REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

MISC. CIVIL SUIT NO. 166 OF 2007 (OS.)

IN THE MATTER OF: THE ESTATE OF SHARIFF NASSIR (DECEASED)

AND

IN THE MATTER OF: AN APPLICATION BY ABDALLA BREK t/a ABDALLA WHOLESELLERS FOR THE HONOURABLE COURT TO APPOINT NASEEM DOST MOHAMMED AND ABDUL SWAMADI NASSIR AS ADMINISTRATORS OF THE ESTATE OF SHARIFF NASSIR (DECEASED) FOR DETERMINATION OF HIS RIGHTS AS CREDITOR TO THE SAID ESTATE

BETWEEN

ABDALLA BREK t/a ABDALLA WHOLESELLERS ……...PLAINTIFF/RESPONDENT

AND

1. NASSEN DOST MOHAMMED ..... DEFENDANTS/APPLICANTS

2. ABDUL SWAMADI NASSIR ……..…DEFENDANTS/APPLICANTS

R U L I N G

Against the background of the Originating Summons of **25th April,2007,** the defendants filed an application by Chamber Summons dated **5th October, 2009** and brought under Orders IXA (Rule 8), XXI (Rule 22) of the Civil procedure Rules and s. 3A of the Civil Procedure Act (Cap.21 Laws of Kenya). The application has one substantive prayer:

that the judgment entered herein be set aside.

The application is based on the following grounds:

(i) that, the defendants were never served with the Originating Summons filed herein;
(ii) that, no directions were taken as to the hearing of he Originating Summons;
(iii) that the judgment given was contrary to the provisions of the Law of Succession Act (Cap. 160, laws of Kenya);
(iv) that, as a result of the Judgment issued herein, the defendants/applicants have been condemned

to pay a sum of Ksh.507,000/- being the decretal sum ordered in Mombasa CMCC No. 338 of 2007;
(v) that, the defendants are not holding any property belonging to the deceased and as such, are being condemned unfairly.

The supporting evidence is set out in the affidavit of 2nd defendant sworn on **8th October, 2009**: he avers that the defendants were, on **5th April, 2007** served with summons to enter appearance and plaint in Mombasa CMCC No. 338 of 2007; they objected to the suit, and filed a memorandum of appearance; they later objected to the suit on the grounds that they did not hold Letters of Administration for the estate of the late **Shariff Nassir Taib**; thereafter, the defendants did not receive any further communication from the plaintiff — until **30th September, 2008**; but on **1st September, 2009** the deponent received copies of proceedings and judgment, and that is when he noted that he was *"allegedly served with Originating Summons on **21st April, 2007** and a hearing notice on **14th June, 2007**";* he was not, in fact, served with the Originating Summons or the hearing notice by the plaintiffs, and so he had given no instructions to counsel; no directions had been given prior to the hearing of the Originating Summons suit; on the basis of the judgment which was issued, the applicants have been arrested and threatened with committal to civil jail for failing to pay the decretal sum ordered in CMCC No. 338 of 2007; the defendants stand the risk of being committed to civil jail, even though they hold no properties belonging to the estate of the late **Shariff Nassir Taib.**

The respondent swore a replying affidavit on **12th April, 2010**, and averred that:

"on 4th June, 2008 the defendants through their Advocates, M/s Khatib & Co. Advocates, admitted the operation of the judgment in the instant Miscellaneous Application when they entered into [a] consent with the plaintiff in another case, Mombasa CMCC 338 of 2007".

The said consent, signed for M/s Wanjiku Nduati & Co. Advocates [for the Plaintiff] and for M/s Khatib & co. Advocates [for the defendants, and filed on **8th July, 2008**, thus reads:

"***BY CONSENT, the ex parte judgment [in CMCC No. 338 of 2007] herein be and is hereby set aside.***

"BY FURTHER CONSENT the plaint dated 6th February, 2007 be and is hereby deemed as duly and properly filed in compliance with the Judgment of he High Court in Misc. Appl. No. 166 of 2007 (OS) dated 20th April, 2007 and Order issued on 31st July, 2007".

On that basis, the deponent deposed that *'the applicants did not learn [of] the instant judgment on **1st September, 2009***". The deponent averred that *"the applicants did not object to Mombasa CMCC No. 338 of 2007 but entered appearance after an earlier judgment in default of appearance was entered against them"*.

The deponent averred that the applicants had not questioned the respondent's claim as vindicated in CMCC No. 338 of 2007 and indeed, had paid to the respondent substantial amounts towards the claim; and he deponed that the judgment in the instant case had been quite properly made.

The record shows that only the defendants/applicants made submissions in this matter, though the Court gave an equal opportunity to both sides. I will assess the submissions on file as they stand.

Learned counsel for the defendants/applicants submitted that they had not been served with the Originating Summons, and no directions had been taken prior to the hearing of the matter; and counsel further submitted that the judgment of **13th July, 2007** contravenes the provisions of the Law of Succession Act (Cap 160).

