



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE 121 OF 1991

IN THE MATTER OF THE ESTATE OF: ISMAIL OSMAN ADAM (DECEASED)

NOORBANU ABDULRAZAK APPLICANT

VERSUS

ABDULKADER ISMAIL OSMAN RESPONDENT

JUDGEMENT

The Applicant in this succession cause one Noorbanu Abdulkader filed this Chamber Summons dated 9th March 2005 seeking the following orders:-

“1. THAT the grant of probate to ABDULKADER ISMAIL OSMAN on 7th November 1991 be revoked/annulled.

2. THAT the costs of this application be provided for”.

The estate in dispute is that on the deceased ISMAIL OSMAN ADAM who met his death in Mombasa on 25th March 1991. The basic undisputed facts are that the deceased was survived by nine children one of whom was the Applicant and another is the Respondent ABDULKADER ISMAIL OSMAN. The deceased died testate having made a Will dated 28th January 1987 by which he left his immovable property consisting of Plot No. Mombasa/Block XVII/Parcel 66 to his two sons Abdulkader Ismail Osman (the Respondent in this matter) and Mohamed Hussein Ismail Osman. In the same Will the deceased appointed the Respondent as the sole executor of his Will. The Respondent applied for and was issued with Grant of Letters of Administration for the estate of the deceased which Grant was thereafter confirmed by the court on 14th September 1992. All this time the Applicant had not raised any objection to either the grant or confirmation of the probate. However on 5th February 2001 the Applicant did file Succession Cause No. 50 of 2001 before the Kadhis Court in Mombasa protesting her exclusion from the deceased Will which she alleged to be contrary to Islamic Sharia Law. However before the matter could be heard and determined in the Kadhis court the Respondent did on 15th May 2002 file Miscellaneous Application No. 61 of 2002 and obtained leave to file Judicial Review proceedings to quash the decision allowing the Applicant to proceed with her case in the Kadhi's court. The leave so granted also acted as a stay to the proceedings before the Kadhi's court. Based on those developments the Applicant moved to

file this present application seeking the revocation and/or annulment of the Grant issued to the Respondent.

In her supporting affidavit sworn on 9/3/2005 the Applicant challenges the grant issued to the Respondent on four main grounds. These are as follows:-

1. ***That the respondent was guilty of non-disclosure of material facts and misrepresentation to the court in applying for the probate.***
2. ***That the deceased Ismail Osman Adam had no capacity to make a valid will***
3. ***That the purported will by the deceased is not in fact valid***
4. ***That the applicant was entitled to a reasonable provision from the estate of the deceased.***

At the outset I note that all the parties in this succession cause

are Muslims and followers of the Islamic faith. As such it is my considered opinion that this matter ought properly to have been heard before the Kadhis Court. I note that indeed the Applicant had initially filed Succession Cause 50 of 2001 before the Kadhi's court in Mombasa and the Kadhi had ruled that he did have jurisdiction over the matter. The Respondent effectively thwarted that case by filing Judicial Review proceedings and obtaining a stay of the proceedings in the Kadhis court. It is curious to say the least why the Respondent being a Muslim would be averse to the distribution of his late father's estate in accordance with Islamic law. I shall say no more on this.

As it is this succession cause is now before the High Court at Mombasa. The law which governs matters of succession in Kenya is the law of Succession Act Cap 160 Laws of Kenya.

Before I proceed to look at the four grounds raised by the Applicant in her objection I feel it is prudent and indeed it is necessary to consider whether the Applicants present objection is limited by time. The grant being complained of was confirmed on 14th September 1992. The Applicant's Summons for Revocation and annulment of Grant of Probate dated 9/3/2005 is stated as being brought under S. 26, 76(a) and (c) of the Succession Act Cap 160 Laws of Kenya. The Applicant brings her objection in her capacity as a beneficiary/dependant under S. 26 of Cap 160 in that she is one of the biological children of the deceased. This fact is not in any way contested by the Respondents. The Applicants argument and objection to the Grant is basically on the basis of the fact that the deceased failed to make any provision for her in her Will. S. 26 of Cap 160 provides that:-

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate”.

S. 29(a) of Cap 160 goes on to define a dependant as follows:-

“(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death”.

So far so good as the Applicant being the biological daughter of the deceased is properly covered as a dependant under S. 29(a) of Cap 160 and as such would be entitled to a share of his estate.

However a reading of Cap 160 reveals that it does provide more than ample time for an aggrieved dependant to raise any objection to the issuance or confirmation of the Grant. A look at the record in this file reveals that the petition for Grant of probate dated 2nd August 1991 was gazetted by the Deputy

Registrar Mombasa Law Courts on 4th October 1991 under gazette notice No. 4546. This notice gave to any aggrieved party thirty (30) days in which to raise in any objection. The Applicant took no action and the grant was duly issued. Following this issuance the law allowed the Applicant a further six months before the grant was confirmed to raise any objection. Still the Applicant took no action and the Grant of Probate was confirmed by the court on 14th September 1992. The Applicant cannot claim to have been unaware of the Will or of its contents. In her evidence-in-chief the Applicant told the court that after the death of her father the Will was read out and she realized that she was not named as a beneficiary. It was at this point that the Applicant ought to have moved to court. It is only in 2001 almost nine years following the confirmation of the grant that the Applicant moved to the Kadhis court to challenge her fathers Will. S. 30 of Cap 160 provides that the time limitation for such objections and provides that:-

“No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by S. 71”.

This section clearly provides that once a grant has been confirmed by the court then no application relating to that estate shall be entertained by the court. This is a mandatory provision as the term used in the Act is **“shall”**. The Applicant in her supporting affidavit avers that she only became aware of the confirmation of the Grant in the year 2001. I find this hard to believe. The Applicant was well aware of the existence of the Will and its contents after the death of her father in 1991. She was therefore well aware that the Respondent had been appointed by the deceased as the executor of his estate. She cannot claim to have been ignorant of the fact that the Respondent would move to execute the said Will. The Applicant may be a lay person but by her own admission she did have an advocate one Mr. Karimbhai representing her. It is clear that the Applicant was well aware of the need to seek legal counsel. If the Applicant wanted to file this application **after** confirmation of the Grant then she ought to have sought leave of the court to extend the time within which to do so. Again despite having legal counsel the Applicant did not bother to file such an application. In the cited case of **In the Estate of Samuel Mburu Njoroje Succession Cause 2508/1999** Hon. Justice Martha Koome dismissed a similar application which was made five (5) years after confirmation of the Grant. In this case the Applicant brings her application a full nine (9) years after Grant was confirmed. No justifiable reason has been given for this inordinate delay. The Applicant ought to have acted as soon as the Will was read and she realized that she had been excluded therefrom. Her explanation that she took time to come to court as she was waiting to see if her brothers would give her something does not hold water. The Applicant could have filed her objection even as she communicated with her brothers on her wish to receive a part of the deceased estate. The Applicant in this case is a person who chose to sit on her rights. Those rights cannot exist in perpetuity. By failing to take legal action when she should have the Applicant sat back and allowed those legal rights to lapse. She cannot now come to claim them nine years later. I find therefore that this present application is time-barred under the provisions of S.30 Laws of Succession Act. Whatever the merits or otherwise of her objections I cannot at this stage entertain them. For the above cited reasons I dismiss this application in its entirety. No order as to costs.

Dated and delivered at Mombasa this 30th day of July 2009.

M. ODERO

JUDGE

Read in the open court in the presence of:-

Mr. Ochwa holding brief for Respondent

Mr. Chakera for Applicant

M. ODERO

JUDGE

30/7/2009