



REPUBLIC OF KENYA

High Court at Mombasa

Succession Cause 62 of 2000

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

Before this court are two applications as follows:

a) Chamber summons dated 18th September, 2009 in which **OMAR MOHAMED SAID** one of the Administrators of the estate of the late **ESHA MOHAMED ADAM** (hereinafter referred to as '*the deceased*') sought the following orders:

“1.THAT this Honourable court be pleased to

order that Chief Kadhi’s award dated 2nd June,

2008 be accepted by all parties.

2.THAT the court be at liberty to grant any

reasonable and just order regarding fair

distribution of the estate.”

b) Chamber summons dated 27th October, 2010 by which one **ABDULRAZAK KHALIFA** a co-administrator of the estate of the deceased prayed as follows:

“1.THAT the Honourable court do sanction

the sale of the estate of the deceased herein being the parcel of land known as plot No. 1497 section XVII together with the developments thereon, and the proceeds thereof be distributed among the beneficiaries, namely Abdalla Mohamed Said, Abdulrazak Khalifa (Applicant), Omar Mohamed Said (co-administrator), Abdulkarim Mohamed Said, Zainab Khalifa, Rahma Khalifa, Fatuma Mohamed and Salama Mohamed Said according to Islamic Law.

2.THAT the instrument of transfer of the

property herein be executed by the Deputy Registrar, High Court Mombasa.”

It was agreed that both applications be disposed of by way of written submissions. **MR. A. HAYANGA** advocate acted for the applicant '*Omar Mohamed Said*' whilst **MR. ODONGO** acted for '*Abdulrazak Mohamed Said*'. Both parties duly filed their written submissions and the matter now awaits the court's ruling.

The dispute revolves around the disposal of the estate of the deceased 'Esha Mohamed Adam' who passed away on 9th September, 1985. Both applicants are sons of the deceased and they jointly petitioned the High Court for letters of administration intestate on 18th April, 2000. The petition listed one single asset of the estate being Mombasa Block No. XVII/1497 (hereinafter referred to as 'the suit property') which was at the time given a value of Kshs. 50,000/= . A grant of letters of administration was made on 9th October, 2000 which grant was later confirmed on 9th April, 2003. The estate was to be shared out amongst the seven (7) children of the deceased. This in a nutshell is the background of the case. I will now proceed to consider each application individually.

CHAMBER SUMMONS DATED 18TH SEPTEMBER, 2009.

This application was supported by the affidavit of the applicant 'Omar' sworn on 18th September, 2009. The applicant sought to have the estate distributed amongst the eight (8) beneficiaries in accordance with Islamic Sharia Law based on an arbitration award made by the retired Chief Kadhi 'NASSOR M. NAHDY'. A copy of that arbitration award dated 19th June, 2008 was annexed. The arbitration gave the value of the suit property as Kshs. 2.0 million and set out the specific amounts payable to each beneficiary. Further, according to the terms of the arbitration each heir was to be at liberty to dispose of their share in the suit property as long as preference to purchase was given to the other heirs and as long as Islamic Law was adhered to.

This particular application was opposed by the co-administrator Abdulrazak and three (3) other beneficiaries namely Abdulkarim Mohamed Said, Fatuma Mohamed Said and Salama Mohamed Said. They denied all knowledge of the said arbitration or the award and claimed not to have been party to the same. They also raised issue with the valuation of the property at Kshs. 2.0 million which in their view was far too low. They contended that the actual market value of the suit property was Kshs. 10.0 million. Finally, these respondents claimed that their proposal that the suit property be sold to the highest bidder and the proceeds shared out equally amongst all the beneficiaries was rejected by the applicant for no good reason.

In the alternative the respondents expressed their willingness to buy out the applicants share in the suit property at the price of Kshs. 426,250/= (based on the arbitration award) and have the property transferred solely to Abdulrazak as co-administrator thus leaving the other respondents to deal with the property as they all see fit.

The respondent Abdulaziz claims to have had no knowledge of the arbitration by the former Chief Kadhi and claims to have been unaware of any such arbitration and/or award. I find that the respondent here is not being candid. Communication in the court file between both advocates clearly shows that both parties had knowledge of and had initially accepted to be guided by the arbitration award. In a letter dated 2nd October, 2008, Mr. Odongo on behalf of the respondent writes:

“We now have instructions to advice which we hereby do that our clients do accept the awards of the arbitration as set out by Sheikh Nassor M. Nahdy referred in your letter under reference.

