



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 33 Of 2013

OMAR BAHOLA.....APPELLANT

VERSUS

SALIM ODHA BAHOLA.....RESPONDENT

JUDGMENT

(An Appeal from the Judgment of Hon. Sheikh Abdulhalim H. Athman, Kadhi delivered on 23.9.10 and Ruling of 15.5.13 in Mombasa Kadhi Succession Case No. 214 of 2009)

1. The Appeal filed by Omar Bahola the Appellant herein arises from the Judgment and Decree of Hon. Abdulhalim H. Athman, Kadhi delivered on 23.9.10 and Ruling of 15.5.13 in Mombasa Kadhi Succession Case No. 214 of 2009. The record shows that Salim Odha Bahola the Respondent filed a succession petition in respect of the estate of Ali Abdalla Bahola seeking a determination of the estate and heirs of the deceased and distribution thereof to the heirs in accordance with Islamic law. The deceased was survived by 5 sons including the Appellant and the Respondent and 3 daughters. In the petition, the Respondent stated that the deceased left a Swahili house in Kongowea, Mombasa and a farm in Hola. He also stated that the deceased owed one Hiribae Ali the sum of Kshs. 163,000/=. The Respondent further stated that the Appellant Omar Bahola had locked out the other heirs from the estate and was benefitting therefrom all alone.

2. In his judgment of 15.7.10 (and not 23.9.10 as indicated by the Appellant), the Hon. Kadhi made a determination that:

- i) The debt allegedly owed by the deceased was not supported by any proof and was thus dismissed.
- ii) The existence of the farm in Hola was not supported by any documentary proof and was dismissed.
- iii) The estate of the deceased comprised a house without land in Kongowea.
- iv) Each son is entitled to twice the share of the daughters in accordance with Quran 4.11.

3. The Court thereafter laid before the heirs the following 2 options for realizing the distribution.

- i) The heirs may agree on the room each heir would take in the house.
- ii) After valuation or agreement on value of the house heirs may buy off shares of heirs who wish to be given their entitlement.

4. The record further shows that 3 valuations of the house were done. The Respondent instructed Jeneby's Auctioneers who valued the house at Kshs. 2,500,000/=. This was rejected by the Appellant on grounds that Jeneby's are auctioneers and not registered valuers. The Court allowed the Appellant to instruct a valuer. He instructed Kiliru & Company who valued the house at Kshs. 1,100,000/=. The Respondent objected to this valuation and the Court allowed him to have another valuation done. The Respondent instructed Value Consult Limited who valued the house at Kshs. 3,000,000/=. In its ruling of 14.2.13 on the valuation, the Court adopted the higher valuation by Value Consult limited at Kshs. 3,000,000/=. The Court further directed that the Respondent be paid the sum of Kshs. 461, 538.50 within 90 days and in default the house would be sold by public auction and the proceeds distributed amongst the heirs. Following default, by a ruling of 15.5.13, the Court ordered that the house be sold by public auction for not less than Kshs. 3,000,000/=.

5. The Appellant being dissatisfied with both the Judgment and this ruling of 15.5.13 (the Ruling) preferred this Appeal. The grounds are reproduced hereunder:

1. THAT the Honourable Trial Kadhi erred in Fact and Law in proceeding to determine the ESTATE OF ALI

ABDALLANBADULA(DECEASED) on die basis of lopsided and incomplete proof of death of ALI ABDALLA BADULA(DECEASED) mere having not been presented before the Honourable Kadhi proof of death and/or otherwise.

2. THAT the Honourable Trial Kadhi erred in Fact and Law in proceeding to distribute the ESTATE OF ALI ABDALLA BADULA (DECEASED) on die basis of an incomplete list of would be survivors and/or beneficiaries and proceeding to add the said additional

3. THAT Honourable Trial Kadhi erred in Fact and Law in determining the issue of propnetorship of the ESTATE OF ALI ABDATXA BADULA (DECEASED) without any such documentary proof as to ownership and/or otherwise and in essence failed to collect the entire ESTATE OF ALT ABDALLA BADULA(DECEASED) for full determination thereto for purposes of distribution.

4. THAT the Honourable Trial Kadhi erred in Fact and Law in failing to call all the Beneficiaries and/or survivors of the ESTATE OF ALI ABDALLA BAD ULA. (DECEASED) for purposes of viva voce evidence on oath so as to make full determination thereto without an iota of doubt and inclining evidence of two fighting stepbrothers.

5. THAT the Honourable Trial Kadhi erred in Law and Fact failing to accord such review and/or appeal to the Appellant and the Respondent

6. THAT the Trial Kadhi erred in Fact and Law in relying on valuation reports that were issued on the basis of un sworn evidence and failure of the alleged authors of the valuation report failing to testify before the trial Court so as to ascertain the said valuation reports authenticity.

7. THAT the Trial Kadhi erred in Fact and Law in allowing representations before the trial Court by Advocates without Jeave, of the trial court thereby occasioning a miscarriage of justice.

8. THAT the Trial Kadhi erred in Law and Fact in proceeding to act as the sale agent of the property subject to the ESTATE OF ALI ABDALLA BADULA(DECEASED) thereby convening a partisan approach to the distribution of the ESTATE.

9. THAT the Trial Kadhi erred in Law and Fact in failing to make full determination of the Assets and Liabilities of the ESTATE OF ALI ABDALLA BADULA(DECEASED)

6. The Appellant prayed that the orders of the Hon. Kadhi be set aside and the Appeal be allowed. He further prayed that the redistribution be done based on viva voce evidence of all beneficiaries of the estate.

7. I have given due consideration to the record of appeal, as well as the parties' submissions. The Respondent has challenged the competence of the Appeal on the ground that the same was filed out of time and no application for leave to file the same out of time was filed. The Respondent relied on Section 79G of the Civil Procedure Act which stipulates that every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against.

8. The appellate jurisdiction of this Court over a decision of the Kadhi's Court in respect of the estate of a deceased Muslim is stipulated in Section 50 of the Law of Succession Act which provides:

50. Appeals to High Court

(1) ...

(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.

9. The Judgment and Ruling appealed against were delivered on and 15.7.10 and 15.5.13 respectively. The Appeal was filed on 9.9.13. The Appeal was filed over 3 years after judgment was delivered and about 4 months after the Ruling was delivered. Section 79G of the Civil Procedure Act is not among the provisions listed in Rule 63 of the Probate and Administration Rules as being applicable in succession matters. It is to be noted that the Law of Succession Act does not stipulate the time within which an appeal to this Court from the Kadhi's Court shall be filed. Section 58 of the Interpretation and General Provisions Act is however instructive:

Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.

10. It is a requirement of law that when anything is required to be done then it must be done without unreasonable delay. Where there has been unreasonable delay, a party may not proceed to do the thing that was to be done without first seeking leave or extension of time to do so. While the time for filing an appeal from the Kadhi's Court to this Court is not stipulated, such appeal must be filed without unreasonable delay. A delay of 3 years is by all standards inordinate and unreasonable. A delay of about 4 months requires explanation. Where there has been delay in filing an appeal, the Court has powers to enlarge the time for filing the same upon such terms as the justice of the case may require. Order 50 Rule 6 of the Civil Procedure Rules provides:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the

time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

11. Order 50 is one of the Civil Procedure Rules applicable in succession matters by dint of Rule 63 of the Probate and Administration Rules. In the instant case, in spite of the delay in filing the Appeal, the Appellant has not deemed it necessary to seek leave or enlargement of time to file the same. Does this Court then have jurisdiction to entertain the Appeal filed out of time without leave? The answer lies in the holding of the Court of Appeal in Patrick Kiruja Kithinji v Victor Mugira Marete [2015] eKLR

In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159.

12. Given that there was inordinate, unreasonable and unexplained delay in filing the Appeal herein and no leave to file the same was sought, the Appeal is incurably incompetent and does not lie. The Court has no jurisdiction to grant any of the orders sought in the Appeal. In the circumstances, the Appeal being incompetent is hereby struck out. This being a family matter, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 7th day of June 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent

.....Court Assistant