



REPUBLIC OF KENYA
THE HIGH COURT OF KENYA
AT MOMBASA

Prob & Admin Cause 664 of 1994

IN THE MATTER OF: ABUBAKAR MOHDHAR MOHAMED (DECEASED)

AND

**IN THE MATTER OF: AN APPLICATION BY FAROOK ABUBAKAR AND
MOHAMED ABUBAKAR FOR A GRANT OF PROBATE.**

FATMA ABUBAKA & ANOR.PLAINTIFFS

VERSUS

FAROOQ ABUBAKAR & ANOTHER.....RESPONDENTS

R U L I N G

By a summons dated 17.10.05 filed pursuant to sections 83, 94 and 95 of the Law of Succession Act and under Rule 73 of the Probate and Administration Rules, the Applicants herein, Fatma Abubakar and Hamida Abubakar prayed for the following orders inter alia against Farook Abubakar and Mohamed Abubakar and Mohamed Abubakar (the respondents):

- (a) An order directing the respondents to provide full and detailed accounts including income and expenditure of the deceased's estate and in default they be criminally punished.
- (b) An order of injunction to restrain the Respondents from disposing of any assets of the estate. The summons is supported by the affidavit of Fatma Abubakar sworn on 17.10.2005.

Each respondent filed a replying affidavit to oppose the application.

What is undisputed is that the Respondents herein were granted temporary grant letters of administration in respect of the estate of Abubakar Mohdhar Mohamed (deceased) on 2nd day of March 1995. The applicant filed a summons for confirmation of grant dated 14.11.1996. The same is still pending for hearing. No reasons have been given by either side as to why the application for confirmation of grant has not been prosecuted for the last 10 years despite the fact that the Respondents were served with a notice dated 20.9.96 by this court pursuant to section 73 of the Law of succession Act. That is an issue which should be dealt with at a later stage.

Mr. Odongo advocate who appeared for the Respondents urged this court to strike out the summons because the applicants should have approached this court by way of an originating summons under Order XXXVI of the Civil Procedure Rules. Mr. Hassan advocate for the applicants was of the view that this court should exercise its inherent power under rule 73 of the probate and administration and ignore the application of order XXXVI of the Civil Procedure Rules and determine the application the way it is.

I have carefully considered the rival submissions over the competency of the application. The main prayer sought in this summons is for an order directing the Respondent in their capacities as executors and administrators of the estate of Abubakar Mohdhar Mohamed, deceased, to provide accounts. It is imperative to note that the applicants are entitled to seek for the aforesaid orders under Section 83(e) of the Law of Succession Act. The aforesaid Act and the rules encompassed therein do not provide for the procedure of filing such an application. The summons before this court was filed by some of the beneficiaries of the estate of Abubakar Mohdhar Mohamed, deceased. Their application fall within the ambit of order XXXVI rule 1 of the civil Procedure Rules. In the end I agree with the submissions of Mr. Odongo advocate for the Respondents that the applicants should have approached this court by way of an originating summons. The summons now before court is fatally defective. It is hereby ordered struck out with each party bearing their own costs. Let the parties properly approach the court. In order for the parties not to go and sleep over this matter and in exercise of my inherent power under rule 73 of the Probate and Administration Rules, the Respondents are directed to prosecute the summons for confirmation of grant dated 14.11.96 within 30 days from the date of this ruling and in default the aforesaid application and the grant of letters of administration issued on 2/3/95 shall stand dismissed and revoked respectively.

Dated and delivered at Mombasa this 9th day of February 2007.

J.K. SERGON

J U D G E

In open Court in the presence of Mr. Odongo for the Respondent.

N/A Hassan for the plaintiff.

Court:

Certified copies of the proceedings and ruling be supplied upon payment of the necessary fees.

Sergon, J