

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO.20 OF 2001

ALI MOHAMED (suing as the Administrator of

The Estate of MOHAMED MZEE ALI (Deceased).....APPELLANT

=V E R S U S=

MARYAM AHMED HAJI.....1ST RESPONDENT

NAIMA BENNY BENZ.....2ND RESPONDENT

R U L I N G

The Applicant filed an appeal in this court on 2/4/2001 being Appeal Number 20/2001. In his Memorandum of Appeal he seeks a temporary injunction pending the hearing of appeal. From the material laid before the court as annexures in the Supporting Affidavit herein it is clear that the dispute concerns the Plot No.39 Watamu registered in the name of Mohamed Ali Mzee (annexure 4) who died in 1970 (see annexure 1).

No grant appears to have been taken out previously but on 26/1/2001 a limited grant was issued by this court in favour of the Applicant (Appellant) to enable the Applicant to protect the interest of the deceased estate in the said Plot No.39, Watamu. With this grant in his hand the Applicant filed suit no.34/2001 at Malindi Court specifying clearly that he was acting as representative of the deceased.

It is shown that previously there were other suits filed in respect of this plot being SPMCC No.299/2000, Malindi and SRMCC No.4498/2000, Mombasa. Suit No.SRMCC 4498/2000 was withdrawn on 13/2/2001. In this suit the Applicant was second Plaintiff. Suit No.299/2000 at Malindi was filed against the Applicant in his personal capacity together with 3 others. These two suits were concerning Plot No.39 Watamu aforesaid.

The main ground of appeal is that the learned Magistrate stayed the prosecution of the Applicant suit No.34/2001 pending the disposal of the other 2 previous suits No.299/2000 and 4498/2000 under provisions of Section 6 Civil Procedure Act notwithstanding that in those suits the 4498/2000 was already withdrawn and in 299/2000 he was sued in his personal capacity. The counsel for the Applicant submits that the proposed appeal has overwhelming chances of succeeding and that if the injunction sought is not granted the appeal shall be rendered nugatory.

After taking consideration of all matters and particularly that the Plot No.39 Watamu is registered in the name of a deceased person and there is no trustee appointed or a grant issued to administer the deceased estate by the time these other suits were filed, I am inclined to grant the orders sought. It is said there is inordinate delay by Applicant. In the circumstances of this case I do not find 2 months being inordinate delay. This court would be ignoring the provisions of Succession Act, Cap.160 if it failed to protect the estate of a deceased person. The application is therefore granted and the costs shall be paid by the Respondents.

Dated at Mombasa this 26th day of February, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in presence of Hamza.