



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 21 OF 2014

AHMED SALIM SAID 1ST APPELLANT

FAIZA SALIM SAID 2ND APPELLANT

VERSUS

MUNAA AHMED SALIM RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Aboubakar, Mwanakitina Advocates for the Appellants

Michira Messah Advocates for the respondent

RULING

The applicant filed a notice of motion dated 23.1.19 expressed to be brought under Section 1A, 1B and 3A of the Civil Procedure Rules seeking the following orders:

- 1. That the Judgment of Hon. Chitembwe J delivered on 14.6.2016 be set aside.***
- 2. That upon setting aside the Judgment herein, the Kadhis Court Judgment delivered on 26.6.2014 be reinstated for execution by the respondent/applicant.***

In the affidavit the applicant **Munaa Ahmed Salim** depones that the respondents have not complied with the Judgment of the court delivered on 14.6.2016.

That the said Judgment entered by this honourable court did order the respondents to pay her share of the deceased estate within 45 days from the date of the said Judgment which has not been complied with by the appellants/respondents upto date.

Further in his affidavit the facts deponed are that it has been two and half years now since the Judgment was delivered and the respondents have not shown any sign of willingness to comply with the said Judgment. That due to non-compliance that he has suffered financial constraint and inconvenience to enable her take care of the children. That the Judgment of the High Court should be set aside and substituted with the Kadhis court decision.

The respondent in opposing the application filed grounds of opposition dated 12.9.2019 one of the key grounds raised was non compatibility of the application pursuant to Order 42 of the Civil Procedure Rules.

Background

The applicant **Munaa Ahmed Salim** filed a claim against **Ahmed Salim Said** and **Faiz Salim Said** on 17.2.2012 before the Kadhis Court seeking reliefs of share to the estate of her deceased husband **Salim Said**.

The suit property subject matter of the Succession Cause was **LR 94/R and 95** at Barani Malindi Township and motor vehicle registration **KBE 671L**.

Having heard the claim interpartes on 26.6.2014 Hon Kadhi Salim pronounced himself as follows:

- 1. "If the plaintiffs share the item (s) of the estate shall be a shop and flat or flats to cover her allotted share of 1/8 of the total***

plinth area in square feet of 3 storey building standing on plot LR 94/R & 95/R at Barani – Malindi Township.

2. That the remainder shall be shared equally among the two respondents

3. As for the Black Pajero – valued at Kshs.1.5 Million, the plaintiff share shall be Kshs.187,500/=.

4. The respondents ordered to deposit the amount within two weeks.

5. The court also awarded costs of Kshs.75,000/=.

Being aggrieved with the decision of the Kadhis Court an appeal was preferred to the High Court.

In consideration of the matter the appeal was accorded as stated in the decree as follows:

1. The appeal as proffered accorded in the following terms:

That the plaintiff/applicant Munaa Ahmed Salim is entitled to inherent 1/8 share of the deceased, quarter ¼ share of the suit property and the respondents inherit the balance of 7/8 shared equally.

2. That the respondents/plaintiffs do meet the cases of the Kadhis Court Suit No. 2 of 2012 and the appeal.

3. That the appellants should pay the respondents share of the deceased estate within 45 days thereof.

This is the decree which the applicant has moved the court to have it set aside.

Analysis

Although the application did not come by way of review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, it follows that the gist of the notice of motion and remedy applied for are purely anchored in the above provisions.

The two sections as far as they are relevant state:

Section 80 – “Any person who considers himself aggrieved by a decree or order from which an appeal is allowed by this Act, but which no appeal it has been preferred or

(b) By a decree or order from which no appeal is allowed by this Act may apply for review of a Judgment to the court notice passed the decree or made the order and the court may make such orders as it thinks fit Order 45 Rule (1) of the Civil Procedure Rules.

Any person considered himself aggrieved

“(a) by a decree or order from which an appeal is allowed but from which no appeal is allowed but from which no appeal has been preferred or by a death or order from which no appeal is hereby allowed and who from the discretionary of it new and important matter or evidence which after due diligence was not within the knowledge or coded not be pronounced by him at the time when the decree was passed or the order made, or an account of mistake or error on the face of the record or for any sufficient reason may apply for a review of the Judgment:”

To the court that passed the decree or made the order without unreasonable delay.

In the persuasive case of **Sharon Peter [2017] JMCA** stated:

“On the issue of jurisdiction, it must also be said that Mason v Desnoes and Geddes Limited and Leymon Strachan v The Gleamer Company Ltd and another [2005] (UKPC 33 demonstrate that

“a Judge may, in certain circumstances, set aside an order made by a Judge of concurrent jurisdiction. Examples of such circumstances are, firstly, if the application before the first Judge was made in the absence of a party, or, secondly, where the merits of the case were not decided at that first hearing.

It is usual that the application to set aside is placed before the same Judge who made the order, which is sought to be impugned. Where however, as in this case, that Judge is not available, another Judge may hear and decide the application to set aside the first order.”

The inherent power given to the courts for purposes of meeting the ends of justice includes that of re-opening proceedings but in doing so its implicit the use of this judicial procedure be considered appropriate for the enforcement of fundamental rights to a fair hearing. I bear in mind of the purposes of a litigation must be brought to a foreclosure.

In the case of **Bremer Vulkan Schiffbau und Maschinenfabrik v Southlandia Shopping Corp Ltd [1981] AC 909 Lord Woolf** **parag 34**. The threshold question is whether the standard of review in an already determined appeal by this court is available to the applicant.

It is often said that the court jurisdiction under Section 80 of the Act and Order 45 Rule 1 of the Civil Procedure Rules is based entirely on discovery of new evidence which was not available at the time of the decision, error apparent on the face of the record or for any sufficient cause. The regime of Law available is substantially similar to that found in the principles illustrated elsewhere in this case.

In this regard the court should only invoke review jurisdiction where there is prima facie evidence on the test outlined in Section 80 and Order 45 Rule 1 of the Court Procedure Rules. The position has been summarized by the Court of Appeal in *Muyodi v Industrial Commercial Development Corporation & Another* [2006] 1EA 243.

Applying the above principles to the instant notice of motion, the jurisdiction I am asked to exercise in this matter is certainly that of a Judge with concurrent jurisdiction insulated by the constitution.

As far as the case in the Kadhi's Court is concerned it was determined on the merits. The applicant filed points of dispute on appeal to the High Court which heard and determined the issue on the merits.

There is no doubt the Judgment on appeal interfered substantially against the Kadhis Court decision. There is a clear distinction between the two decisions involving the same object matter. It turns out therefore that parties were required by the Law to implement the new decree of the superior court.

There is no possible room for manoeuvre by way of review unless the applicants satisfied the criteria outlined under Section 80 of the Accused Order 45 Rule of the Civil Procedure Rules. It is very clear that the power to set aside superior court Judgment by substituting it with that of the primary court is not available to the applicant. There is only one serious omission to this case in reference to the execution and enforcement of the High Court Judgment. This brings me to another issue which was not addressed by any of the counsels to this application.

This court being presided over by **Chitembwe J** adjudicated and determined the rights between the applicant and respondents conclusively. It is clear from the notice of motion and affidavit by the applicant.

There is a failure by the respondents to fully comply with the courts order as regards distribution of the share of the property to the applicant. Interestingly enough the Judgment in the claim was determined on 14.6.2016 with time frame conditional of implementation of 45 days from the date of delivery of the court order.

This would therefore mean that the respondents have completely defaulted of compliance of the court order to release the share of the estate to the applicant for a period 3 1/2 years and inconveniently they remain to be in contempt of the order.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE