the late Mohamed Hamisi Magajaja (Mohamed), who stand to lose their inheritance to the Appellant and the Respondent. Mohamed was the father of the deceased, the Respondent and the Interested Party. The patriarch Mohamed was engaged in the business of supplying water to hotels in Ukunda from Plot No. Kwale/Ukunda/2688 (Plot 2688). The Interested Party further averred that he testified in the succession proceedings in Kwale. The Court determined that Plot 2688 belonged to the larger Magagaja family and not the deceased. The Interested Party claims that Appellant and the Respondent conspired to enter into a consent on 24.7.18 (the Consent Order) without involving the other beneficiaries with a view to disinheriting them. The estate listed in the Consent Order does not belong to the deceased as he owned the same jointly with the Interested Party on behalf of the family. Upon the death of Mohamed, the family nominated the deceased to manage the family business as trustee for the Magagaja family. The Interested Party complains that the Appellant has through her advocates, Omulama E. M. & Company written to the Manager Diani Reef Hotel and copied to 23 other customers of Mohamed's business directing them to pay the amount due to the said advocates. It is the Interested Party's contention that unless he is enjoined in these proceedings, the beneficiaries of the patriarch Mohamed will be deprived of their rightful inheritance. The Interested Party exhibited a copy of the title to Plot 2688 and loan account statement in the name of the deceased and the Interested Party as well as a letter from Agricultural Finance Corporation authorizing the disbursement of a loan was addressed to the deceased and the Interested Party.

3. Parties filed their written submissions in support of their respective positions. The Court has considered the material on record and makes findings on the issues in dispute which are:

i) Whether the Interested Party should be enjoined in the proceedings herein.

ii) Whether the Consent Order should be set aside.

4. The Application and indeed the Appeal herein arise from the decision of the Kwale Kadhi's Court in Succession Cause No. 40 of 2017. The Application is expressed to be brought under Order 10 Rule 2 and 25 and Order 45 of the Civil Procedure Rules and under Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act. Save for Order 45, these provisions are inapplicable by dint of the provisions of Rule 63 of the Probate and Administration Rules which provides:

***Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.***

Whether the Interested Party should be enjoined in the proceedings herein.

5. The Interested Party's claim to the proceedings herein is that Plot 2688 is registered in his name and that of the deceased as trustees on behalf of the larger Magagaja family. He contends that through collusion, Plot 2688 was by means of the Consent Order vested to persons unknown to him. The Appellant on the other hand submits that there is no provision in law under which a party can be enjoined to an appeal. The Interested Party was a witness in the Succession cause in Kwale. He ought to have applied to be enjoined at that stage.

6. Section 47 of the Law of Succession Act confers jurisdiction upon this Court to entertain any application and determine any dispute under the Act make such orders therein as may be expedient. Likewise, under Rule 73 of the Probate and Administration Rules, the inherent power of the Court to make such orders as may be necessary for the ends of justice, may not in any way be limited. This Court therefore has unfettered discretion to issue any orders for the ends of justice.

**7. The Court notes that the Interested Party and the Deceased were registered as proprietors of Plot 2688 as per the exhibited copy of title. This is not disputed. It is also not disputed that the Interested Party testified in the succession matter in the Court below. It is however not clear why he did not apply to be enjoined in that matter. He now seeks to be enjoined at the appeal stage. It is a cardinal principle of law that the Court will not make an adverse order without hearing the party to be affected by it. In Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998 the Court of Appeal held:**

***“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly... The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard...”***

8. The view of the Court is that the Interested Party ought to have sought to be enjoined in the succession matter in the Kadhi's Court, and not at the appeal stage. This is because he was well aware of the proceedings having testified therein. However given that he has a proprietary interest in Plot 2688, the outcome of the appeal herein will most likely directly and legally affect him one way or another. He must therefore be given an opportunity to be heard.

9. The fact that the Interested Party is registered with the deceased as owner of Plot 2688 which has been listed as one of the properties forming the estate of the deceased in my view gives him an identifiable stake in the appeal herein. I follow Mativo, J in Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR, who observed:

***It is a fundamental consideration that before a person can be joined as party, it must be established that the party has an interest in the case. In addition, it must be clearly demonstrated that the orders sought in the suit would directly and legally affect the party seeking to be enjoined.***

Whether the Consent Order should be set aside.

10. The jurisdiction of the Court for review of orders is provided for in Order 45 Rule 1 (1) of the Civil Procedure Rules provides:

***“1. Application for review of decree or order***

***(1) 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 judgment to the court which passed the decree or made the order without unreasonable delay.***

11. The Interested Party contends that the parties recorded the Consent Order vesting property that was not registered in the name of the deceased. To him, this was intended to dispossess him as the legal owner of Plot 2688. The Consent Order should be set aside on grounds that it was recorded without full disclosure of all material facts as to ownership of the property and by intentionally misleading the Court. For the Appellant however, it was submitted that it is not disputed that Plot 2688 does not belong to the deceased alone and that is why the Consent Order clearly reads that what forms part of the deceased's estate is the deceased's share in Plot No. Kwale/Ukunda/2688. No fraud or misrepresentation has been demonstrated by the Interested Party.

12. The basis for an application for review, variation or setting aside of an order may be the discovery by a person of new and important matters or evidence which after 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. An application may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The Interested Party has not placed any new and important matter or evidence before this Court for consideration nor has he demonstrated that there is an error apparent on the face of the record.

13. In the Consent Order which the Interested Party has challenged, the Appellant and the Respondent agreed on the beneficiaries of the

estate of the deceased. They also agreed that distribution would be in accordance with Islamic Sharia. Also agreed upon are the properties forming the estate of the deceased. The Court notes that as regards Plot 2688, it was indicated the “deceased’s share in Plot No. Kwale/Ukunda/2688”. This in my view is a recognition that the deceased owned not the whole of Plot 2688 but a portion thereof. Had the Consent Order not qualified the share of the deceased in Plot 2688, the Court would have considered this as sufficient reason to warrant the review, variation or setting aside the Consent Order. As matters stand, the share of the Interested Party in Plot 2688 remains intact.

14. A consent order may only be set aside if there is proven fraud or collusion. This was the holding in Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR, where the Court of Appeal had this to say:

***The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.***

15. In the instant case, the Interested Party has not placed any material before the Court to demonstrate that the Consent Order was obtained by fraud or collusion. The contention by the Interested Party is that Plot 2688 ought not to have been included as part of the estate of the deceased. He claims that he and the deceased held Plot 2688 as trustees for the larger Magagaja family. I have looked at the exhibited title and there is nothing thereon to support the allegation. Further, the exhibited letter from Agricultural Finance Corporation authorizing the disbursement of a loan was addressed to the deceased and the Interested Party and not the larger Magagaja family. The exhibited loan account statement was also in the name of the deceased and the Interested Party. Although the Interested Party referred to several properties, he only exhibited supporting documents of Plot 2688. The contention by the Interested Party therefore is not in my view a cogent reason to persuade this Court to set aside the Consent Order.

16. The upshot of this Ruling is that the Interested Party’s Application dated 26.9.18 partially succeeds. I do therefore make the following orders:

- i) The Interested Party is enjoined in the proceedings herein.
- ii) The prayer for setting aside of the Consent Order of 24.7.19 is hereby declined.
- iii) Each party to bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 26<sup>th</sup> day of April 2019**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

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

..... **for the Respondent**

.....**for the Interested Party**

.....**Court Assistant**