

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(FAMILY DIVISION)

CIVIL APPEAL NO. 11 OF 2018

MOHAMED SALEH AWKE.....1ST APPELLANT/APPLICANT

SALAH MOHAMED SALAH.....2ND APPELLANT/APPLICANT

VERSUS

ANAB SALAH AWKE.....1ST RESPONDENT

ABDULHAMID SALAH AWKE.....2ND RESPONDENT

RULING

By Summons dated 13th August 2020 brought under Section 47 of the Law of Succession Act, Cap. 160 Laws of Kenya, Rule 49 of the Probate and Administration Rules, 1980 and all the enabling provisions of the law, the Applicants are seeking orders of this court:

1. THAT the rental proceeds of the subject estate herein deposited in a joint account of the respective counsels of the parties herein be released and/or deposited to the estate's account No. xxxxxxxxx held with Kenya Commercial Bank.
2. THAT the deputy Chief Kadhi, Nairobi, to release the title deeds and the lease of the plots belonging to the estate deposited before the Kadhi's court pursuant to the deputy Chief Kadhi's court order issued on the 31st January 2017 into the safe custody of the administrator of the estate.

The application is supported by the affidavit of Mohamed Saleh Awke, the 1st applicant. The gist of the grounds in support of the application is that the Hon. Deputy Chief Kadhi ordered the parties to open joint accounts in the name of the respective counsels on record and that the rental deposits of the estate be deposited into these accounts. Further that the court ordered the parties to deposit the lease and title deeds for the plots belonging to the estate into court. The parties filed an appeal being Civil Appeal No. 11 of 2018 before the High Court. Upon hearing the Appeal this court declared the proceedings before the Chief Kadhi a nullity. The 1st Applicant deposes in his affidavit that the estate of the deceased has financial obligations to meet and as such the monies from rental deposits in the joint accounts of the two counsels on record need to be released to the estate in order to enable the estate to meet its financial obligations and further that the title deeds and the lease need to be released to the administrator for safe custody.

Mr. Sikimpa appeared for the Appellant. Mr. Maingi appeared for the 1st and 2nd Respondent. Mr. Sikimpa sought the orders in the Summons but Mr. Maingi opposed the application. Mr. Maingi submitted that the application is wrongly before the court and that the application ought to be filed in Succession Cause No. 273 of 1967 because in this matter this court is functus officio. Mr. Maingi told the court that the file in Succession Cause No. 273 of 1967 has been reconstructed and that this application ought to be filed in that application; that there would be no prejudice on the Applicants if this is done.

On his part Mr. Sikimpa told the court that the reason they brought this application in this cause is because the Applicants will not be able to benefit from this judgment because the Chief Kadhi will not release the funds.

I have considered the matter. In his judgment delivered on 16th December 2019 Hon. Mr. Justice Onyiego declared the proceedings of the Kadhi Succession Cause No. 32 of 2016 a nullity and ordered parties to reconstruct the file in High Court Succession Cause No. 273 of 1967 within 45 days so that the grant issued in that file can be confirmed. The 1st Applicant was directed to fast track the process. The judge was handling an appeal in this matter. After making the orders above this court has become functus officio in this Appeal. It cannot entertain any other matter in the same Appeal. Any party aggrieved can either go on Appeal or go to the High Court in High Court Succession Cause No. 273 of 1967. As submitted by Mr. Maingi, the Applicants will suffer no prejudice. That is the correct procedure to follow. Any title deeds and funds from rentals, if forming part of the estate of the deceased must properly be handled in the said Succession Cause file.

For the above reasons, it is my considered view that the current application is wrongly before me. I have no jurisdiction to entertain the application and the same must fail. The Applicants are at liberty to pursue any claims in respect of the estate of the deceased in the current active file and not this appeal which has been decided. The application dated 13th August 2020 is hereby dismissed. I make no order as to costs. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF NOVEMBER 2020.

S. N. MTUKU

JUDGE