

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 426 OF 2002

IN THE MATTER OF: THE ESTATE OF THE LATE MZEE ALMASI
MUKIRA (DECEASED)
IN THE MATTER OF: THE SUCCESSION ACT CAP 160
IN THE MATTER OF: THE EXECUTORS & TRUSTEES OF THE WILL
OF THE LATE MZEE AMASI MUKIRA
AND
IN THE MATTER OF: PROBATE & ADMINISTRATION RULES
BETWEEN
JAMAL RAMADHAN

JAPHETH ASIGE PLAINTIFFS

VERSUS

FARIDA ALMASI MUKIRA DEFENDANT

R U L I N G

The applicants came to Court by originating summons under the Provisions of order 36 rule 1 of the Civil Procedure Rules. At the same time they filed a chamber Summons under the Provisions of Rule 49, 58, 59, 73 of the Probate & Administration Rules, Section 45, 47, 79 and 82 of the law of Succession Act and Section 3A, order 39 rules 1, 2, 3, 9 of the Civil Procedure Act. By this application the applicants sought orders of an injunction which would effectively restrain the Respondent from dealing with or causing obstruction as far as the operations of a business known as Rembo Guest house and the property situated on Plot Mombasa/Block XX/62A. The application was for hearing on 18.12.02 when Mr. Balala for the Respondent said his point of Preliminary objection should be heard first and since there was no objection by the Applicant's Counsel, Mr. Wameyo, it is the said objection which is the subject of this Ruling.

Briefly the issues arising in the originating summons are that the Applicants are the Executors and Trustees of the Will and Estate of Mzee ALMASI MUKIRA while the Respondent is one of the beneficiaries under the said will.

The objection by Mr. Balala is that the Court has no jurisdiction to deal with this matter as the same involves the Estate of a Muslim and the same therefore does not fall under the Provisions of the Law of Succession

On the other hand Mr. Wameyo submitted that the application is properly before the court under the Provisions of order 36 rule 1 of the Civil Procedure Rules. I have considered the arguments from both sides and what comes out clearly is that there are issues that need to be dealt with as regards the legality of the will and also whether any orders sought under the armpit of the law of Succession Act can issue. Therefore a preliminary objection at this stage in my view is premature as all the facts are not admitted. In the Replying Affidavit by the Respondent the validity of the Will is being questioned.

In the circumstances the objection in this case is premature and is dismissed.

Dated and Delivered at Mombasa this 13th day of March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE