

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL CAUSE 1 (CS) OF 1976

BJ MOHAMEDALI APPLICANT

VERSUS

KEKI CAWASJI N DASTOOR..... RESPONDENT

JUDGMENT

By originating summons dated 13th January 1976 made under order XXXVI, rule 3, of the Civil Procedure Rules, the applicant applies under section 103(2) of the registered Land Act for an order: That the formal consent of Keki Cawasji N Dastoor also known as Keki Cawasji Dastoor the remaining proprietor in Lamu/I/Parcels 97, 129 and 130 for the transfer of undivided one half share to the applicant by Mohamedali Moledina, the vendor (as executor of the estate of Roshanali Mohamedali Moledina, deceased) be dispensed with.

The supporting affidavit avers that the respondent is unreasonably and willfully withholding his consent to the deed of transfer (annexure A) whereby on 31st July 1973 the applicant purchased from Mohamedali Moledina, the executor of Roshanali Mohamedali Moledina (deceased), his undivided half share of three plots of land at Lamu on which there are houses and an oil mill for Shs 5000. It is not a question of the formal consent of the respondent being dispensed with as the originating summons states. The burden of proving that the respondent is unreasonably withholding his consent is upon the applicant, assuming that the applicant has a *locus standi* in the matter. Section 103 of the Act provides:

(1)Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

(2)No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

As I read subsection (2), only a proprietor in common can apply to his coproprietor for his consent in writing to the alienation of his share to third party. Here the original proprietor and his executor are both dead. They were both Muslims and their estates were to be administered under Mohamedan law. Under that law, it appears that an executor appointed by will can, in his turn, appoint an executor who takes the same place and exercises the same power as the original executor : *Paruck's the Indian Successor Act* (5th Edn), page 609. It is not suggested that the applicant is Mohamedali's executor; or it might have been necessary to make an application to the Court for letters of administration *de bonis non* in order to protect the interests of the heirs against this purported sale of valuable property to an outside party at the ridiculously low price of Shs 5000.

Also it appears that the powers of an executor of a will under Mohamedan law are limited and that as a Mohamedan cannot dispose by will of more than one-third of his property after payment of his funeral expenses and debts, the executor, when he has realized the estate and paid the debts and legacies, is a bare trustee for the heirs as to the two thirds. He is more of a manager of the deceased's estate than an executor in the usual meaning of that term: see *Paruck*, *ibid*, page 609.

As the respondent's consent was not a formality, he was entitled to raise objections, which he has

effectively done in his affidavit in reply, to having the applicant as a sharer in his undivided interest in the whole of the property. The application is misconceived. It is dismissed with costs.

Summons dismissed with costs.

Dated at Nairobi this 25th Day of October 1976.

D.J. SHERIDAN

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JUDGE