



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)

CIVIL APPEAL NO. 54 OF 2016

ABDISATAR HAJI MOHAMED1ST APPELLANT

ASHA MOHAMED2ND APPELLANT

AND

OMAR AHMED1ST RESPONDENT

ALI AHMED MOHAMED 2ND RESPONDENT

(Being an appeal from the ruling/order of the High Court of Kenya at Mombasa (Thande, J.) dated 11th February, 2016

in

H.C.SUCC.C. No. 380 of 2008.)

JUDGMENT OF THE COURT

The respondents are the grandsons of the late **Haji Mohamed Adam**, “*Haji*” who passed away on 11th February 1996, and left behind a will dated 15th August, 1994. The respondents’ late father, **Ahmed Mohamed Adam** alias **Ahmed Haji Mohamed**, “*Adam*” was one of the sons and daughters of Haji and was named as a beneficiary in Haji’s will. Adam however predeceased Haji. The respondents contend that as Adam was named in the will of Haji as one of the beneficiaries, his estate is a beneficiary of the estate of Haji, and as the administrators of Adam’s estate, they are entitled to treat Adam’s share in Haji’s estate as part of his estate.

Haji was a polygamous man having married two wives. He had 12 issues with the 1st wife, **Fatuma Haji Yusuf**, and 6 with the second wife, **Hadija Jamaa Dirir**. The 1st appellant, a son from the first house, was appointed as one of the executors of the will of Haji by a grant of probate issued on 24th June 1997. However, following a successful application by **Fatuma Haji Mohamed**, from the second house, that grant was revoked and she and the 2nd appellant, a daughter from the first house were appointed by the High Court as the administratixes of Haji’s estate effective from 12th July 2000.

By an application dated 17th July, 2015, the respondents sought orders; to restrain the 1st appellant from

intermeddling or interfering with Haji's estate; compel him to deposit in court all the title documents in his possession in respect of Haji's estate; to place Haji Plaza, a commercial building situate in Voi town, under the management of a reputable estate management company for purposes of rent collection and rendering of accounts; directing the administratixes of the estate to render a full, detailed and accurate account of Haji's estate including all income and expenditure; to hold the administratixes criminally and personally liable should they fail to render accounts and to revoke the grant issued to the administratixes and a new one issued to the 1st respondent and one, Ali Ahmed Mohamed.

The respondent's application was premised on the grounds that Adam, was named in the will of Haji as one of the beneficiaries of his estate. Therefore, and in effect, Adam's estate became a beneficiary of Haji's estate after he passed on. They claimed that the administratixes of Haji's estate had failed to properly and diligently administer his estate despite his will being clear and specific on how the estate was to be administered. They accused the administratixes of wastage and pilferage of the estate to the detriment of the beneficiaries. Further, they alleged that the administratixes had allowed the 1st appellant to intermeddle in the estate. They exhibited a lease over Haji Plaza executed between the 1st appellant and the National Social Security Fund (N.S.S.F) in their bid to demonstrate that the 1st appellant was intermeddling in the estate. The 1st respondent exhibited receipts paid by him to the 1st appellant as rent for a shop in Haji Plaza that he had leased. The respondents further accused the 1st appellant of holding the title documents of properties belonging to the estate and seeking confirmation of grant yet he was no longer the administrator of the estate following the revocation of the initial grant of probate.

According to the respondents, an administrator of an estate cannot legally delegate to another person the administration thereof through a power of attorney or otherwise as the 2nd appellant had purported to do by appointing the 1st appellant as such by a power of attorney dated 4th October, 2006. The respondents ultimately contended that 20 years after the passing on of Haji, the administratixes had failed to distribute the estate in accordance with the wishes expressed in the will and had instead put all the proceeds to their personal use and there was a danger of the estate being dissipated.

The appellants opposed the application. In the affidavit sworn by the 1st appellant he deponed that since Adam predeceased Haji, the respondents were not beneficiaries of Haji's estate under Islamic law. The 1st appellant maintained that he was one of the original executors of Haji's will and had requisite mandate to administer the estate, and even if the grant of probate had been revoked, it did not affect his position. He denied the allegation that he was managing the estate courtesy of the power of attorney donated to him or that he had converted any collected rents to personal use but instead deponed that the rents collected were distributed to the beneficiaries of the estate equally. He admitted to holding the title documents in regard to properties forming part of the estate but asserted that the estate had already been distributed amongst the two families in accordance with the will through equal distribution of rents collected since the properties were not to be sold. He went on to depon that the appellants had been given a portion of land where they had built a house and could therefore not claim to have received nothing from the estate.

