



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. SUCCESSION CAUSE NO. 445 OF 1996

IN THE MATTER OF THE ESTATE OF THE LATE SHEIKH

FAZAL ILAHI

R U L I N G

This summons for Review dated 20th November, 2002 is specified to be an Ex-parte application. It is based on grounds appended thereto and the annexed affidavits of Abdul Waheed Sheikh and Abdul Hameed Sheikh.

The history of this matter is given in the affidavit of Abdul Waheed Sheikh as perceived by him.

However, it cannot be disputed that despite the protest made by Mr. Sehmi the learned counsel for the applicants. Mr. Nagpal the learned counsel for the Administrator was allowed to address the court when Kuloba, J. gave directions on the application for annulment of grant. I perceive that those directions were made under Rule 44(3) of the Law of Succession Act (Cap 160).

It may be useful to quote the directions made in the presence of both the counsel.

- “1. That the Applicants be and are hereby directed that the Application for annulment of Grant be served upon the Administrators of the estate and upon the beneficiaries whose names are set out in the Petition and in the Will.
2. That the said service on the Administrators be upon the Advocate of the Administrators and the service upon the beneficiaries personally or on their respective Advocates in accordance with the rules of service of process.
3. That the Applicants shall have liberty for leave to be sought from the Court as to any such substituted service as shall in their circumstances be fair and reasonable.
4. That thereafter the matter be processed in the normal course till determination.”

The said directions were given admittedly on 27th January, 1999.

It is undisputed that the applicants have not served even the Advocates of the Administrators.

Curiously the minutes of the record of the court on 27th January, 1999 are not available in the court file. I do not know how Abdul Waheed Sheikh has averred to the contents of paragraph 14 of his affidavit in absence of those records when specifically he has not shown the source of his information.

Be that as it may, it is also not indisputable that the applicants did not file any application for leave for substituted service until 12th September, 2002 despite the fact that directions to apply for leave were

granted as way back as January, 1999.

It is also to be noted that an invitation from Mr. O.P. Nagpal to fix a hearing date, the same was fixed for 16th September, 2002 by consent. Conveniently the fact that the hearing date was taken by consent is omitted in the affidavit.

After writing a letter of 10th September, 2002 to Mr. Nagpal, Mr. Sehmi filed an ex-parte application of 12th September, 2002 to apply for leave to serve some beneficiaries by substituted service. The application was supported by an affidavit sworn by Abdul Waheed Sheikh. There is no mention of or explanation for the non-service of the application on the Administrator which was directed to be made on his advocate who happens to be Mr O.P. Nagpal.

On 16th September, 2002 the cause was listed to be heard by me. Both counsel were present.

Mr. Sehmi protested against the presence of Mr. Nagpal on the ground that the application for annulment was not served on him yet and thus the proceedings as at that date ought to be ex-parte.

Anyway, nothing was done upto 21st November, 2002 when this application was filed. I see from the record that the administrator has filed a replying affidavit to the Application dated 12th September, 2002. Once again that fact is not mentioned in the affidavit.

Let me revisit the proceedings of 16th September, 2002. After some arguments and discussions, I recorded the order which is specifically stated to be by consent. Although no comment is made against that fact, Mr. Sehmi attacks the said order on the ground that a consent order cannot be made on an ex-parte application and thus that order was without jurisdiction.

He further took me by fingers through provisions of Rule 44 of the Probate and Administration Rules and submitted that if a party is not served and an order is made which involves that unserved party, the same is an abuse of process of the court and the court, in its inherent power conferred under Rule 73 of the said Rules, ought to review the same by striking it out.

The applicant has not uttered a word in his affidavit why the order of this court of 27th January, 1999 is not obeyed by him so far as service on the counsel is concerned and yet he wants to capitalize on his utter disobedience of the court order and seeks the order which is purely a discretionary order.

In my humble view this applicant intends to take a stealthy ride on provisions of Rule which he has flouted with impunity and tells the court that it has committed an abuse of the court process. He has totally ignored his own acts of flagrant abuse of the court process. He by his acts now wants this court to make an ex-parte order in his favour without the court having benefit of hearing the administrator who is in my view an aggrieved party.

Without much ado, I in my own sense of justice and conscience cannot grant a remedy under my inherent power conferred by Rule 73 to a Litigant who has sat over the process of law at least since January, 1999 if not from 1987.

I therefore shall refuse to hear this application as exparte and shall not make any order thereon ex-parte. The applicant, if so wishes, can file an application after complying with the order of 16th September, 2002.

Dated and delivered at Nairobi this 21st day of January, 2003.

K. H. RAWAL

JUDGE.