



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 13 OF 2012**

**IN THE MATTER OF MZEE SHARBAIDI KHAMIS (DECEASED)**

**IN THE MATTER OF AN APPLICATION FOR ISSUE OF A VESTING ORDER  
IN FAVOUR OF MWANAMKUU MZEE MWITU THE PETITIONER IN KADHI'S  
COURT AT MOMBASA SUCCESSION CAUSE NO. 33 OF 2011.**

**1. KIBIBI MZEE SHARBAIDI**

**2. HADIJA MZEE SHARBAIDI.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**MWANAMKUU MZEE MWITU.....DEFENDANT/RESPONDENT**

**RULING**

By way of a Notice of Motion dated 2-11-2012 the Applicants seek inter alia the following orders:-

2. **“THAT** the extraction and/or enforcement of the order made herein on 31<sup>st</sup> October 2012 vesting the sole ownership of **Title No. Msa Block XVI 11089** in the Respondent be stayed.
3. **THAT** the aforesaid vesting order be set aside.
4. **THAT** the Respondent be restrained from selling or otherwise dealing adversely with the property comprised in **Title No. Msa Block XVI 11089**.
5. **THAT** the Applicants as the children of the deceased are entitled in law and in equity to a share of the deceased's estate.
6. **THAT** the Respondent, the Applicant, **Salama Mzee Shabaid** and **Fatma Mzee Shabaidi** be registered together as owners in common of the parcel of land comprised in **Title No. Msa Block XVI 11089**.
7. Such other further orders/directions as the justice of this case may necessitate”

Prayer No. 2 seeking a stay of the vesting order was granted on interim basis on 5/11/2012. The application was disposed of by way of written submissions after which both advocates appeared in court in order to highlight said written submissions.

I have carefully perused and given consideration to the submissions on record. This application arises from Succession Cause No. 33 of 2011 heard by the Hon. Kadhi in Mombasa. The Hon. Kadhi did on 30/1/2012 make orders with respect to the distribution of the estate **MZEE SHARBAIDI KHAMIS**. The relevant part of the Kadhi's order read as follows

*“A House without land at Mwembe Tanganyika – Title No. Mombasa/Block XVI/1089 be transmitted and/or transferred in the names of the Petitioner herein **MWANAMKUU MZEE MWITU** as agreed by all the other heirs mentioned above”*

Based on the judgment of the Kadhi the High Court sitting in Mombasa did issue a vesting order in favour of the Respondent. It is this vesting order which the applicants are seeking to challenge.

In their written submissions the applicants have raised the following points for determination

- “ - *Whether or not the vesting order was obtained through false misrepresentation and fraud*
- *Whether the Applicants are rightfully heir of the deceased property*
- *Whether their mother was a wife of the deceased at the time of his death*
- *Which party is the rightful owner of the said property”*

Looking at the above issues raised by the Applicant, I do agree with Counsel for the Respondent that this is more of an appeal against the decision of a Kadhi than a Miscellaneous application. The applicants are in effect asking this court to set aside and/or overturn the decision of the learned Kadhi. This can only be done by way of an appeal. The vesting order was issued by the High Court. This court being a court of concurrent jurisdiction cannot sit in appeal over a High Court decision. This court has been wrongly moved. The correct procedure for the aggrieved applicants would have been to file an appeal against the decision of the Kadhi. I find no merit in this application. The same is hereby dismissed with costs to the respondent.

**Dated and Delivered** in Mombasa this 13<sup>th</sup> day of **October, 2014.**

No appearance by either parties.

**M. ODERO**

**JUDGE**

**13/10/2014**