



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A.)

CIVIL APPEAL NO. 102 OF 2016

BETWEEN

ZEINAB KHALIFA KHATOR.....1ST APPELLANT

RAHIMA KHALIFA KHATOR.....2ND APPELLANT

FATUMA MOHAMED KHATOR.....3RD APPELLANT

SALIMA MOHAMED SAID.....4TH APPELLANT

ABDUL KARIM SAID.....5TH APPELLANT

AND

ABDULRAZAK KHALIFA SALIM.....1ST RESPONDENT

OMAR MOHAMED SAID.....2ND RESPONDENT

(Being an appeal from the Orders of the High Court of Kenya at Mombasa (Odero, J.) dated 8th March, 2013 and 20th June, 2014

in

HC Succ. Cause No. 62 OF 2000)

JUDGMENT OF THE COURT

[1] The dispute in this appeal is over the estate of the late Aisha Mohamed Adam (deceased) who died intestate on the 9th September, 1985. The deceased is survived by 7 children namely:-

1. Omar Mohamed Said.....son
2. Abdulrazak Khalifa Salim.....son
3. Zeinab Khalifa Salim.....daughter

4. Rahma Khalifa Khatar.....daughter
5. Fatuma Mohamed Sketty.....daughter
6. Salima Mohamed Said.....daughter
7. Abdulkarim Mohamed Said.....son

Zeinab, Rahima and Abdulrazak are children of the deceased with her first husband, Khalifa Khator Salim who is also deceased, while Fatuma Salma, Abdulkarim and Omar are children of the deceased with her second husband Mohamed Said, also deceased. On the outset there is no dispute over the identity of the beneficiaries of the deceased and the shares of each beneficiary seems to have been settled as per the confirmed grant. The only issue is the mode of sale of the deceased's only asset which seems to have hit a snag as the 2nd respondent was given the first priority to purchase the shares of the other beneficiaries.

[2] The brief factual background is that on 9th October, 2000 the High Court in Mombasa issued letters of administration of the deceased's estate to her two sons that is Abdulrazak Khalifa and Omar Said Mohamed the 1st and 2nd respondents respectively. The grant was subsequently confirmed on 9th April, 2003 and the only property belonging to the deceased being Plot No. 1497 Sec XVII Mombasa has remained a thorn in the flesh as every attempt to have it distributed according to Islamic Sharia law to the beneficiaries have been resisted as the two administrators hold divergent views of how the estate should be liquidated for purposes of sharing the proceeds thereto.

[3] It was against the above background that each administrator filed an application which were heard together by Odero, J. the outcome of the said ruling is what has provoked the instant appeal. Omar Mohamed Said, filed a summons dated 8th September, 2009 seeking an order to adopt an award by the Chief Kadhi made on 2nd June, 2008. His co- administrator Abdulrazak Khelifa also filed a summons dated 27th October, 2010 seeking an order to sell the deceased's only property and proceeds be distributed among the beneficiaries in accordance with the Islamic law. The learned trial Judge dismissed Omar's application on grounds that the arbitration of the matter before the Chief Khadhi was not sanctioned by court nor was it done with the consent of the beneficiaries. As regards the summons by Abdulrazak, the following orders were made:-

- a) The application dated 27th October, 2010 is allowed;
- b) A valuation of the suit property being plot No. 1497 Section XVI together with all developments thereon be conducted by an independent valuer to be agreed upon by both parties. The costs of this valuation to be met by the applicant- Abdulrazak Khalifa and Mohamed Said;
- c) The co-administrator Omar Mohamed Said to be allowed first priority based on that valuation, to buy the shares of the other beneficiaries;
- d) If the said Omar is unable to buy out the other beneficiaries, then the suit property to be put on the market and sold to the highest bidder;
- e) The proceeds of sale to be distributed amongst the named beneficiaries, then the suit property to be put on the market and sold to the highest bidder;
- f) Each party to meet their own costs for this application;
- g) The application dated 18th September 2009 made by Omar Mohamed Said is dismissed in its entirety.

[4] Aggrieved by the aforesaid orders, the appellants seem to have taken issue with every aspect of the said orders challenging even the jurisdiction of the court especially for considering two applications that

were separately filed by the administrators who are supposed to act as one. The grounds of appeal by the appellants are repetitive and contain matters of facts, they are also argumentative contrary to **Rule 86(1)** of the **Court of Appeal Rules**. The Rule stipulates in mandatory terms thus:-

“A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.” Emphasis added.

[5] We will attempt to summarize them as thus-

- a) The applications and proceedings in which the two impugned orders were made is a nullity, having been brought as separate applications by joint administrators;
- b) There was no prayer seeking to allow Omar the first priority to purchase the un-divided shares of the other beneficiaries;
- c) The other beneficiaries were not given an opportunity to participate in the proceedings nor did they give their consents;
- d) The consent of the administrators who accepted the value of the property could not bind the other beneficiaries (*cestui que trust*) as the filing of two separate applications was not in law joint act of administrators of the estate;
- e) None of the advocates appearing for the two administrators represented the interests of the beneficiaries; their consents were never given to the firm of Odongo B. O and Co Advocates who purported to act for them;
- f) The consent order of 20th June, 2014 was null and void, as it did not include the developments on the suit land;
- g) The learned Judge erred in law by accepting a valuation which disregarded the principle *quidquid plantatur (inaedificature) solo solo cedit* that is the land includes the surface of the earth and the subsurface of the rock.

[6] Mr Kimani learned counsel for the appellant, elaborated on the aforesaid grounds during the plenary hearing of the appeal. He faulted the act of filing two separate applications by the two administrators which he referred to as ‘discordant’ actions. According to counsel, under **Section 81** of the Law of Succession, administrators should always act in unison unless they seek leave of the court to file separate applications. In this case their applications should have been dismissed as the beneficiaries did not give their consents. Moreover the property is valued more than 20 million as it should have factored in the developments; there is no way a land can be valued without the developments therein. Counsel urged us to allow the appeal and grant the prayers sought in the memorandum of appeal.

[7] This appeal was opposed; Mr. Hayanga, learned counsel for the 2nd respondent, submitted that the property in question is inherited by the beneficiaries in different shares. Whereas some hold their shares from their mother only, others from the father only and some from both their mother and father. The 2nd respondent always wanted to buy the shares of other beneficiaries, so he obtained first a valuation of the property and it was on that basis the former Chief Kadhi (the late Nassor) determined the percentage of shares for each beneficiary. That is how the beneficiaries filed a consent with the summons dated 18th September, 2009 seeking *inter-alia* that the Chief Kadhi’s award be accepted. Counsel for the 2nd respondent also objected to the general style adopted by counsel for the appellant in introducing arguments in the grounds of appeal; attacking the jurisdiction of this court in submissions in the absence of a specific ground of appeal; the order the appellant should appeal against is the valuation which was accepted by court at Ksh.7,000,000 as the order of 20th June, 2014 was corollary to the order of 16th April

2014.

[8] As aforesaid, the summons dated 18th September, 2009 by Omar was dismissed and in doing so the learned Judge gave the following reasons in her own words:-

“...Awards are decisions made by an arbitrator to which the parties to a dispute have all submitted their dispute for resolution. In Kenya arbitration is governed by the Arbitration Act 1995. Section 3A of the said Act provides that “An arbitral award is binding upon the parties to it”

However, in order for the court to enforce this particular arbitral award there must exist evidence to show that there existed an agreement between the parties to refer their dispute to arbitration by the Chief Kadhi. No such evidence exists. No arbitration agreement executed by both parties has been submitted before this court by which the respondent bound himself to accept the arbitral award. Neither is there any evidence that the court itself referred this dispute to arbitration. As such the arbitral award cannot be said to have been legally binding on the parties as such, I find no basis upon which this court can compel the respondents to comply with this arbitral award and I do dismiss in its entirety the application dated 18th September, 2009. Each party to meet their own costs for the application.”

As regards the summons dated 27th October, 2010 by Adulrazak Khalifa it was allowed as per the aforesaid orders which have been challenged in this appeal.