Counsel submitted that the plaintiff/respondent had served the Originating Summons of **28th April, 2007** on **21st April, 2007**; and hearing notice was served for **3rd July, 2007** as the hearing date; the Originating Summons was heard *ex parte*, and judgment delivered on **13th July, 2007** – prayer No.

3 being granted, an Order issuing, appointing the defendants/applicants as administrators of the deceased, for the limited purpose of being sued in the name of the estate.

The defendants ask for a setting aside of the Judgment of **13th July, 2007**; they deny having been served with the Originating Summons and the hearing notice. Counsel submitted that, at the time of the "alleged service', the defendants had already been served with proceedings in CMCC No. 338 of 2007 between the very same parties, and they duly instructed their Advocates to file appearance and defence.

Counsel disputed the claim that proper service had been effected upon the defendants: because there were two affidavits of service bearing different dates. Counsel urged that *"the Originating Summons and the hearing notice were not served on the defendants, and the Court should hold that there was no service"*.

Counsel's second contention was that *"no directions were taken as to the hearing of the Originating Summons"*. He went on to urge:

"B*efore the hearing of the Originating Summons, the plaintiff ought to have listed the same before the Court for directions as provided for under Order XXXVI, Rule 8A.…"*

Counsel submitted that even though the said rule is not couched in mandatory terms, *"it has been the practice of the Courts that directions be taken first, before the Originating Summons is listed for hearing, otherwise the Summons becomes more or less an ordinary Chamber summons or Notice of Motion"*.

Thirdly, learned counsel argued that the said judgment is "contrary to the provisions of the Law of succession Act (Cap 160)". Counsel urged:

"**The Law of Succession Act has elaborate provisions on how the grant is issued, and it is our humble submission that the Order made in these proceedings does not amount to a grant. The grant can only be issued under the provisions of the Law of Succession Act ……..and not under the Civil Procedure Act …… In the circumstances the Order issued was a nullity and the Court has jurisdiction to set it aside *ex debito justitiae*".**

In aid of the foregoing argument, counsel invoked the Court of Appeal decision, **Patel v. E. A. Cargo Handling Services Limited** [1974] E.A. 75; however, counsel did not focus the Court's attention on any specific element of that case, but contended in general that —

"The Court has a wide discretion and, in considering whether or not to set aside the Judgment the Court shall have regard to:
(a) the defence being given by the applicant;
(b) the explanation given for his failure to file defence or appearance."

Counsel went on to urge that in this case, the defendants/applicants were not served with the Originating Summons, *"and this is a sufficient ground to set aside the judgment"*.

Counsel further urged that the Originating Summons *"is incompetent, as the orders sought cannot be granted under the Civil Procedure Act"*; and so, it was submitted, the application to set aside the judgment be allowed.

As regards the formal consent, by which both parties agreed to joinder of the defendants for the purpose of being sued in the name of the estate, counsel urged that it *"does not make the defendants the legal representatives of the late Shariff Nassir [deceased] because they do not hold a grant issued under [the Law of succession Act]……They can…… deal with the property [legally]……if they hold the grant…….. The joinder has exposed them to personal liability rather than the estate's liability"*.

The application before the Court raises wider legal issues than have been addressed by counsel for the defendants/applicants; and it is a pity that the plaintiff/respondent elected to make no submissions at

all.

Firstly, there is a **jurisdictional issue**, which learned counsel has not addressed squarely. The authority relied on by counsel, **Patel v. E.A. Cargo Handling Services Ltd**. (1974) is, in my opinion, inapposite: that case was concerned with the setting aside of a default judgment in a perfectly plain situation. But in the instant case both parties had been substantially involved in the conduct of the proceedings, having made a formal consent (dated **4th June, 2008** and filed on **8th July, 2008**), and significant payments having been made by the defendants. The contest to the Judgment of **13th July, 2007** is clearly a contest of **merits** – in which case this Court has no jurisdiction to deal with the same.

The contest to the Judgment of **13th July, 2007** on the basis that it proceeded without Originating Summons directions first having been given, will not, in my opinion, be a valid contention; for counsel has submitted that giving such directions is a matter of **practice**, rather than of mandatory requirement: the implication is that the **judicial act** of proceeding to prepare and deliver judgment, amounts to an override of the said directions, in the particular case. The standing of the judgment, in the circumstances, can only be contested on **appeal**.

The question regarding the propriety of the judgment, in relation to the requirements of the Law of Succession Act (Cap.160, Laws of Kenya), is certainly an **issue of merit** which cannot be the subject of a lateral challenge in a Court of the same jurisdiction.

Those are the main questions to dispose of the instant application, as it cannot be said, from the record, that there was any failure of service as claimed by the applicants.

This Court could only have entertained an issue of a **review** nature, founded on a clearly identified, and formally presented error appearing on the face of the record; but such a situation does not apply to the prayers made by the defendants/applicants.

Consequently, I disallow the Chamber Summons of **5th October, 2009**. The applicants shall bear the costs.

DATED and **DELIVERED** at **MOMBASA**this **1st** day of **April, 2011.**

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J. B. OJWANG
JUDGE