



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 68 of 2004

MWANAISHA NOORDIN

ABDULRAHMAN M. HATIMYAPPELLANTS

VERSUS

MWANAHALIMAABDULREHMAM.A.HATIMY.....RESPONDENTS

J U D G M E N T

Notice of Motion dated 4/5/05 was abandoned and both parties in appeal proceeded in argument against the Ruling made on 8/6/2004 in Kadhi succession case No. 55/2004.

The memo of Appeal sets out 7 grounds of appeal namely:-

1. Summons to enter appearance were not valid.
2. Provisions of Order IV 3(4) were not followed.
3. Learned Kadhi misapprehended the law and authority relating to order IV rule 3(4) CPC.
4. Learned Kadhi erred in procedure by proceeding to consider the Respondent application before determining Preliminary objection.
5. The rules of natural justice were not followed thereby prejudicing the appellant.
6. Learned Kadhi misapprehended the law related to Power of Attorney.
7. The Learned Kadhi erred in holding that the Respondent's Attorney was authorized to sign, swear or file various proceedings in the Attorney's name.

Upon perusing the record, it shows that on 26/5/04 the appointed Attorney of the Halima Abdulrehman Mohamed filed an application against the administration of the estate seeking restraining orders regarding property of estate No. 6/XXXVI pending the hearing of this case.

The Appellants raised a Preliminary Objection which was heard and determined by the Kadhi on 8/6/2004 who rejected the Preliminary objection. In the argument on the said Preliminary objection the Kadhi was referred to the decision of Court of Appeal No. 174 of 1999 **Care East Airbus Ltd. Vs.**

Kenya Shell Ltd. In which the court stated clearly that summons which gives 10 days to enter appearance is in contravention of order 4 rule 3 (4) and makes the summons invalid and of no effect. Notwithstanding the clear statement of law by 3 Judges of Appeal the Learned Chief Kadhi proceeded to dismiss the Preliminary objection. Further the court found that the Power of Attorney was sufficient to sue on behalf of donor.

The provisions of Order VII rule 4 requires only that a plaintiff who sues in a representative capacity declare the capacity in which he is suing. In this case the holder of Power of Attorney has disclosed this source of authority and in this respect the finding of the Learned Kadhi is correct.

The important issue is in regard to validity of summons issued. It will be noticed that the appellants entered appearance in protest.

It will also be seen that this is a succession matter under Succession Act Cap 160. The proceedings under this Act are governed by Probate and Administration Rules made therein.

The forms of pleadings are set out and summons to enter appearance as provided under Civil Procedure Order V rule 1 are not applicable also provisions of Order IV rule 4(3)4 is not applicable.

However Order 36 CPC rule 1 provides for determination of any question affecting the rights or interest of the person claiming ... as heir, furnishing of any accounts by Administrators or trustees, directing the administrator to do or abstain from doing any particular act in their character as administrators and determination of any question arising directly out of administration of the estate. The validity considerations for summons are quite different from those of other ordinary suits.

From the Petition filed in this suit the prayers are:

1. Distribution of estate to the heirs
2. Endorsement of all heirs in the tile deeds.

The real dispute is that the estate has not been distributed and the Petitioner and her daughter who have been in possession of business premises (part of estate) are now subjected to levy of distress for rent while they are entitled to a share of all income of the estate.

In these circumstances the objection as to the validity of summons is not proper. The requirements of Order IV rule 3(4) is not applicable.

The Chief Kadhi sat as assessor in this case but seeing that the matter does not really concern Muslim Law but rules of procedure he left court to conclude the matter. The court of Kadhi applies rules of Civil Procedure as provided in Cap.21. The forms of Petition is not in accordance with P & A rules and prescribed forms .

Upon considering the above, I find that the appeal has no merit and the same is hereby dismissed with no order as costs.

Delivered and dated at Mombasa this 1st day of July 2005.

J. KHAMINWA

J U D G E

The file shall be returned to Kadhi Court forthwith.

KHAMNIWA J

1/7/05

Khaminwa J

Jason – Court clerk

The appellant

Mr. Kiema holding brief

Judgment read in their presence in open court.

KHAMINWA, J