



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
SUCCESSION NO. 62 of 2000

IN THE MATTER OF THE ESTATE OF ESHA MOHAMED ADAM (DECEASED)

1. ZEINAB KHALIFA
2. RAHIMA KHALIFA
3. FATUMA MOHAMMED SAID
4. SALMA MOHAMMED SAID
5. ABDULKARIM MOHAMMED SAID.....BENEFICIARIES/CESTUI QUE TRUST

VERSUS

1. ABDULRAZAK KHALIFA
2. OMAR MOHAMED SIAD.....LEGAL REPRESENTATIVES/RESPONDENTS

RULING

1. Before this court for determination are two applications brought by the **Beneficiaries/Cestui Que Trust** (“the Applicants”).

2. The background of this case is that the deceased died on 9.9.85 leaving behind several children being the parties hereto and an estate consisting of only one asset namely Mombasa/Block XVII/1497. A Grant of letters of Administration was issued to the Respondents on 9.10.00. A Certificate of Confirmation of Grant setting out the mode of distribution of the estate was issued on 9.4.03.

3. Thereafter a dispute arose regarding the disposal of the estate. Each of the Administrators filed separate applications which culminated in a Ruling by this Court on 8.3.13. In this Ruling, the Court ordered a valuation of the suit property by an independent valuer to be agreed upon by the Administrators. The Court also ordered that the 2nd Respondent herein be allowed first priority based on that valuation to buy the shares of the other beneficiaries failing which the property be sold to the highest bidder. The Court further ordered that proceeds of sale were to be distributed amongst the beneficiaries in accordance with Islamic Sharia law as set out in the confirmed Grant.

4. Unfortunately, the Administrators were unable to agree on a valuer and valuations were done by 3 valuers all giving different valuations of the same property. This Court in a Ruling on 25.4.14 directed that a valuation be carried out by the Government Valuer which shall be binding on all parties. The Government Valuer did carry out the valuation of the property and filed a valuation report on 13.6.14 placing the value of the suit property at Kshs. 7,000,000/=. Upon the filing of the said valuation, the

Court on 20.6.14 by a consent Order adopted the valuation by the Government Valuer of the suit property at Kshs. 7,000,000/=. By the said Order, the 2nd Respondent was to exercise his option to purchase the said property within 90 days.

5. The Applicants herein are beneficiaries of the estate of the deceased and have filed the first Application dated 3.7.14. Being dissatisfied with what they term “the order recorded by collusive consent of the respondents on 20.6.14” the Applicants seek leave to appeal to the Court of Appeal from that Order. The Application is supported by the grounds on the face of it. The principal ground is that the Order sought to be appealed against is not appealable to the Court of Appeal as of right and leave of this Court is required to appeal to the Court of Appeal.

6. The key reasons advanced by the Applicants for dissatisfaction are that they as beneficiaries/cestui que trust never consented to the sale of the suit property to one of the Administrators at below the market price. That the said Order gives rise to a conflict of interest and confers an undue advantage to a person in a fiduciary capacity as trustee. Further, that the applications giving rise to the said order were incompetent as they were not the joint acts of the Administrators of the estate of the deceased herein. The Application further states that the other beneficiaries came to know of the impugned order after 1.7.14.

7. The Application is opposed by the 2nd Respondent in his “Objection to Summons by Beneficiaries for leave of Court to appeal order of 20.6.14 under Section 47 of the Succession Act,” which was filed on 31.10.14. The 2nd Respondent claims that the two administrators are named as Respondents in the Application yet it is on record that the 1st Respondent has all along acted together with the Applicants against the 2nd Respondent. The 2nd Respondent argues that the Application is not supported by Affidavit. He further claims that Section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules under which the Application has been made do not provide for leave of this Court to appeal to the Court of Appeal. The 2nd Respondent further states that the Application is an abuse of the Court process and is embarrassing as it suggests deceit and fraud on the part of the advocates who recorded the consent.

8. The parties filed their written submissions as per the direction of the Court and highlighted the same before me. The issue for determination is whether leave should be granted to the Applicants to Appeal to the Court of Appeal against the order of this Court of 20.6.16.

9. I have carefully considered the Application, the submission by both Counsel, and authorities relied upon. The Applicants seek leave of this Court to file appeal against the Order of 20.6.14 in the Court of Appeal because the same is not appealable as of right. The Application is expressed to be brought under the provisions of Section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules. Section 47 of the Act provides for the jurisdiction of the High Court as follows:

47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

10. Rule 49 of the Rules provides for applications that are not otherwise provided for in the Act or the Rules:

49. A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.

11. The 2nd Respondent opposes the Application. He takes issue with the fact that the Application is not supported by affidavit. He claims that the Application is incomplete and lacking in factual evidence because there is no affidavit in support. Rule 49 of the Probate and Administration Rules is clear. An affidavit is not mandatory. The Rule clearly provides that an application relating to the estate of a deceased person for which no provision is made shall be by summons supported *if necessary* by affidavit.

