



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL 16 OF 2012

NICKSON KIPNGENO BASUBEN& 6 OTHERS.....APPELLANTS

VERSUS

SHABAN ALI KOECH.....RESPONDENT

RULING

This is an appeal against the decision in Nakuru Kadhi in Succession Cause No. 4/2009, rendered on 28/8/09. The ruling is was respect of the estate of the late Fatuma Chebet. The appellants have filed the Notice of Motion dated 16/2/2012 in which they seek prayer 3 which states:-

“3. That this Honourable Court be pleased to restrain the respondent either by himself, agents, employees or any other person acting from instructions from entering, leasing, selling, charging or transferring and/or in any other manner dealing with the parcels, Bondeni and Somali T-O-L Gilgil Township Plot no. 13 Bondeni and City Council of Nairobi, Pumwani Block B7/59(B) pending final determination of the appeal herein.”

The seven (7) applicants claim to be the siblings of the respondent, Shaban Ali Koech. They allege that without consulting them, the respondent filed Nakuru Kadhi Succession Cause 4/2009, never served them with the pleadings or notified them; that the respondent misrepresented facts to the court that the assets of the estate belonged to Binti Agita, the grandmother, instead of Petronilla Cherono Chumo, their mother who is also deceased; the respondent failed to disclose to the court that his mother Petronilla and the applicants profess the Christian faith not Islam and that he obtained an ex-parte judgment on 28/8/09 disinheriting the applicants. It is during the execution of the judgment that the applicants became aware of the proceedings before the Kadhi’s Court. They challenged the Kadhi’s decision by an application to set

aside by way of petition but it was dismissed on a technicality. The applicants fear that the respondent might dispose of the suit properly and put it beyond their reach if the order sought is not granted. They are also threatened with eviction.

The respondent swore an affidavit in which he opposed the application. He contends that the application is incompetent/defective because he has not been served with it, that the deponent of the affidavit in support of the application does not have written authority from the other applicants, that this motion is a replica of the petition No.12/2010, which was dismissed; that the applicants counsel's law firm are wrongly on record; and that applicants are guilty of laches; they have not demonstrated that they have an arguable appeal and they should provide security of Kshs.5 million; that in any event, the appeal is overtaken by events as the suit property has already been sold.

I have now considered the application, affidavits filed by the parties and submissions. The respondent has raised issue with the first appellant purporting to bring this application on behalf of all the applicants. In my view, failure by the applicants to file authority, authorizing the 1st applicant to swear the affidavit on their behalf cannot vitiate the proceedings. This can be cured by the applicant being given time to comply failing which the application can then be dismissed.

The applicants challenged the proceedings before the Kadhis Court for reasons that they relate to the estate in which they are beneficiaries and they are not subject to Islamic Law yet Shaban Ali Koech who is also a beneficiary from the same estate approached the Kadhis Court without notice to them and as a result they have been disinherited. In my view, the applicants have demonstrated that they have an arguable appeal with probable chances of success.

The respondent already claims to have disposed of some of the property so that this application is overtaken by events. The respondent did not avail any document or any other evidence to prove disposition of the property. If an order of injunction is not granted, the deceased's estate may be wasted and put beyond the reach of the applicants.

The applicants have not provided any security. It is not a monetary decree. This application relates to the estate of a deceased person to whom the applicants claim to be heirs. In that event, I do not find it necessary to order that the appellants provide any security. The demand by the respondent that the applicants provide security of Kshs.5,000,000/- has no basis.

In the end I direct that the applicants do file and serve the necessary affidavits authorising the 1st applicant to swear affidavits on their behalf within 7 days of service of this order and in default, the application will stand dismissed as against all the applicants except the 1st applicant. If the applicant complies with the above order, the court hereby grants an order of stay as prayed pending hearing of the

appeal. Costs to abide the appeal.

DATED and DELIVERED this 22nd day of May, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Montat for appellants

Mr. Kibet holding brief for Mr. Simiyu for defendant

Kennedy – Court Clerk