[9] This is a first appeal, that being so, we are alive to our duty on a first appeal as stated by Sir Clement de Lestang VP in SELLE V. ASSOCIATED MOTOR BOAT COMPANY [1968] E.A. 123 at p. 126;

“... An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

The above was cited with approval by this Court’s decision in JIVANJI V. SANYO ELECTRICAL COMPANY LTD [2003] KLR 425 at p. 431. Bearing the above principles in mind, we have considered the record of appeal, submissions filed and the rival arguments; we discern three straightforward issues for our determination in this appeal. The first issue being whether the learned trial Judge could entertain two separate applications filed by the two administrators who are appointed as joint administrators. In other words whether the Succession Act allows joint administrators to apply for separate orders. The second issue is whether there was justification to order that **Omar** be given the first priority to purchase the un-divided shares of the other beneficiaries and lastly, whether the consents of appellants as beneficiaries of the deceased estate was obtained by Abdulrazak prior to filling the aforesaid summons.

[10] On the first issue, Mr. Kimani learned counsel for the appellants heavily relied on an old English decision of 14th July, 1864 in the case of;- HANCOCK v LIGHTFOOT 3 SW & TR.555 page 1391; where Sir J.P Wilde stated:-

“When a joint administration is granted to two persons, they together make but one administrator. Can one of them act without the other? Would not the proper course be for Miss Hancock to renounce, and then that administration should be granted to the cestui que trust?”

Apart from the above case being so ancient, a reading of the basic facts of the case reveal that, the estate of Mr. John Hancock was left to a trustee who also died and the issue was whether one administrator

could be appointed out of his three children where one could not be found and the other had died. Moreover, we have not come across any provisions in the Law of succession and also the Probate and Administration Rules of Cap 160 laws of Kenya that prohibit joint administrators from seeking different orders from court. Indeed in our view what would be prohibited is one administrator dealing with the assets of the estate singularly where there is joint administration.

[11] It is also necessary to state that until the estate of a deceased person is fully administered and distributed, the Court is actively involved. From experience many joint administrators fail to agree on the mode of distribution and make all manner of applications in court for directions and orders on the mode of distribution or administration of the assets. **Section 47** of the Law of Succession, gives the High Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. We also wish to point out that this issue of jurisdiction was also not raised before the High Court, and as was rightly pointed out by Mr. Hanyaga, learned counsel for the 2nd respondent, a question of jurisdiction ought to be raised at the earliest opportunity and in any event, an issue that is not predicated on grounds of appeal cannot be canvassed in submissions. We therefore find no merit in the first issue that incorporated several grounds of appeal touching on what counsel for the appellant referred to as “discordant applications”.

[12] This now takes us to the second issue on whether the Judge erred by giving **Omar** the first option to purchase the suit property when no such order was sought in the application dated 27th October, 2010. The order sought was couched in the following words:-

“That the Honourable Court do sanction the sale of the estate of the deceased herein being the parcel of land known as plot No. 1497 Sec. XVII together with the developments thereon, and the proceeds thereof be distributed among the beneficiaries, namely Abdalla Mohamed Said, Abdaulrazak Khalifa (applicant), Omar Mohamed Said (co-administrator), Abdulkarim Mohamed Said, Zainab Khalifa, Rahma Khalifa, Fatuma Mohamed and Salama Mohamed Said, according to Islamic Law.”

[13] The learned Judge by ordering the suit property be sold with the first option being given to Omar, must have brought to bear the submissions made on behalf of Omar, the co-administrator who contended that he was in occupation of the suit premises even during the lifetime of the deceased; he has been paying the rates and had undertaken repairs as would be necessary; he had formed an emotional attachment to the property and would not like it sold off to a stranger. This is what the Judge indicated in a pertinent portion of the said ruling:-

“The ideal situation would be that the parties agree by consent on a way to settle the estate of the deceased. However, clearly such an agreement could not be reached and that is why the matter has ended up in the courts. As stated earlier the only asset of the estate is the suit property which is currently occupied by Omar. The other beneficiaries are entitled to a share of this asset and it is desirable that the estate be settled one way or another. There is a clear conflict on the value of the suit property one administrator put it at about Ksh 2.0 million whist the other administrator put it at Ksh 10.0 million. There is a wide disparity (about 8.0 million between these two figures). In the interest of justice it is best that an independent valuer be appointed to value the property. Thereafter the suit property to be put on the market and sold to the highest bidder. The proceeds of sale are to be distributed amongst the beneficiaries named in the confirmed grant in accordance with Islamic law in the shares as indicated in the confirmed grant. However, the (sic) applicant Omar ought to be given a first priority to buy out the other beneficiaries. I therefore do allow the chamber summons dated 27th October, 2010...”

