



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 3174 & 2982 of 2003

IN THE MATTER OF MOHAMED ASLAM KHAN (DECEASED)

RULING

By summons dated 04.07.06 brought under section 47 of the Law of Succession Act, Cap.160 and under rules 49 and 73 of the Probate and Administration Rules, MARYAN ALI MOHAMED applied for the following orders:-

1. That the instant application be and is hereby certified as urgent and the same do proceed ex-parte for hearing.
2. That there be stay of the orders issued by the honourable court on 29.06.06 pending the hearing of the application herein.
3. That the honourable court be pleased to set aside vary and/or review the consent order recorded on 29.11.04 in the following terms:-

(a) That paragraph 1 and 4 of the said consent be varied and set aside and be substituted with an order that the petitioner MARYAN ALI MOHAMED be given access to her matrimonial home and take possession thereon and enjoy quiet and peaceful possession thereafter parties to refer the matter for determination of the shares to be given to each beneficiary of the estate under Muslim Law to be determined by the Kadhi of Nairobi.

The grounds upon which the application is based are:-

- i) That the applicant did not give instructions to her former advocate S.O. Owino & Associates Advocates to enter to (sic) the consent dated 29.11.04.
- ii) That the said order was recorded by misrepresentation of facts to the honourable court.
- iii) That the applicant needs access to her matrimonial home and stay there.
- iv) That the court has powers to vary and/or set aside the order.

The application is supported by the applicant's affidavit sworn on 04.07.06.

Inter-partes hearing of the application took place before me on 08.11.06 whereat the applicant/objector

was represented by learned counsel Miss R.B. Mbaka while the respondents/executors were represented by learned counsel, Mr M.A Khan.

Applicant's counsel reiterated the prayer sought in the summons and the grounds in support of the prayer as supported by the applicant's affidavit.

On the other hand, respondents' counsel objected to the variation of the consent orders entered into on 29.11.04. He drew attention to grounds of opposition dated 23.10.06 which he had filed on 25.10.06 on behalf of the executrix opposing the variation sought vide the summons dated 04.07.06. It was his client's case that following summons dated 24.05.04 all matters were discussed and consent orders dated 29.11.04 entered into and that the question of the matrimonial home was again raised before the late Hon. Justice Kamau and that it was agreed by consent that MARYAN ALI MOHAMED (present applicant) be paid a sum of Kshs.20,000 per month effective from 15.12.05. He submitted that the court by itself has no powers to vary any consent order already entered into.

Respondent's counsel reported that the properties forming the deceased's estate have been valued and the rental income can be worked out and that the estate is now ready to be distributed and wound up. He clarified, however, that although order No.2 in the Orders of 29.11.04 requiring the executrix to furnish accounts had been substantially complied with, he had not been able to get details of the account said to have been held by the deceased in Lloyds Bank in the UK since no account number had been furnished. It was his client's case that order No.1 in the Orders of 29.11.04 requiring determination of the shares to be given to each beneficiary of the estate by the Kadhi of Nairobi had not yet been complied with and that it should be complied with as a prelude to the winding up of the estate. With regard to order No.4 in the Orders of 29.11.04 requiring the applicant to be given access to the matrimonial home to get her belongings and remove them therefrom, respondent's counsel said the respondent was waiting to be told, by the applicant, where to deliver the suit case containing the applicant's belongings.

I have given due consideration to the arguments and counter-arguments of the parties.

The consent orders now sought to be set aside, varied and/or reviewed were recorded before me on 29.11.04. The applicant was represented thereat by learned counsel, Mr S. Owino of S.O. Owino & Associates Advocates while the respondent was represented by learned counsel, Mr M.A. Khan. On 07.12.04 the same advocates for the parties appeared before the late Hon. Justice Kamau and recorded a consent that the executor would pay the applicant a sum of Kshs.20,000 per month from 15.12.04 until the estate is distributed. However, the summons dated 04.07.06 now under consideration was filed on the applicant's behalf by M/s Ongegu and Associates as Advocates for the applicant. It appears that after the consent orders of 29.11.04 and 07.12.04 were made, the applicant changed lawyers and engaged M/s Ongegu & Associates as her Advocates to bring the present application. The thrust of the applicant's present application is that her former lawyers, S.O. Owino & Associates, in particular Mr S. Owino, had no instructions from her to enter into the consent orders recorded before me on 29.11.04 and before the late Hon. Justice Kamau on 07.12.04. The applicant did not bring to this court's attention at the hearing of the present application any evidence that she had notified her former advocates, S.O. Owino & Associates of the fact that she had filed the present application challenging their authority to enter into the consent order now being disputed and given the said former advocates an opportunity to respond to the challenge. The effect of the omission is that the applicant is asking this court to condemn Messrs S.O. Owino & Associates unheard. That runs counter to the rules of natural justice.

I shall not entertain the summons dated 04.07.06 and the same is hereby dismissed. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 20th day of November, 2006.

B.P. KUBO

JUDGE