



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 47 OF 2015

FATUMA ABDULRAHAMAN AHMED.....APPELLANT

VERSUS

HAHMAN AHMED ABDULRAHMAN & 3 OTHERS.....RESPONDENTS

Coram: Hon. Justice R. Nyakundi

Mr. Gicharu Kimani for the Appellant

Mr. Aboubakar Mwanakitina for the Respondent

RULING

The appeal is based on the Ruling of the **Learned Kadhi** dated 11th November, 2015. Pursuant to Succession Cause No. 8 of 2014. The crux of the appeal is based on the memorandum of Appeal dated 10th December, 2015 as pleaded in the grounds crafted as follows:

- 1. THAT the Learned Kadhi misapprehended and misunderstood the application of the Appellant and the implication thereof.***
- 2. THAT, the Learned Kadhi erred in law and in fact by misdirecting himself by admitting evidence from the bar.***
- 3. THAT, the Learned Kadhi erred in fact and law in failing to take into consideration all the evidence and documents produced and filed by the Appellant vis-a-viz no evidence produced the Respondent.***
- 4. THAT , the Learned Kadhi erred in fact and law in failing to realize that the said Application to be enjoined was not opposed by the Respondent.***
- 5. THAT, the Learned Kadhi erred in fact and law by adjudging that the Appellant would only be admitted to the suit as a witness only and not as a party.***
- 6. THAT, the Learned Trial Judge erred in law and fact in failing to weigh all the evidence placed before him before delivering the Ruling.***

Appellant's Submissions

Counsel for the appellant **Mr. Gicharu** submitted that in terms of the on-going proceedings in Succession Cause No. 8 of 2014, the 1st respondent failed to inform the appellant but went out of his way to include her under the guise that her interest was fairly taken into account even in default of her actual participation.

Learned counsel further added and submitted that the counterclaim was in respect of some property to the Estate due for distribution to the heirs. With respect to the decision made by the **Hon. Kadhi – Learned counsel** submitted out of the key properties identified as Mfuneni – Retail Shop situated in Bomani – has always been owned by the appellant but in the judgement it was distributed to the 1st respondent.

Learned counsel urged the court to find that the Learned Kadhi should not have proceeded to make a determination on the distribution of the Estate without considering the sufficient interest held by the appellant.

Learned counsel relied and cited the legal proposition in the case of **Parsalol Ole Meikok & others v Commissioner of Lands & 9 others 2017 eKLR** and **Joseph Njau Kingori v Robert Maina Chege & others 2002 eKLR**.

It was urged before this court that the evidence admitted from the bar to make a determination of the issues was clearly irregular and lowered the legal and evidential burden expected of a claimant to a claim.

Further it was learned counsel contention that the appellant affidavit in support and other accompanying annexures would appear was never factored in the final decision. To reinforce this part Learned counsel submitted that the appellant was therefore an indispensable and necessary party to the **Succession Cause No. 8 of 2014**. That in declining to enjoin the appellant as a party even when there was no opposition to the application, it was a departure from the laid down statutory and constitutional requirements. On this ground, Learned counsel urged this court to be guided by the principles in **Kenya Medical Laboratory Technicians and Technological Board & others v Attorney General & 4 others 2017 eKLR**.

Finally learned counsel argued and submitted that the appellant should be given a chance to present her evidence on this matter.

Mr. Aboubakar for the 1st respondent implored the court in his submissions not to set aside the ruling of 11th November, 2015 because all the rights attended and entitled to for the benefit of the appellant were taken into account by the **Learned Kadhi**.

Learned counsel urged the court take notice that the appellant was recognized as a heir to the estate of the deceased and in the final distribution. On application of Islamic Law, her share was determined and duly allocated. Further learned counsel contended that the decision by the trial court was in line with Article 159(2)(b) and (D) of the Constitution. On substantive justice it was his contention that by invoking Article 159(2)(d) the **Learned Kadhi** acted in compliance with procedural substance to accord the parties a hearing and conclusion of the trial within a reasonable time.

Learned counsel therefore urged the court not to interfere with the ruling so challenged by the appellant.

Analysis

A good place to begin a discussion on the appeal are on the principles. In the case of **Strawbridge v Curtiss 17 Hav (58) O.S. at 159** on indispensable parties as herein under stated:

“Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. While necessary parties are those:

“Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, who finally determine the entire controversy and to do complete justice, by adjudicating all the rights involved in it but if their interests are separable from those of the parties, before the court, so that the court can proceed to a decree and do complete and final justice, without affecting other persons not before the court, the later are not indispensable parties.”