On the basis of these facts, **Thande. J**, delivered a ruling in favour of the respondent and accordingly issued an injunction restraining the 1st appellant from intermeddling or interfering in Haji's estate and directed the 1st appellant to deposit in court all the title documents in his possession in respect of the property forming part of Haji's estate. The administratixes, Fatuma Mohamed and Asha Mohamed were ordered to produce to court a full and accurate inventory of the assets and liabilities of the deceased together with a full account of all dealings from 12th July, 2000 within 60 days of the delivery of the ruling.

Aggrieved by these orders, the appellants proffered this appeal on six grounds to wit; that the Judge erred; in not adverting to Islamic law in the determination of the application; failed to appreciate that the respondents were not entitled to benefit from the estate since their father had predeceased Haji; disregarded **Section 3 (4)** of the Statute Law (Miscellaneous Amendments) Act No. 2 of 1990 in his determination; in adjudging the 1st appellant solely on the basis of his capacity as the constituted attorney of the 2nd appellant while he was still the executor of the will since he had not been affected by the

revocation; ignoring that another grant had never been issued in accordance with part VII of the Law of Succession Act after the revocation of the initial grant of probate; and finally, ignoring that the orders would create an aberration in the sense that they would mean that the grandchildren of a deceased could supplant the immediate beneficiaries or children of a deceased person.

The appeal was canvassed by way of written submissions. In their hard-to-follow submissions dated 24th November 2016, the appellants reiterated that Islamic law, which was the law applicable to the estate disentitled the respondents from any benefit or share in Haji's estate and that the Judge failed to appreciate that point. That the Judge failed to make a finding or made a wrong finding that the 1st appellant could not participate in the affairs of Haji's estate because his mandate as an executor had been revoked. It was further submitted that the Kadhi's Court rather than the High Court had jurisdiction to hear and determine the application as per **Article 170 (5)** of the Constitution as read together with **Section 2 (3)** of the Law of Succession Act. For that proposition, the appellants cited the case of **Genevieve Bertrand v Mohamed Athman Maawiya & Another [2014] eKLR**. According to the appellants the jurisdiction of Kadhi's Court was determined by the existence of three factors; the subject matter of the claim or dispute; parties who must profess Islamic faith and submit to the jurisdiction of Kadhis Court. The appellants relied on the case of **Zog'llo Zolleyn aka Alias Ali Said Ahmed V Abdalla Said Ahmed [2014] eKLR** for their submission that the application should have proceeded before the Kadhi's Court at first instance and then to the High Court on appeal if at all. That even if the High Court had jurisdiction to try and determine the application then it should have applied Islam law, and not the Law of Succession Act as all parties professed the Islamic faith. That as it were the High Court exceeded its jurisdiction in entertaining the application. The cases of **Re The Estate of Ismail Osman Adam (deceased), Noorbann Abdul Razak v Abdulkader Ismail Osman, C.A No. 258 of 2009 (Mombasa) (UR)** and **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** were cited in support of that proposition.

The respondents in their submissions asserted that Adam's estate was entitled to benefit from the estate of Haji as per the contents of the will. They accused the 1st appellant of intermeddling in Haji's estate by purporting to lease out Haji Plaza to N.S.S.F and collection of rent from tenants which he applied solely to his personal use. The respondents pointed out that the grant issued to the 1st appellant was revoked by the High Court which then appointed the current executors. They submitted further that the 1st appellant could not purport to be an executor of the estate or apply for the confirmation of grant of probate since she was no longer an executor of the will. It did not matter that a Power of Attorney had been donated to him by one of the executors. The respondents stated that their aim in filing the application was to preserve the estate and not to distribute the same. According to the respondents, the issue before the High Court was whether the administrators were properly discharging their mandate; whether there was intermeddling in the estate and whether the administrators could account for the assets of the estate. As such, they argued, that did not call for the application of Islamic law. The respondents submitted that the issue whether or not they were entitled to a portion of Haji's estate was not an issue that was before the High Court at that stage as that was to be determined at a later date during the confirmation of the grant of probate. In response to the claim by the 1st appellant that he had been appointed an administrator through a power of attorney, the respondents submitted, the duties of an executor cannot be delegated or donated to someone else as such powers attached personally to the executor appointed by court.

The respondents further submitted that the High Court had the jurisdiction to hear and determine the application since **Article 165 (3) of the Constitution** accorded the court unlimited original jurisdiction in civil and criminal matters. They further argued that under the provisions of **Article 170 (5) of the Constitution**, the jurisdiction of Kadhi's Court could only be invoked where all parties submitted themselves to its jurisdiction. They submitted that the appellants had in fact submitted to the jurisdiction of the High Court since 1997 and they were now estopped from claiming otherwise. The respondents finally claimed that it was too late in the day to object to the jurisdiction of the High Court and further that in any event it was an issue that was never raised before the High Court.

Highlighting the appellants' written submissions, **Mr. Kurgat**, learned counsel, stated that although there was an application to remove or revoke the executorship of some of the executors of the will, the 1st

appellant was not affected and the Judge therefore erred to have held otherwise. He submitted further that there were two conflicting grants which according to counsel went to the root of the Judge's decision. He denied that there was any intermeddling in the estate. He contended that **Section 2 (3) and 48 (2) of the Law of Succession Act** encouraged parties professing the Islamic religion to solve their disputes before the Kadhi's Court and so the parties herein should have gone to the Kadhi's Court first in accordance with the principle that a party should first approach the lowest court with jurisdiction.

Mr. Omondi, learned counsel for the respondents, highlighted that the issue before the High Court was for the preservation and not distribution of the estate, whether in accordance with Islamic law or otherwise. On the allegations that the High Court lacked jurisdiction to try the application, counsel submitted that the appellants themselves invoked the court's jurisdiction and could not therefore turn around and deny the same by claiming that jurisdiction over this matter now lay with the Kadhi's Court.

We have carefully read and considered the record of appeal, the ruling of the High Court, respective written and oral submissions, the authorities cited as well as the law and hold the following view on the matter.

The appellants have challenged the jurisdiction of the High Court to hear and determine the application. It is common ground that all the parties herein profess the Islamic faith. It is in this premise that the appellants argue that Islamic law is applicable and not the Law of Succession Act. The appellants have also advanced the contention that by dint of **Article 170 (5) of the Constitution**, as read together with **Sections 2 (3) and 48 (2) of the Law of Succession Act**, the dispute herein should have been determined by the Kadhi's Court.

Article 170 (5) of the Constitution gives the following instances where the jurisdiction of Kadhis' Court should be invoked:-

“The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Courts.”

As is discernable from that provision, where a matter calls for determination of issues touching on Islamic law, the jurisdiction of Kadhi's would be the appropriate forum. Such a matter must however relate to either the personal status, marriage, divorce or inheritance. Therefore, not all matters touching on Islamic law fall for determination by the court. The Constitution goes further to state that the parties in the proceedings must profess the Islamic religion; and finally that the parties must submit themselves to the jurisdiction of the Kadhi's Court. This position is buttressed by **Section 2 (3) and (4) of the Law of Succession Act** which excludes the Act from application to testamentary or intestate succession of a person who at the time of death professed Islamic religion and *in lieu* thereof Islamic law is to apply. However, Part VII of the Law of Succession Act is applicable to the administration of estates of Muslims where it is not inconsistent with Islamic law.

The Kadhis' Court Act came into force on 1st August, 1967. **Section 5** of that Act gives the jurisdiction of Kadhis' Courts as follows:-

“A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.” [Emphasis]

In our judgment, that section does not oust the jurisdiction of the High Court to entertain matters that would strictly be in the province of the Kadhis Court. From the above discourse, it is clear that both the High Court and the Kadhi's Court had the jurisdiction to handle the application. Indeed, it is therefore sufficiently clear that the parties in this matter had the liberty to approach the court of their choice

between the High Court and the Kadhi's Court for the determination of any rights or dispute over Haji's estate. This is what could have informed the decision of the appellant to petition the High Court in place of the Kadhi's Court. They cannot now turn around and claim that the respondent should have filed the application in the Kadhi's Court. There were no proceedings pending in the Kadhi's Court with regard to the estate.

We reiterate that the record shows that the 1st appellant was named in the late Haji's will as one of its executors. Following Haji's death on 11th February 1996, the 1st appellant amongst other petitioners petitioned the High Court at Nairobi for a grant of probate vide **Succession Cause 810 of 1997** through a petition dated 17th April 1997. They never proceeded to the Kadhi's Court though they were entitled, given their submissions on this aspect. They cannot now turnaround and claim that the cause ought to have been filed in the Kadhi's Court when they themselves made an election. Following their successful petition, the 1st appellant among others were issued with a grant of probate on 24th June 1997. On 12th July 2000 that grant was revoked pursuant to an application by Fatuma Mohamed and another grant subsequently issued to her and the 2nd appellant. Since the filing of Succession Cause 810 of 1997, there has been a plethora of applications filed in respect of the estate within that cause by various beneficiaries. It's been 20 years since the late Haji passed on. From their conduct, the implication is that the parties chose their forum and submitted to the jurisdiction of that forum, the High Court. They did not submit to the jurisdiction of the Kadhi's Court as is envisaged by the Constitution and the Kadhi's Court Act. They cannot now use that submission as a sword against the respondents by alleging that the High Court lacked jurisdiction to determine the application. There was also no objection or challenge raised by the appellants before the High Court in regard to its jurisdiction. This Court therefore does not have the benefit of the reasoning by the court on that issue. On the whole, that submission must be taken as an afterthought and must fail.

