



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 619 OF 2002

AHMED ALI FARAH.....PLAINTIFF/APPLICANT

VERSUS

MOHAMED DUALLE.....DEFENDANT/RESPONDENT

JUDGEMENT

This application was made by Originating Summons under Sections 45 of the Trustee Act (Cap. 167, Laws of Kenya) 126 of the Registered Land Act (Cap. 300, Laws of Kenya) and Order XXXVI Rules 1(a) and 7 of the Civil Procedure Rules, dated 3rd June, 2002 and filed on the same date.

The Applicant was praying for Orders -

- (a) that the property known as GARISSA TOWNSHIP/BLOCK 1/169 be sold and the proceeds thereof shared out among the beneficiaries in their respective shares in accordance with Islamic law;
- (b) that the costs be in the cause.

The grounds given in support of the application were as follows:

- (i) that the suit property belonged to one Anab Osman who had died intestate on 6th October 1978;
- (ii) that following the death of Anab Osman, the suit property had been vested in the Public Trustee in Probate and Administration Cause No. 286 of 1981;
- (iii) that the Public Trustee had transferred the suit property to the Respondent, Mohamed Dualle in his capacity as widower of the deceased and as trustee for Ahmed Ali Farah the Applicant, Halima Ali Farah and Abdi Rizak Mohamed who are the children of the deceased;
- (iv) that the Respondent acted in breach of his fiduciary duties as trustee, by profiting personally from the proceeds of the trust;
- (v) that the Respondent has refused to relinquish his position as a trustee, when he can no longer be trusted to perform the fiduciary functions of a trustee;
- (vi) that the beneficiaries cannot agree on the settlement of the property, and the prudent course in the circumstances is to sell off the property so that the proceeds may be shared out in accordance with Islamic law, whereunder the sharing formula is to be as follows: Ahmed Ali Farah, son of deceased: $\frac{1}{2}$ share Halima Ali Farah, daughter of deceased: $\frac{1}{4}$ share Abdi Rizak Mohamed, son of deceased: $\frac{1}{4}$ share;

(vii) that the suit property in its existing form is not capable of partition or division and hence should be converted into cash, to be distributed to the persons entitled, in accordance with Islamic law;

(viii) that it is desirable to have a recognized estate agent to effect sale of the suit property, being guided by the operative market conditions.

The application is supported by the affidavit of Ahmed Ali Farah, the Applicant. The Applicant asserts that after the death of the intestate, a meeting took place of her four heirs and heiresses; and at this meeting a resolution was made to distribute the estate in accordance with Islamic principles, and the Respondent was allocated the first three rooms of the suit premises. Thereafter, the Respondent proceeded unilaterally to charge the suit premises to the Kenya Commercial Bank, in return for a loan purely to service the interests of the Respondent alone.

Subsequently, the Respondent defaulted in the loan repayment, leading the chargee to commence action to exercise the statutory power of sale and to subject the suit premises to public auction, thus jeopardizing the interests of the beneficiaries of the estate. The sale by auction was averted only after the Respondent filed HCCC 1829 of 2000 in which the chargee was restrained from exercising the statutory power of sale. The deponent avers that the Respondent has since then refused to relinquish his position as trustee. It is stated also that there has been no agreement on the best mode of sharing the property, and that this has created disharmony among the beneficiaries and the benefits expected to accrue from the suit premises have not been realized. The deponent therefore prays that the suit premises be declared a trust for sale and the proceeds distributed in accordance with Islamic law.

At the hearing of this application, on 15th January, 2004 Mr. Kanyeki represented the Applicant, while the Respondent was not represented though the record shows M/s. Odhiambo M.T. Adala Advocates to have been instructed. In an appearance before the Honourable Mr. Justice Mbiti, on 6th September, 2002 the Respondent had been ordered to file and serve a replying affidavit within 21 days.

From the contents of the file, it would appear that the Respondent did not take action as necessary.

At the hearing, counsel for the Applicants requested the Court to proceed with the hearing. This was allowed, considering that the Respondent had been duly served. Mr. Kanyeki made a presentation of the Originating Summons and the supporting affidavit.

Counsel drew the Court's attention to the fact that the distribution formula proposed in the Originating Summons (paragraph f) did not include the Respondent personally; and the reason was that other assets in the estate had already gone to the Respondent. These assets included two motor vehicles and livestock; and the effect was that the Respondent had received something probably slightly more than his fair share.

As I consider the submissions of counsel to have been well conducted and as demonstrating a fair distribution plan in respect of the estate of the deceased, Anab Osman, I am in agreement with the case made; I declare the trust over the estate of the deceased, GARISSA TOWNSHIP/BLOCK 1/169 a trust for sale, and order that the same be sold in the open market, through the services of a recognized estate agent designated by the beneficiaries, and the proceeds be shared out among the following or their estates as the case may be, in the proportions set out hereunder:

- (a) Ahmed Ali Farah..... ½ share;
- (b) Halima Ali Farah..... ¼ share;
- (c) Abdi Rizak Mohamed..... ¼ share.

The costs of this application shall be borne by the Respondent who will thus pay the Applicant's costs.

DATED and DELIVERED at Nairobi this 20th day of February, 2004

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Kanyeki, instructed by M/s Swaleh Kanyeki & Co. Advocates

For the Defendant/Respondent: M/s. Odhiambo M.T. Adala Advocates (On record).