



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 14 OF 2016

IN THE MATTER OF THE ESTATE OF ALIMAZ NZELEM (DECEASED)

BINYANYA ABDUL MOHAMED.....APPELLANT

VERSUS

BAKARI MEHRAAJ FAUZ.....RESPONDENT

J U D G M E N T

1. **Binyanya Abdul Mohamed** by an application dated **31st March, 2016** brought pursuant to *inter alia* provisions of **Rule 73** of the **Probate and Administration Rules** seeks orders that:

- i) The Respondent be ordered to deposit in Court the proceeds of rent collected from the Deceased's property known as **Plot No. 14 Kitui Municipality** pending the hearing and determination of this application.
- ii) The Respondent be ordered to deposit in Court the proceeds of rent collected from the Deceased's property known as **Plot No. 14 Kitui Municipality** pending the hearing and determination of the Appeal herein.
- iii) The costs of this application be borne by the Respondent.

2. The Application is premised on grounds that: the determination of how the Estate of the Deceased was to be distributed was made by the **Kadhi** in a Ruling dated the **2nd June, 2015**; the Respondent has failed to yield possession of the property **Plot No. 14 Kitui Municipality** forming the Estate of the Deceased; the Respondent has continued to receive rent collected from the property excluding other beneficiaries; it is in the interest of justice for the proceeds of rent from the property to be preserved by depositing it in Court pending the determination of the Appeal.

3. The application is supported by an affidavit sworn by the Applicant where he deposed that: The **Kadhi** determined how proceeds of rent the only asset in the Estate of the Deceased was to be apportioned among the beneficiaries. That pursuant to leave granted he sold the property so as to distribute the proceeds of sale to the beneficiaries. That the Respondent's application to set aside the orders for sale was allowed by the **Kadhi** hence provoking the Appeal. That for a period of ten (10) years the Respondent has continued to collect rent to the exclusion of other several beneficiaries.

4. In response the Respondent filed a Replying Affidavit where he deposed that the allegation that he was benefiting from the plot solely was untrue. That he only collects rent from three (3) shops, two (2) of which he built and the third one he inherited from his mother **Bishara Mohamed**. That rent from the other premises is collected by the children and grandchildren of **Masoso Mohamed** who was his mother's sister. That the Applicant has not disclosed the proceeds of the plot that he sold following the order of the **Kadhi** on the **2nd June, 2015**. That being jobless if deterred from collecting the rent from the three (3) aforesaid shops he will be rendered destitute and homeless.

5. In a Further Affidavit, the Applicant averred that the only issue pending is whether or not the house forming the Estate of the Deceased should be sold and proceeds thereof distributed to the beneficiaries. That in the meantime all beneficiaries are entitled to the rent in the ratio determined by the **Kadhi**. That by his own admission the Respondent is jobless and has no tangible income hence wont account for rent received.

6. In the instant application the Applicant seeks orders pending hearing and determination of the Appeal. I have perused a copy of Memorandum of Appeal filed on the **31st March, 2016**. The prayer sought is setting aside the Ruling of the **Kadhi** of **1st March, 2016** and substituting it with an order dismissing the Respondent's (**Bakari Mehraaj Faus**) application dated **10th February, 2016**.

7. On the **1st March, 2016** **Bakari Mehraaj Faus** (Respondent) sought to be granted the opportunity of being the first purchaser of the Estate in a period of two (2) weeks. **Binyanya Mohamed** (Applicant) raised an objection alleging that the Respondent was not sincere.

Other beneficiaries of the Estate namely; **Aaba, Aisha Maya, Shauma Mali, Hadija Mohamed** daughter of **Fatuma Mohd Saburi** and the family of **Masoso** raised an objection to the application on the grounds that they had not been involved in the sale. In his Ruling the learned Kadhi declared the scheduled sale of **Plot No. 14 Kitui Municipality** null and void as other beneficiaries had not been involved in the sale process per the order of the Court. The Applicant (**Bakari**) be given the first priority of purchasing the plot as he was the only beneficiary residing in the plot. He was given two (2) weeks within which to avail the amount in Court and in default the Estate was to be distributed and consequently further proceedings in the matter were stayed.

8. In the Notice of Motion dated **10th February, 2016 Binyanya** (Applicant) is the one who sought orders thus:

“That the Honourable Court be pleased to review its order issued on 7th January, 2016 and 25th January, 2016 directing that a fresh valuation of Plot No. 14 Kitui Municipality be done and that the subsequent sale of the plot by the Petitioner be declared null and void for failure to involve all the beneficiaries in the process. That pending hearing and determination of the application, this Honourable Court do stay any further proceedings related to distribution of the Estate of the deceased in the Succession Cause herein until its earlier orders are complied with.”

9. In a Ruling dated **2nd June, 2015** it was stated that the monthly revenue of the Estate if **Kshs. 54,500/=** and the learned Kadhi proceeded to distribute the sum amongst the beneficiaries. This Ruling has not been faulted. In the course of canvassing the impugned application and Ruling the issue of rental income was not raised. Similarly it has not been raised as a ground of Appeal.

10. The Respondent has alleged that he only collects rent from three (3) shops, one (1) that he inherited from his mother and two (2) that he personally constructed. The Applicant was obligated to adduce evidence to establish the allegation of the rent being collected on behalf of the Estate by the Respondent. It was not sufficient to come up with allegations without any proof.

11. This is a matter where the grant of Letters of Administration were revoked. Thereafter the **Hon. Kadhi** continued recording the proceedings in the High Court file. **Binyanya Abdul Mohamed** was referred to as the Petitioner without evidence of appointment as such. This confusion must be clarified and addressed. In the premises it is in the interest of justice that the Appeal be heard on priority basis. In the result, I decline to grant the orders sought. The application stands dismissed with no orders as to costs.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of September, 2018.

L. N. MUTENDE

JUDGE