

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 4 OF 2016

AHMED ABBAS EDIN 1ST APPELLANT

ABDINASIR ADAN SOMO 2ND APPELLANT

VERSUS

HASSAN ABDI ADAN RESPONDENT

(Being an Appeal from the Ruling of Senior Resident Kadhi Hon. A.D. WAKO, delivered on 23/11/2016 at Moyale in Kadhi's Court Succession Cause. No. 43 of 2016).

RULING

This court delivered its judgment on 18th of April 2018. The court directed that a grant be issued to the two appellants and their sister and the respondent jointly. On 30th of May 2018, the appellants filed an application seeking orders that a fresh grant be issued to them without the respondent's name. The court certified the application as urgent and ordered that the tenants in the premises which are subject of the dispute stop paying rent to the respondent. The court allowed the appellants to collect the rent either by themselves or through their appointed agents pending the determination of the application. The respondent filed his application on 11th June 2018 seeking temporary stay of execution of the orders that were issued on 30th day of May 2018 and that those orders be set aside. Parties filed responses and or grounds of opposition to both applications. The two applications were heard together.

Mr. Ochieng appeared for the appellants. The totality of his submissions and affidavit in support of his application dated 29th of May 2018 is that the respondent is curtailing the enforcement of the decree of this court. The appellants requested to have a joint account opened by all the administrators but that request was declined. In his audit report filed in court, the respondent indicated that over Ksh 7,000,000 was collected as rent from 2012 up to July 2017. According to the Kadhi's decision that was overturned by this court the appellants were to get over Ksh 800,000 but only Ksh 400,000 was paid. The respondent has refused to cooperate and has been collecting the rent for all these years. The appellants had no option but to come to court and seek the orders as per the application. The respondent filed an appeal before the Court of an Appeal. The respondent filed an application before the Court of Appeal seeking to have the matter deemed as urgent but the same was declined.

With regard to the application by the respondent, counsel maintain that the same is not merited as the respondent is not agreeable to the opening of the joint account. The appellants are within their rights to enforce the decree of this court. The letters requesting the opening of the account were sent to the respondent's advocates and there was no response.

Mr. Mutembei appeared for the respondent. Counsel opposed the application by the appellants. Counsel maintain that he did not receive the letter dated 14th May 2018 from the appellants' advocate. Counsel submit that it is not clear whether the application is seeking a review of the court's judgment. This court has become *fuctus officio*. It is not shown what steps the respondent has done to stop the compliance of the court order. With regard to the application by the respondent it is submitted that the orders of 30th May 2018 seems to have reviewed the judgment and decree of this court. The respondent is a joint administrator and the orders seem to remove him from collecting rent. The orders are directed at third parties like tenants who are not parties to these proceedings.

The dispute herein began from the Kadhi's court. The parties are the children of the late **FATUMA ABDI**. The respondent is from the deceased's first husband. The Kadhi found that the respondent was to inherit a bigger portion of the state. This court set aside that finding and held that all the deceased's children were entitled to inherit the estate in accordance with Islamic Sharia. The effect of my decision is that the respondent's share will be small compared to that of the appellants. The respondent will get an equal share to that of his step brothers. The deceased had more children from her second marriage. The property in dispute was developed through the assistance of the tenants. It is clear to me that the tenants are paying rent and the respondent is the one collecting the rent. Throughout the dispute the respondent has been collecting the rent and it appears that he is considering himself as the only person entitled to the benefit of the rent collected.

This court in its judgment directed that a grant be issued to four of the deceased's children. The respondent is one of the administrators. The essence of the appellant's application is that the court decree cannot be affected because the respondent is collecting the rent and has refused to cooperate and have a joint account of the administrators opened. The respondent has not indicated his willingness to have the account opened so that the rent can be deposited. In his replying affidavit sworn on 11th June 2018 the respondent does not state that he is willing to abide by the decree. The emphasis is that there is an appeal pending before the Nyeri Court of Appeal. It is also stated that the premises were developed through the assistance of the tenants. It is my view that opening of a joint account will go towards benefitting all the parties. There are other beneficiaries who are not administrators. The fact that there is an appeal pending does not mean that the decree of this court has been stayed. The rent collected is meant to benefit all the deceased's children. The actions of the respondent are purely meant to frustrate the other beneficiaries from getting their respective shares of the estate.

The application by the appellant is not seeking a review of the judgment of the court. It is my view that the application was filed in an attempt to enforce then decision of this court. No prejudice will be suffered by the respondent if a bank account is opened and the rent is deposited. As of now the appellants are entitled to a bigger share of the income compared to the respondent. Counsel for the respondent seems to suggest that no application for contempt of court was filed. According to counsel there is no indication as to what the respondent did to stop the enforcement of the decree. The appellants have stated in their affidavit in support of their application that the respondent has continued to collect the rent. Since the respondent is only one of the administrators he should work together with the other administrators in collecting the rent. It is clear to me that the respondent is not willing to oblige and would like to continue collecting the rent alone. He has never stated anywhere that he is willing to have the rent collected and deposited in a joint account or shared as per the decree of this court. The Kadhi had given the respondent a bigger portion and the effect of my decision may lead to the respondent refunding part of the money which he utilized from the rent.

Given the nature of the dispute I do find that there will be no prejudice on the respondent if the appellants are allowed to collect the rent. It is clear from the pleadings that the respondent has been inciting the tenants not to pay rent to the appellants. This amounts to defiance of the court decision. Should the court of appeal overturn the decision of this court and revert to the decision of the Kadhi or make any other decision that would affect the shares of the appellants herein still no prejudice will befall the respondent. He will be able to get whatever share he will be awarded by the Court of Appeal as the money would be deposited in the bank. He has been collecting money on his own and that is why this court gave the orders of 30th May 2018. I see no reason as to why those orders should be reviewed or set aside. The orders are geared towards the enforcement of the decision of this court.

The application dated 29th May 2018 seeks to have the name of the respondent removed as an administrator. Since the respondent is alone from his father's side, I do find that it will not be prudent to remove him as one of the administrators. I do find that prayer three of the application which calls for the opening of a bank account without the mandate or signature of the respondent will solve the problem. I also find that the orders of this court of 30th May 2018 will also assist in the enforcement of the decree of this court. The respondent had been collecting the rent alone and in total exclusion of the other beneficiaries. I see no problem if the other beneficiaries who are the majority will collect the rent in total exclusion of the respondent. The mere fact that the respondent is one of the administrators does not entitle him to be the one collecting the rent. The respondent can complain only if he does not receive his share of the estate.

In the end I do find that the application dated 11th June 2018 by the respondent lacks merit and is hereby dismissed. The application dated 29th May 2018 by the appellants is hereby granted in terms of prayer three (3) and in terms of the orders of 30th May 2018 which allowed the appellants and their sister who are the other three administrators to collect the rent. Parties shall bear their own respective costs of both applications.

DATED, SIGNED AND DELIVERED AT MARSABIT THIS 23rd DAY OF JULY 2018

S.J. CHITEMBWE

JUDGE