The contention by the 2nd Respondent that the Application is incomplete and lacking in factual evidence because there is no affidavit in support is therefore fallacious.

12. The 2nd Respondent further opposes the Application claiming that Section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules under which the Application has been made do not provide for leave of this Court to appeal to the Court of Appeal. It is trite that where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power [Makhangu v. Kibwana (1985-8)]. The Law of Succession Act only makes provision at Section 50 for appeal to the High Court from any order or decree made by a Resident Magistrate or Kadhi's Court.

13. Section 47 of the Law of Succession Act gives the High Court jurisdiction to entertain *any* application and determine *any* dispute under the Act. Given that the Act contains no specific provision for leave to appeal to the Court of Appeal from the High Court, a party may invoke the provisions of Section 47 of the Act to seek leave to appeal to the Court of Appeal. This Court therefore has the jurisdiction to consider the Application herein and in exercise of that jurisdiction, I am satisfied that the refusal to grant this Application would result in injustice and prejudice to the Applicants herein. Consequently, I do hereby grant the Application dated 3.7.14.

14. I now turn to the second Application dated 3.1.15 which seeks leave to appeal to the Court of Appeal from part of the order of the Court made on 8.3.13 which says that "the Co-administrator Omar Mohamed Said to be allowed first priority based on the valuation to buy shares of the other beneficiaries". The Application also seeks leave to issue and serve Notice of Appeal out time. The grounds as set out in the body of the Application are that the Applicants were unaware of the ruling and could not seek interposition of court before August 2014. That between August 2014 and January 2015 the family made several attempts at building consensus.

15. The reason given for the delay in filing notice of appeal is that the Applicants became aware of the Ruling in July 2014 when they instructed S. M. Kimani, Advocate to appeal against the Ruling of 20.6.14. That from that time till December 2014, they were trying to build consensus in the family and when those efforts failed, they decided to appeal against the Ruling. The 2nd Respondent Omar Mohamed Said opposes the Application claiming that there has been inordinate delay. That it is not true that the Applicants did not know of the Ruling as the same was delivered in the presence of their advocate and that they have even acted on the same.

16. The impugned Ruling was delivered on 8.3.13 and the Application herein was filed almost twenty two months after. This Court has considered the Applicants' reasons for the delay in filing a notice of appeal. A notice of appeal must be filed within 14 days of the date of the Ruling a party wishes to appeal against. Rule 75 of the Court of Appeal Rules provides

(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal

17. The law grants power to the High Court to extend the time for filing a notice of appeal. Section 7 of the Appellate Jurisdiction Act under which the Application herein is brought provides:

"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired..."

18. The power of the Court to extend time for filing a notice of appeal is however discretionary. The Applicant must convince the Court that there are sufficient reasons for the delay. The Applicants claim

that they became aware of the Ruling in July 2014. I find this reason to be unconvincing because the Ruling was delivered in the presence of a Mr. Ngure holding brief for Mr. Odongo. There is an Affidavit on record sworn by three of the Applicants and the 1st Respondent on 6.5.10 in which they acknowledge Mr. Odongo as their advocate. The Applicants have not said that their advocate failed to inform them of the Ruling. Rather, the impression they have tried to create is that they were unrepresented. I find that the Applicants were adequately represented in all the proceedings herein and they cannot turn around and say that they were not aware of the Ruling when Mr. Ngure for Mr. Odongo their advocate, was present in Court on the date of delivery of the same.

19. The Applicants have stated that between July 2014 when they became aware of the Ruling and December 2014, they were trying to build consensus in the family and it is only after failing to agree that they filed the Application herein. I take the above to mean that the Applicants were not decided on whether to Appeal or not. The more prudent action would have been for them to file the Application even as they were exploring an out of Court settlement to avoid further delay. This they did not do in spite of having competent legal representation. The delay of over twenty two months in filing a notice of appeal is inordinately long.

20. In the result, this Court is not persuaded that the Application dated 3.1.15 has any merit. The inordinate delay in filing the notice of appeal was not sufficiently explained by the Applicants. The prayer for leave to file notice of appeal out of time fails and having so failed, the prayer for leave to appeal to the Court of Appeal must also fail. The Application dated 3.1.15 is therefore dismissed. Each party to meet own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 21st day of April, 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicants**

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

..... **Court Assistant**