



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
KIBERA LAW COURTS
Succession Cause No. 16 Of 2013
IN THE MATTER OF TRANSFER OF OWNERSHIP
AND
IN THE MATTER OF THE KADHI'S COURT ACT SEC 15 CAP 11
AND
IN THE MATTER OF THE LAW OF SUCCESSION ACT SEC 49(2) CAP 160
Y K ARA P BAPPLICANT
-VRS-
SH1ST RESPONDENT
AH2ND RESPONDENT
KH3RD RESPONDENT

J U D G E M E N T

The plaintiff through originating summons dated 19th November,2015 sued respondents seeking a declaration that:-

1. That HM died a Muslim in 2008 and was survived by his wife, his two sons, one daughter and one step son.
2. That upon HM death , he left three unencumbered and available properties which was subdivided and acquiesced to as follows;
 - I. ADS (widow) - 12.5%
 - II. SH (Son) - 35%
 - III. AH (Son) - 35%
 - IV. KH (Daughter) - 17.5%

3. That ADS died intestate in June 2012 and was survived by four beneficiaries and her estate should be distributed in the following manner;

I. YK Arap B (son) - 3.571%

II. SH (Son) - 3.571%

III. AH (Son) - 3.571%

IV. KH (Son) - 1.786%

The summons is supported by affidavit of YK Arap B and the pertinent grounds set out as follows:-

I. That the deceased HM left the said piece of land in [particulars withheld] , Mombasa Town and Zanzibar to my deceased mother law, who then passed it to the beneficiaries. (Sic)

II. That, the late ADS died sometimes in the June of 2012.(Sic)

III. That the respondent has recently though implied action sought to take away from me the applicant the said inheritance rights in the Estate of ADS. (Sic)

IV. That the fact constituting this application are that the Deceased's plot is subject to Muslim law of succession. (Sic)

The respondents filed a Replying Affidavit objected to the averment raised by the applicant but admitted the applicant is the uterine brother of the respondents. The respondents further averred that there is no part of the deceased's, HM, estate that is within the scope of this Honourable court jurisdiction.

It is on record that the Petitioner was duly served with a mention notice for the purpose of setting the hearing date on 23rd July,2015 . When the matter was called for mention failed to appear before the court, notwithstanding his absent the court went ahead and ordered the respondents to serve him with a notice of hearing.

The return of service traced on the file reveals that a process server by name Charles Kenga deponed a R/S on 27th July 2015 and filed on 30th July 2015, to effect that he had duly served the applicant who accepted the service and signed it.

Trial commenced on the 10th August 2015 with none appearance on part of the applicant. The matter therefore proceeded ex-parte.

The 2nd respondent(herein after 'the respondent) on the authority of 1st and 3rd respondent testified that and He reiterated the content of his replying affidavit and stressed on the following:-

I. That the deceased , HM died testamentary on 13th April 2008 and was survived by the following heirs:

a. ASN - Widow

b. ZM - Widow

c. SHM - Son

d. AHM - Son

e. KHM -Daughter

f. MHM - Daughter

g. HMM - Daughter

h. FMM - Daughter

II. That the Applicant has no blood relation with the deceased , HM, and that he is the uterine brother of the respondent; parties herein are the children of A who was married to the deceased.

III. That the deceased, HM, had only one property within Kenya ; the property at Mombasa [particulars withheld] area which he had bequeathed to the 3rd Respondent before his death and consented to by all the heirs.

The respondent tendered a copy of instrument granting the beneficial rights over the said property to the 3rd respondent made on 29th June 1974 marked as "AHM2". He further stated that the 3rd respondent has since been in full control of the said property to the exclusion of the deceased during his lifetime up to date.

The respondent further submitted that the property situate at Rose Avenue being LR No. 209/390/10/17 Nairobi belonged to him and not his father (the deceased) , he tendered a copy of certificate in respect of the said property bearing his name as the registered proprietor the document which is marked as "AHM2". He further testified that the only property that belonged to the deceased is situated in Zanzibar which is beyond the jurisdiction of this Honourable court for determination.

IV. That A passed away on 3rd June 2012 without leaving any property and was survived by the following heirs:

a. YKB - Son

b. SHM - Son

c. AHS - Son

d. KHM - Daughter

The respondent further submitted that their mother , A, was under care and support of the respondents in every respect until her death without any contribution and/or support from the applicant.

The respondent testified that the applicant has not been denied of any inheritance rights as alleged and he should not be allowed to reap what he did not sow

The respondent further testified that the applicant's claim is misconceived and based on greed and misrepresentation and as such it's against the interest of justice and should be dismissed with costs.

I have given careful consideration to the evidence adduced herein by the respondent which was not challenged as the applicant did not adduced evidence in rebuttal.

The attention of this court was drawn Order 12 Rule 3 of the Civil Procedure Rules which provides:-

"3.(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

A suit means any proceedings commenced in any manner prescribed thereby it includes an application. That being the case, if only a respondent appears on the date fixed for a hearing of an application , the application shall be dismissed. The rule is in mandatory terms that if the suit or application is not

dismissed, the Court shall give reasons for failure not to have dismissed such a suit or application. The law therefore presupposes that once a matter has been fixed for hearing unless there is a compelling reasons which must be recorded, if plaintiff or applicant fails to attend after having been notified, the suit or application MUST be dismissed - unless there is a compelling reasons which MUST be recorded. The Court's discretion is taken away by the term "shall".

There is only one course open to this court that is, *a verbis legis non est recedendum*, from the words of law there must be no departure.

In the premises given above I dismiss the Applicant's application with costs.

Dated and delivered at Nairobi this 14th day of August, 2015.

Hon. A. I. Hussein (Mr)

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