



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 17 of 2006 (OS)**

**IN THE MATTER OF THE TRUSTEE ACT, CAP. 167**

**AND**

**IN THE MATTER OF A VARIATION OF TRUST**

**AND**

**IN THE MATTER OF EX-PARTE**

**1. ABDUL RAZAK SULEMAN &**

**2. ARIF SULEIMAN ..... PLAINTIFFS**

**RULING**

On 27.07.06 the plaintiffs filed originating summons applying for the following orders:-

1. That service of this summons be dispensed with in terms of Order XXXVI rule 5A of the Civil Procedure Act (*sic*).
2. That this honourable court be pleased to vary the Trust created by the Will of the late SULEIMAN ABDUL GANI TOBARIA to the extent of consenting to the appointments of ABDUL RAZAK SULEMAN and ARIF SULEMAN the plaintiffs to be additional executors thereof.
3. That this honourable court be pleased to give authority to the plaintiffs to sell all that property designate L.R. No.336/174 situate in the City of Nairobi.
4. That this honourable court be pleased to give authority to the plaintiffs to issue a valid receipt for the consideration to be paid arising out of the sale of the said L.R. No.336/174.
5. That this honourable Court be pleased to grant any/or further or all such orders as will meet the ends of justice in this case.

The application is based on grounds stated in the affidavit of the 1<sup>st</sup> applicant, Abdul Razak Suleiman sworn on 17.07.06 and stated to be brought under Order XXXVII(G) and rule 5A of the Civil Procedure Act (*sic*) as well as sections 15(2) and 26(1) of the Trustee Act, Cap 167.

The applicants' case may be summarized as under. Applicants are sons of the late Suleiman Abdul Gani Tobaria who died domiciled in Kenya on 21.09.97. He left a written Will vide which he appointed Abdul Khaliq Suleiman as trustee and executor of the Will. The executor, Abdul Khaliq migrated to the U.K.

where he lives. It is intended to sell the subject property. Abdul Khaliq Suleiman who now lives in the UK is by virtue of section 26(1) of the Trustee Act authorized to delegate to any person (including a trust corporation) the execution or exercise during his absence from Kenya of all or any trusts, powers and directions vested in him as such trustee, either alone or jointly with any other person or persons. The said Abdul Khaliq Suleiman has donated a General Power of Attorney to the applicants herein as he is empowered so to do. However, section 15 of the Trustee Act does not empower a sole trustee, as Adul Khaliq Suleiman is, to give a valid receipt for the proceeds of sale or other capital money arising under a disposition on trust for sale of land. That is what has necessitated the present application for appointment of the applicants as additional executors of the Will of the late Suleman Abdul Gain Tobaria.

At the hearing of the application on 03.10.06, the applicants were represented by learned counsel, Mr. A.G.N. Kamau. He drew attention to the above requirements of the law and that the Trustees Act also requires the court's consent for the applicants, once appointed as additional executors of the deceased's Will, to proceed with the contemplated sale of the property in question. He also asked that there be no orders as to costs of the application.

Whereas sections 15 and 26 of the Trustee Act are relevant to the application under consideration, Order XXXVII cited as one of the legal provisions upon which the application is based has no relevance to the application. There is neither Order XXXVII (G) nor rule 5A of the Civil Procedure Rules. These anomalies were brought to the attention of Miss C.W. Nanjala on 19.10.06 when she held brief for applicant's counsel and she was directed to ask applicant's counsel himself to appear before court on 25.10.06 to clarify the issue of citation of irrelevant Order and rule. On 25.10.06 Mr. A.G.N. Kamau, counsel for applicant appeared before this court and conceded that citation of Order XXXVII (G) Rule 5A is wrong and that the correct citation should be to Order XXXVI rules 1(g) and 5A, whose purport is essentially that an application like the present one by the administrator/executor should be by way of originating summons, as has been done here.

I have given due consideration to the application before me as amended and I am satisfied that it is merited. Accordingly, the originating summons application dated 17.07.06 and filed on 27.07.06 is allowed and prayers 2,3 and 4 are granted as prayed.

Orders accordingly.

**Delivered at Nairobi this 27<sup>th</sup> day of October, 2006.**

**B.P. KUBO**

JUDGE