



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Succession Cause 260 of 2002**

**IN THE MATTER OF THE ESTATE OF ABDULRAHMAN OMAR CHEKA  
(DECEASED)**

**R U L I N G**

The application before the Court is made by a Chamber Summons dated 27<sup>th</sup> February, 2009 and taken out under Rules 49, 63 and 73 of the Probate and Administration Rules and Section 48 of the Law of Succession Act; Sections 3A, 6, 7 and 63(e) of the Civil Procedure Act, and all the enabling provisions of the Law. After the application was certified urgent, only three prayers remained for determination. These were-

1. *THAT this Honourable Court be pleased to order stay of suit/proceedings in Kadhi's Court Succession Cause No. 213 of 2008 at Mombasa between OMAR ABDULREHMAN OMAR v. MWANAMKUU LALI SHEE AND FATUMA ABDULREHMAN inclusive of orders issued on the 9<sup>th</sup> day of February, 2009 and consequential orders thereafter pending hearing inter partes of this application and/or further orders from this Honourable Court.*
2. *THAT this Honourable Court be pleased to make such orders as it deems fit and convenient to meet the ends of justice.*
3. *THAT the costs of this application (be provided for).*

The application is supported by the annexed affidavit of Mwanamkuu Lali shee, the 1<sup>st</sup> applicant herein and is based on the ground that the grant of letters of administration made in this matter to Omar Abdulrehman Omar Cheka were revoked by this court on 12<sup>th</sup> November, 2007. Upon that revocation, Mwanamkuu Lali Shee and two others were granted fresh letters of administration and the grant was duly confirmed. On that note, the matter seems to have gone to rest. It was thereafter awakened by the filing in the Kadhi's Court Succession Cause No. 213 of 2008 on 9<sup>th</sup> December, 2008, in which the Petitioner is Omar Abdulrahman Omar, while Mwanamkuu Lali Shee and Fatuma Abdulrahmn Omar are the Respondents. On the filing of that Cause, the Petitioner obtained a temporary injunction restraining the Respondents from interfering in any way with the estate of the deceased. It was the obtaining of those orders which provoked the filing of this application and the orders sought therein.

In his replying affidavit, Omar Abdulrahman Omar deposes that the proper court to tackle the issues contemplated in this matter is the Kadhi's Court since the letters of administration clearly state that distribution be under Islamic Law. He therefore believes that under Section 48(2) of the Succession Act, the court charged with the duty of distributing estates under Islamic Law is the Kadhi's Court. He therefore prays that this court do give directions.

On 17<sup>th</sup> March, 2009, this application was given at the Registry a hearing date for 30<sup>th</sup> March, 2009. The date was given ex parte in the presence of a representative from the firm of Kadima Advocates, and the record shows that a hearing notice was served on the firm of Musinga Munyithya & Company, Advocates for the respondent, on 24<sup>th</sup> March, 2009. At the hearing, Mr. Kadima appeared for the applicant, but there was no attendance by or for the Respondent. Being satisfied that the Respondent's Advocates were served in sufficient time to enable them to attend court, the court opted to proceed ex parte.

The most salient facts in this matter are that the initial grant of letters of administration was made to Omar Abdulrehman Omar on 21<sup>st</sup> January, 2004 and confirmed on 5<sup>th</sup> August, 2004. This grant was revoked by this court on 12<sup>th</sup> November, 2007, and on the same day a new grant was made and confirmed to Mwanamkuu Lali Shee, Tunu Fatuma Abdulrahman Cheka, and Salim Abdulrahman Cheka. Todate, that grant has neither been stayed nor set aside. These facts are acknowledged by the Respondent in paragraphs 4, 5 and 6 of his Replying Affidavit. Having thus made that acknowledgment, it is surprising that Mr. Omar Abdulrehman Omar should state in paragraph (e) of his grounds for seeking injunctive orders in the Kadhi's Court Succession Cause No. 213-

*“That I am the administrator to the said estate having a grant letter attesting the same but was annulled by the high court and the respondents were illegally turned the beneficiaries hence selling and/or interfering with the deceased estate as stated herein.”*

That is a very unfortunate choice of words. Unless and until the orders of the High Court are nullified by the Court of Appeal, or reviewed by the High Court itself, the orders by the Kadhi's Court will remain subservient to those of the High Court. It was the Respondent himself who elected to prefer the initial application to the High Court for the grant of the letters of administration. He was given the initial grant, but owing to non-disclosure of all the material facts, this grant was revoked and a new grant made to some others. If there was anything amiss in the administration of the estate of the deceased by the new administrators, the best venue to resort to would have been this very Succession Cause, but not to institute a fresh Cause in the Kadhi's Court. We cannot afford to have a kingdom going to war against itself, and these matters should not be scattered in two different courts while they relate to one and the same estate.

For the above reasons, I make the following orders-

1. *THAT the suit/proceedings in Kadhi's Court Succession Cause No. 213 of 2008 at Mombasa between OMAR ABDULREHMAN OMAR v. MWANAMKUU LALI SHEE and FATUMA ABDULREHMAN inclusive of orders issued on 9<sup>th</sup> February, 2009 and consequential orders thereafter be and are hereby stayed pending further orders of this court.*
2. *THAT all matters relating to the estate of the late Abdulrehman Omar Cheka be henceforth dealt with under this file until further orders.*
3. *THAT Omar Abdulrehman Omar, the Respondent, shall bear the costs of this application.*

Dated and delivered at Mombasa this 3<sup>rd</sup> day of April, 2009.

L. NJAGI

JUDGE