On the issue whether the Judge should have adverted to Muslim law in her determination of the issues raised, the appellants have argued that even where the High Court had jurisdiction over the cause, Islamic law should have applied rather than the Law of Succession Act. To support that proposition, they have relied on the cases of **Re The Estate of Ismail Osman Adam (deceased)** (supra), **Noorbann Abdul Razak v Abdulkader Ismail Osman**, (supra) and **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others** (supra). It is however clear that the provisions of part VII of the Law of Succession Act do not exclude applications brought by persons who profess the Islamic religion, subject to the extent that they are not inconsistent with Muslim law. The application was premised under **"Sections 47, 83, 94 and 95 of the Law of Succession Act and Rules 49, 58, and 59 of the Probate and Administration Rules"**. As such, it fell under part VII of the Law of Succession Act. The provisions under that part, titled **"Administration of Estates"** are mainly concerned with preservation and administration of an estate. The gist of the application and a perusal of the prayers sought in the application reflects that they are all geared towards the preservation and proper administration of the estate. We agree with the respondent's position that the application was not concerned with distribution of the estate in any manner as the appellants would have this Court believe. In any event, the respondents discharged the burden that fell on them of proving that the application or reliance on the said provisions was inconsistent with Islamic law and therefore not applicable in the cause as contemplated by **Section 2 (4)** of the Law of Succession Act.

The respondents have asserted that they are entitled to benefit from the estate of Haji. The appellants have denied the same and have argued that under Islamic law, the respondents are not beneficiaries in the estate since their father Adam predeceased Haji. The High Court in determining the question rendered itself thus: -

"Whether the Applicants are beneficiaries of the deceased's estate or not is a matter that should be determined at the hearing of the Summons for Confirmation of Grant issued to Fatuma Mohamed and Asha Mohamed. To make any pronouncement at this stage on whether the Applicants are entitled to the estate of the deceased would be to preempt the outcome of the Summons for Confirmation."

That holding by the Judge cannot be faulted. The current grant of probate is yet to be confirmed and the hearing at the confirmation presents the best opportunity to determine whether indeed the respondents were entitled to benefit from Haji's estate. Any determination of that question by the High Court at that time would have been preemptive and prejudicial to the parties.

It is discernable from the record of appeal that the 1st appellant has throughout the course of this matter held himself out and continues to do so as an executor of the estate. His belief stems from the fact that he was one of the executors appointed by Haji. The rest of the appointed executors were his brother, Mohamud Haji Mohamed, his step sister Fatuma Haji Mohamed, his step brother Adam Haji Mohamed and Abdifaisal Haji Mohamed, a step brother. When the said executors petitioned for the grant of probate of the written will, they failed to disclose that Fatuma Haji Mohamed was one of the appointed executors and trustees. Fatuma Haji Mohamed later applied for a revocation of the grant issued as aforesaid on that ground. Her application was successful and so on 12th July 2000, the original grant was revoked and the current executors appointed by the High Court. The appellant cannot therefore argue that he was not affected by the revocation of the original grant of probate. He was pushed out of administering the estate of Haji with the revocation of the initial grant. That remains the position to date.

Following that revocation, the 1st appellant now claims to exercise the powers of an administrator over the estate on the basis of a power of attorney granted to him by one, Asha Abdi Ismael. The Judge found and rightly so in our view, that, powers granted to personal representatives or executors cannot be delegated. An executor cannot delegate his authority but may engage the services of other experts or professionals, for instance, advocates, accountants, property valuers, managers, estate agents who may offer services which may be required in the administration of an estate. To that end the learned Judge concluded that the power of attorney had no backing in law and was therefore of no effect. As such, the appellant had no lawful authority to administer the estate in any manner and in purporting to so act and carrying out the activities he was accused of by the respondents, he was simply intermeddling with the estate of Haji which is not allowed in law.

In our view, there are no reasons present in this appeal to warrant interference with the High Court's findings and the appeal is accordingly dismissed in its entirety with costs to the respondents.

Dated and delivered at Malindi this 31st day of March, 2017

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR