



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 31 OF 2014

SHEIKH ALI MOHAMED MWINZAGU...APPELLANT/APPLICANT

VERSUS

ABDULKADIR HASSA ABDULAZIZ.....RESPONDENT

RULING

1. By a Notice of Motion dated 27.7.16, the Appellant/Applicant seeks in the following orders:

a) Spent.

b) THAT pending the hearing and determination this Appeal, the children and other Kins (sic) to Abdulkadir Hassa Abdulaziz an injunction be restrained by a temporary injunction from disposing of, wasting, assigning or in any manner meddling with the assets or incomes derived from the properties of the Estate of Ahmed Mohamed Nasib and /or Aisha Said Nasib.

c) THAT the Public Trustee be substituted as the Respondent to this Appeal in place of the Respondent Abdulkadir Hassa Abdulaziz Deceased.

d) THAT the Court be pleased to make further orders and/or Directions in the matter.

2. The Appellant/Applicant avers in his affidavit sworn on 27.7.16 that the Respondent died sometime in January 2016. The Respondent had in 2003 filed proceedings against the Appellant in the Kadhi's Court in respect of the estates of Ahmed Mohamed Nasib and Aisha Said Nasib seeking a determination of the heirs of the respective estates. The Appellant being dissatisfied with the decision of the Chief Kadhi of 30.1.08 filed the Appeal herein. The Respondent filed a cross appeal on 9.4.16. The Appellant now seeks the substitution of the Public Trustee for the Respondent. According to the Appellant/Applicant, the Public Trustee is the rightful person to take the place of the deceased Respondent as the matter in the Kadhi's Court was not personal but brought on behalf of the 2 estates. The children of the Respondent hold out to the public that they are the administrators of the 2 estates which are in real danger of wastage, alienation and meddling. Submissions in the appeal were filed in June 2015 and what remains is highlighting of the same.

3. The Appellant has invoked the provisions of Order 24 Rule of the Civil Procedure Rules. The record however shows that the Appeal herein arises from a decision in Kadhi Court Case No. 38 (S) of 2003 relating to the estates of the Ahmed Mohamed Nasib and Aisha Said Nasib. The matter in the Kadhi's Court was a succession matter. The Applicable law is the Law of Succession Act. Rule 63 of the Probate and Administration Rules provides:

Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

4. Order 24 which makes provision for substituting a party to a suit who dies during the pendency of a suit is not one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act by dint of Rule 63. Where it is necessary to make substitution for a party who has died, the correct provision of the law to invoke is Paragraph 14 of the Fifth Schedule of the Law of Succession Act which provides:

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.

5. It is only a personal representative of a deceased party who can be made a party to pending proceedings. However where a person entitled to administration of a deceased party's estate is unable or unwilling to act, letters of administration may be granted to a nominee of a party.

6. Our Courts have consistently held that where an established statutory procedure for redress of any grievance exists, a party must strictly follow the same in order to be deserving of any relief sought. This was the holding in Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

7. A clear procedure has been set out in Paragraph 14 of the Fifth Schedule of the Law of Succession Act for making the representative of a deceased person a party to a pending suit. This is the provision by which the Appellant ought to have moved the Court to nominate the Public Trustee. He is also under an obligation to demonstrate to the Court that the persons entitled to the administration of the Respondent's estate are unable or unwilling to act. It is only then that the Court may consider the application to make the Public Trustee a party to the Appeal herein.

8. As regards, the injunctive orders sought, the Appellant/Applicant prays that the "Children and other Kins (sic)" of the deceased Respondent be restrained from dealing with the assets and income of the 2 estates. It is not clear who these children and kin are, and it is not stated what assets and income the intended restraining orders are to apply to. It is not possible for this Court to issue injunctive orders against unknown parties over unknown properties. An injunctive order such as that sought by the Appellant/Applicant must be against specific persons over specific properties. Further the said children and kin are not parties herein and any injunctive orders against them will lead to infringement of their right to be accorded an opportunity to be heard. In this regard I am duly guided by the decision in the case of Mbaki & Others v. Macharia & Another [2005] 2 EA 206, at page 210, where the Court of Appeal stated as follows:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

The Court went on to say:

In Pashito Holdings & another v Ndungu & 2 others KLR (E&L)1 295 it was held that "The rule of audi alteram partem, which literally means 'hear the other side', is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him"

9. For the foregoing reasons, I find that the Application dated 27.7.16 lacks merit and the same is dismissed. Costs shall be in the cause.

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

M. THANDE

JUDGE

In the presence of: -

.....**for the Appellant/Applicant**

.....**for the Respondent**

.....**Court Assistant**