It will be recalled that the courts in **Moses Wachira vs Niels Bruel & 2 others 2015 eKLR**, the Supreme Court in **Communications Commission of Kenya & 4 others v Royal Media Services Ltd & 7 others Petition No. 15 of 2014 eKLR** and **Meme v R 2004 1EA 124** held that interalia:

“That there can be no doubt that the question of joinder under Order 1 Rule 10 of the Civil Procedure Rules should be considered on anyone of the following ground that:

- a) joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings*
- b) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law*
- c) joinder to prevail a likely course of proliferated litigation.*

The point illustrated with reference to the above authorities is that in pending proceedings the court’s discretion on joinder serves two purposes:

- a) First, the public interest in utilization of judicial resources being one of the overriding objective under Section 1A and 1(B) of the Civil Procedure Act in the administration of justice and*
- b) Secondly, to avoid multiplicity of suits against the same defendants where the potential issues in controversy are closely interconnected that adjudicating in halves instead of the whole would fundamentally and materially alter the character of the claim.*

Coming first to my mind in the present interest is in respect of the issues raised in the appellant’s appeal. In the matter of succession and distribution of the estate, each beneficiary under Section 29 of the Law of Succession stands in equal position with each other, none of them approaches the court with superior rights of survivorship. Filing the death of the deceased or there would be testate or intestate probate

which obligates the administration of the estate borne by the appointed executor or administrator with sufficient power conferred by the will or grant to ultimately devolve the estate to the beneficiaries. The consent of each beneficiary on intestate distribution is mandatory.

As for the respondents in opposing the appeal, he relied on various grounds to strip the court of the jurisdiction to exercise any discretion to set aside the ruling.

In absence of due process and an opportunity to be heard at a crucial stage on distribution of the estate. Learned Counsel was of the view that an opportunity was accorded the appellant but she squandered by her own conduct to participate in the proceedings.

That as it may be by its very nature, the measure of approach was not appropriate as adopted by the Learned Kadhi. It would appear on the face of it that although the appellant was accorded some share of the property, there is direct and substantial issue which ought to have been ventilated with regard to Mfuneni Retail Shop – Malindi. Whether the court was essentially right in the final judgement.

The issue of joinder concerns the rights and obligations of the appellant visa viz the 1st respondent contrary to the view taken by learned counsel for the 1st respondent. What was needed at the trial is to order for joinder and a careful analysis of the evidence as it affected each of the beneficiaries.

By the court rejecting the application for joinder and to proceed to draw inferences from findings of fact went against the rule on natural justice.

The issue was dealt with in the matter of **Captain Geoffrey Kujogg Muringi v attorney General CANO 160 of 1993** where the court held that:

“ certiorari deals with decisions already made. Such an order can only be stated where the court considers, that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice or contrary to the law.”

In **Byrne v Kimemotograph Renters society Ltd 1958 2 ALL ER 579** the court stated on this part as follows that:

“What, then are the requirements of natural justice in a case of this view?

First, the person accused should know the nature of the accusation made.

Secondly, that he should be given an opportunity to state his case

Thirdly, of course that the tribunal should act in good faith.”

With this in mind, in pursuing its objects under Article 50(1) of the Constitution the trial court took the steps to ensure the distribution of the estate was done in accordance with Islamic Law. However, the appellant argues that she was never heard as to the matters pertinent to the estate and distribution. As a control mechanism the legitimate expectation imposed on the trial court was not met.

In that regard she filed an application and affidavit to be granted leave to join the proceedings as a necessary and indispensable party. I believe in resolving the cause on the merits, it was imperative that the proposed application for joinder be granted by the trial court. Regardless of the compelling reasons why the trial court disregarded both procedural and substantive due process in purporting to act under that power and jurisdiction, the appellant was denied an opportunity to be heard before the final decision on the claim.

The non-joinder of the appellant was both intravires and ultravires exercise of jurisdiction of the trial court to make its final decree ineffective.

For example, the foundation of the claim is that the estate is distributed did not comply with the residual interest of the appellant in respect of Mfuneni Retail shop. There is no doubt that this was a claim, the appellant should have been allowed to render evidence, personally on extenuating circumstances as beneficiary before the final decision.

So far as to this appeal and for purposes of the arguments appraised by both counsels the finding of the trial court dated 10th November, 2015 is hereby set aside as it relates to the issue on non-joinder of the appellant.

In the case involving a claim of Mfuneni Retail shop, Malindi, fresh and new evidence be admitted by the Learned Kadhi and as a consequence do make a finding necessary for determination of the original action.

Subject to the evidence so admitted above, the structure on the mode of distribution can be made permitting amendments to the estate under the cherished principles in Islamic Law in so far as the evidence availed permits.

Consequently, the appeal on this ground succeeds with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF FEBRUARY, 2020

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R. NYAKUNDI

JUDGE