



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT MOMBASA

SUCCESSION CASE NO. 168 OF 2008

IN THE MATTER OF THE ESTATE OF MSWABAH KARAMA DECEASED

IDHA MSWABAH KARAMA PETITIONER

VERSUS

MAHMOUD ABEID MSWABAH KARAMA RESPONDENT

SHAFIGA BINT MUSABBAH INTERESTED PARTY

RULING

INTRODUCTION

The interested party prays for orders:

1. That she be enjoined in the petition as an interested party
2. That the court be pleased to stay execution of the court's order issued on 12th June 2014
3. That the Honourable court be pleased to review the orders issued on 12th June 2014 to the effect that the property known as MSA/ Block XVII/1275 be excluded from the list of the deceased's estate.
4. That the applicant's succession share [in monetary form] be determined and the same be paid to her.

The applicant deponed that the property known as MSA/ Block XVII/1275 has been listed as part of the estate although she owns a half share in it with one Bukhete Ahmed Said as proven by the titled deed dated 27th November 1995. She contends the property does not belong to the estate and should be excluded from the list of the estate properties. She is also a daughter of the deceased herein and would like to be her share in monetary form.

In response the respondent filed a replying affidavit dated 16th September 2014. He deponed that although the property was registered in the name of the applicant, she was so registered as trustee for the deceased, that the same belongs to the estate of the deceased herein as evidenced by a copy of the original lease document and that the applicant had always been aware the property belongs to the deceased.

The petitioner, in response filed a replying affidavit dated 17th October 2014. He deponed that the court is *functus officio*, that the applicant was aware and participated in this matter which took over [6] years to determine, that she had been aware the property was listed as part of the estate but she had never declared that it was hers. He contends the deceased bought his interest in the property using the name of the applicant.

The application was disposed by way of written submissions.

Mr. Olaba represented the interested party, Mr. Odongo represented the petitioner while Mr. Khatib for

SUBMISSIONS

Mr. Olaba for the interested party submitted that the titled deed of the property known as MSA/ Block XVII/1275 bears the name of the applicant and one Bukhete Ahmed Said as absolute proprietors, that there is no evidence the applicant was registered as a trustee for the deceased. He argues the deceased was of sound mind and could have registered the property in his own name if indeed he bought it. He contends the court has unfettered powers under the Kadhi's court Act and the constitution to review orders and is not *functus officio*.

Mr. Odongo for the petitioner submitted that the court gave every beneficiary a chance to contribute to the determination of the succession matter, which on 6th December 2011, the applicant testified [at page 21 of typed proceedings] but never mentioned that the property known as MSA/ Block XVII/1275 was personally hers. He contends the application does not meet the requirement for review and the court is *functus officio* as regards ascertainment of properties of the estate. He cited the Raila Odinga Vs IEBC & 3 others case in support of his submissions.

Mr. Khatib for the respondent submitted that the application does not pass the test for review under Order 45 rule 1, Civil procedure Rules. He states that the applicant testified in court relating to the same house in dispute but never stated it belongs to her.

He further submitted the sale agreement registering the property was executed by the late Mswabah Karama who registered it in the applicant's name as his trustee, that the deceased had been paying rent of the property over the years.

ISSUES

The main issue for determination in this application is whether or not the Property known as MSA/ Block XVII/1275 is part of the estate of the late Mswabah Karama despite it being registered in the name of the applicant.

ANALYSIS AND FINDINGS

This matter had been finalised by my brother Hon. Sheikh Twalib. I have had to peruse the proceedings and judgment again for purpose of writing this ruling. In the judgment given on 8th March 2011, the Hon. Sheikh Twalib B. Mohamed observed one of the properties of the estate was a *'half share of a house at Kaloleni, Mombasa whose plot number has not been indicated though agreeable by both parties'*. The learned Kadhi held post judgment proceedings on distribution of the estate and took views of other beneficiaries of the estate who had not been parties in the matter. On 17th May 2011, the Kaloleni houses were identified by Mr. Khatib for the respondent as MSA/ Block XVII/93 and MSA /Block XVII/1275. The other estate house is situated at Kuze. Mr. Mwinyi holding brief for Mr. Mazrui for petitioner was present, he did not object. The petitioner reiterated he had sat with his siblings, including the applicant and agreed to buy off the shares of the other heirs in the Kuze house, and that half share in two [2] Kaloleni houses belonged to the estate, jointly with other people. Swalhe and Shafiga were present in these proceedings when this statement was made and did not oppose it when giving their views.

Swalhe, Dhukune and Shafiga Mswabah testified giving their views to court on 6th December 2011. Shafiga, the applicant, stated:

'...The Kaloleni house, I stay in two [2] rooms. The other house there are tenants. it is in partnership with other people'

By giving her views on distribution of the estate, the applicant is party to these proceedings and need not

be enjoined any further. The house in this application is one of the houses at Kaloleni, which were in the knowledge of the applicant at the time she gave her views on distribution. Whilst the registration in the title is evidence of proprietorship, in many a inheritance matter, properties - as in this case - are registered in one name but belong to another. Where this is the case, either upon agreement of parties and beneficiaries or evidence adduced in court, it can be held that a property belongs to the estate although it was registered in the names of one of the beneficiaries. In this case, the court found that a half share in one of the Kaloleni house was part of the estate. The Kaloleni houses were identified and confirmed by beneficiaries including the applicant. Accordingly, the applicant cannot - at this late stage after the issue has been concluded and three years after she had given her views - claim that the share in the Kaloleni house is not part of the estate. The application is misconceived, bad in law and lacks merit. It is hereby dismissed with costs.

Dated and delivered at Mombasa on 2nd April 2015

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Yusuf K. Abdulrahman, Court Assistant

Mr. Odongo for petitioner

Mr. Khatib for respondent

Mr. Olaba for interested party / applicant