In order to finalize this matter a buyer should be found and proceeds shared as envisaged in the distribution instrument.”

There is no denial by the respondent of this letter nor its contents, and the letter was not written on a 'without prejudice' basis. Having instructed his lawyer to accept the award it is dishonest of Abdulrazak to now turn around and claim to have no knowledge of the award.

However, the central question is whether this court can (and indeed ought to) compel the respondent to accept this arbitration award as prayed by the applicant. Article 159(2)(c) of the Constitution of Kenya provides:

“159(2) In exercising judicial authority the courts and tribunals shall be guided by the following

principles

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.....”

Thus courts have a constitutional mandate to encourage parties to explore alternative avenues of dispute resolution. This is more so in cases of family disputes such as this one. Awards are decisions made by an arbitrator to which the parties to a dispute have all submitted their dispute for resolution. In Kenya arbitration is governed by the Arbitration Act 1995. Section 3A of the said Act provides that “*an arbitral award is binding upon the parties to it.*”

However, in order for the court to enforce this particular arbitral award there must exist evidence to show that there existed an agreement between the parties to refer their dispute to arbitration by the Chief Kadhi. No such evidence exists. No Arbitration Agreement executed by both parties has been submitted before this court by which the respondent bound himself to accept the arbitral award. Neither is there any evidence that the court itself referred this dispute to arbitration. As such the arbitral award cannot be said to have been legally binding on the parties. As such, I find no basis upon which this court can compel the respondents to comply with this arbitral award and I do therefore dismiss in its entirety the application dated 18th September, 2009. Each party to meet their own costs for the application.

CHAMBER SUMMONS DATED 27TH OCTOBER, 2010

By this application the co-administrator Abdulrazak asked the court to sanction the sale of the suit property to the highest bidder and the distribution of the proceeds of sale thereafter to the beneficiaries in accordance with Islamic Sharia Law. He claims that the suit property is likely to fetch a sum of Kshs. 10 million if sold to the highest bidder.

The co-administrator Omar Said opposed this application. He argued that the family had reached an agreement that the children from their mother’s first husband would remain in occupation and possession of the suit property whilst the children from the 2nd husband would occupy a plot situated in Mwembe Tanganyika village in Mombasa. Omar states that he has always occupied the suit property even during the lifetime of the deceased and has paid all rates due on the property as well as undertaking repairs as and when necessary. He says that he has formed an emotional attachment to the property and would not wish to have it sold off to a stranger. His wish is to have the property remain in the family.

The ideal situation would be that the parties agree by consent on a way to settle the estate of the deceased. However, clearly such an agreement could not be reached and that is why the matter has ended up in the courts. As stated earlier the only asset of the estate is the suit property which is currently occupied by Omar. The other beneficiaries are entitled to a share of this asset and it is desirable that the estate be settled one way or another. There is a clear conflict on the value of the suit property one administrator puts it at about Kshs. 2.0 million whilst the other administrator put it at Kshs. 10.0 million. There is a wide disparity (about 8.0 million between these two figures). In the interests of justice it is best that an independent valuer be appointed to value the property. Thereafter the suit property to be put on the market and sold to the highest bidder. The proceeds of sale are to be distributed amongst the beneficiaries named in the confirmed grant in accordance with Islamic Sharia Law in shares as indicated in the confirmed grant. However, the applicant Omar ought to be given first priority to buy out the other beneficiaries. I therefore do allow this chamber summons dated 27th October, 2010 and make orders as follows:

(1) A valuation of the suit property being plot No. 1497 section XVII together with all developments thereon, be conducted by an independent valuer to be agreed upon by both parties. The costs of this valuation to be met by the applicant Abdulrazak Mohamed Said.

(2) The co-administrator Omar Mohamed Said to be allowed **first priority** based on that valuation to buy the shares of the other beneficiaries.

(3)If the said Omar is unable to buy out the other beneficiaries then the suit property to be put on the market and sold to the highest bidder.

(4)The proceeds of sale to be distributed amongst the named beneficiaries in accordance with Islamic Sharia Law as set out in the confirmed grant.

(5)Each party to meet their own costs for this application.

Dated and delivered in Mombasa this 8th day of March, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Hayanga for the Applicant

Mr. Ngure h/b Mr. Odongo for the Respondent

Court Clerk Mutisya

Mr. Hayanga:

We seek a further mention to confirm that the valuation has been done.

Court:

Further mention on 22nd April, 2013 to confirm valuation.

M. ODERO

JUDGE