[14] Going by the record of appeal, it is clear to us that the all appellants supported the sale of the suit property to the highest bidder and the proceeds to be shared among them according to Islamic law. This is contained in an affidavit sworn by four of the appellants on 6th May 2010 where they stated:-

“That we are all brothers and sisters, and the estate herein belongs to us all, and we have all along suggested to the applicant that the subject property herein be sold to the highest bidder

and the proceeds thereof shared by us in accordance with the Islamic law, but the applicant refused to accept the said proposal. Infact, we must admit that we do not understand him.”

Having considered all the above, the Judge ordered the property be sold to the highest bidder and the only addition in the orders that was not prayed for by the application of Abdulrazak was giving the first option to **Omar** to purchase the shares of the other beneficiaries. This is the gravamen of this appeal, and we would be right to opine that it is the issue that has held the distribution of this asset among the beneficiaries since the grant was confirmed in April, 2003 some 15 years ago, the estate of the deceased has not been distributed to the beneficiaries whilst **Omar** is enjoying exclusive occupation of the same.

[15] Did the learned Judge err by giving **Omar** the first option to purchase the shares from the other beneficiaries? The Judge is clothed with inherent powers even under **Rule 73** of the Probate and Administration Rules to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. **Omar** is a beneficiary of the estate just like the appellants, and his share of the estate is settled according to the confirmed grant. The learned Judge appreciated that the parties herein were not able to agree on the mode of disposal of the estate property; **Omar** gave a valuation of Ksh.2 million while the co-administrator gave a value of 10 million; having considered all these divergent positions taken by **Omar** on one hand and the other beneficiaries, we think it was a misdirection for the Judge to grant **Omar** the first priority to purchase the shares of the other beneficiaries. Further, if the learned Judge considered the length of time the deceased estate which is occupied by **Omar** remained undistributed, and the difficult positions taken by him to ensure that he remains in occupation to the suit premises to the exclusion of the other beneficiaries, we have no doubt the Judge would have arrived at the same conclusion as we have, that giving the first priority to **Omar** to purchase the shares of the other beneficiaries did not serve the ends of justice as the whole process was prolonged. Accordingly we think this ground of appeal has merit, the property should be sold to the highest bidder.

[16] On the last issue of whether the consents of the beneficiaries was obtained by Abdulrazak before filling the summons dated 27th October, 2017; this issue was answered by an affidavit sworn by the appellants on 6th May, 2010 an excerpt of which is reproduced in this judgment. Also there was no contention before the learned Judge regarding the identities of the beneficiaries and shares of each beneficiary; indeed the grant was confirmed and no one challenged the confirmed grant, it was only the mode of disposal of the estate property that became contentious and that was because **Omar** remains in occupation to the exclusion of the other beneficiaries and wants to remain that way at his own convenience and terms to the disadvantage of the other beneficiaries. The Court requires express consents of the beneficiaries principally when appointing the administrators and when determining the mode of distribution of a deceased estate. There was no dispute over the appointment of beneficiaries and even the identity and shares of the beneficiaries.

[17] We think we have said enough to demonstrate that this appeal partially succeeds and we partly interfere with order Nos. 1 and 2 by substituting thereto that the suit property being plot No. 1497 Sec. XVII Mombasa together with the developments thereon, be sold in the open market to the highest bidder and the proceeds thereto be shared among the beneficiaries in accordance to the Islamic law. This being a family matter we make no orders as to costs. Each party to bear their own costs of the appeal and the subsequent transfers of their respective shares.

Dated and delivered at Mombasa this 2nd day of November, 2017.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR