



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 20 OF 2016

BETWEEN

ZEINAB KHALIFA.....1ST APPLICANT

RAHIMA KHALIFA.....2ND APPLICANT

FATUMA MOHAMED SAID.....3RD APPLICANT

SALMA NOHAMED SAID.....4TH APPLICANT

ABDULKARIM MOHAMED SAID.....5TH APPLICANT

AND

ABDULRAZAK KHALIFA.....1ST RESPONDENT

OMAR MOHAMED SAID.....2ND RESPONDENT

(Application for leave to appeal from the ruling and order of the High Court of Kenya at Mombasa, (Odero, J.) dated 8th March 2013 in Succession Cause No. 62 of 2000)

RULING OF THE COURT

The dispute to which this ruling relates involves the Estate of *Esha* or *Aisha Mohamed Adam (Deceased)*, late of Mombasa who died on 9th September 1985. Her entire estate comprised only one asset known as *Mombasa Block No. XVII/1497 (the suit property)*. Seven children survived the deceased, namely:

- i) Abdulrazak Khalifa;***
- ii) Omar Mohamed Said;***
- iii) Abdulkarim Mohamed Said;***
- iv) Zeinab Khalifa;***

v) **Rahima Khalifa**

vi) **Fatuma Mohamed; and**

vii) **Salma Mohamed Said.**

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 9th October 2000 the High Court issued a grant of letters of administration intestate of the estate of the deceased to two of her sons, namely **Abdulrazak Khalifa (1st respondent)** and **Omar Said Mohamed (2nd respondent)**. That grant was confirmed on 9th April 2003 to the intent that the suit property was to be shared out among the seven in the shares set out therein.

It appears from the record that subsequently disputes and disagreements arose between the two administrators among themselves and also with the applicant beneficiaries, stalling efforts to distribute the estate as directed in the confirmed grant. Each of the administrators filed in the High Court separate applications seeking what their advocates describe as “dispirit and incongruous orders” on the distribution of the suit property. The first application, by the 2nd respondent, was dated 18th September 2009 and sought an order to distribute the suit property in accordance with an award purportedly made by the former Chief *Kadhi* on 2nd June 2008. The second application was by the 1st respondent and dated 27th October 2010. Substantively it prayed for an order for the sale of the suit property and distribution of the proceeds to the seven children of the deceased in accordance with Islamic law.

Odero, J. heard both applications and in a single ruling dated 8th March 2013, dismissed the 2nd respondent’s application after holding that the beneficiaries had not agreed to an arbitration by the former Chief *Kadhi*. As regards the 1st respondent’s application, the learned judge allowed the same and ordered the suit property to be valued by an independent valuer. She granted the 2nd respondent first priority to purchase the shares of the other beneficiaries, failing which the suit property was to be sold in the open market to the highest bidder and the proceeds distributed in accordance with Islamic law to the beneficiaries named, and per the shares set out, in the confirmed grant.

It appears that at some point the two administrators and some of the applicants made efforts towards the implementation of the order but nothing came of it. By a ruling dated 25th April 2014, the court directed the suit property to be valued by the Government valuer and the value so assigned to bind all the beneficiaries. Ultimately the suit property was valued at Kshs 7 million and by a consent order made on 20th June 2014, the parties adopted the valuation and the 2nd respondent was given 90 days to exercise the option to purchase the shares of the other beneficiaries.

That still did not put the dispute to rest for thereafter the applicants filed against the two administrators two applications seeking leave to apply to this Court. The first application, dated 3rd July 2014 prayed for leave to appeal against the orders of 20th June 2014. They contended that they required such leave because there was no automatic right of appeal and that the orders were obtained by collusion of the two administrators to transfer the suit property to one of them, namely the 2nd respondent.

The second application was dated 3rd January 2015 and in it the applicants prayed for leave to appeal to this Court against the part of the order of 8th March 2013 which allowed the 2nd respondent the first priority to buy the shares of the other beneficiaries. The main grounds in support of that application were again that there was no automatic right of appeal to this Court; the applicants were not aware of the ruling and that they were busy trying to amicably distribute the suit property.

Thande, J. heard those two applications and by a ruling dated 21st day of April, 2016, she allowed the 1st

application and granted the applicants leave to appeal against the order of 20th June 2014. However she dismissed the 2nd application after finding that the applicants were aware of the ruling and that there was an inordinate delay of close to 22 months. Aggrieved by that decision, the applicants have now moved this Court, principally under **rule 39** of the Court of Appeal Rules, for leave to appeal against the decision of 8th March 2013, and for consequential orders regarding the filing of the intended appeal.

While the principles for determining whether to grant leave to appeal to this Court are fairly clear, the parties have crowded and obfuscated the issues by filing unnecessary supporting, replying and supplementary affidavits. We do not intend to be sidetracked or drawn into the parties' internecine skirmishes and will focus on the real issue in the application.

As far as is relevant for this application, the applicants contend that the Law of Succession Act does not grant them, in the circumstances of this case, an automatic right of appeal to this Court. Accordingly they require such leave as a condition precedent. They further contend that their intended appeal has good prospects of success and also raise matters of public interest.

Some of the issues they intend to canvass in the intended appeal are whether joint administrators are allowed to act at cross-purpose. They contend, relying on ***Hancock v. Lightfoot* [3 SW &TR 555]** and ***In the Goods of Francis Nayler, Deceased* [2 ROB. ECC, 406]** that when a joint administration is granted to two persons, they cannot act separately and must act as one administrator. Secondly the applicants contend that the High Court erred by giving the appellant first priority to purchase the shares of the other beneficiaries in the suit property while there was no prayer for that order in the application dated 27th October 2010, which the court allowed. Thirdly the applicants intend to argue that all the beneficiaries, who stood to be affected by the order giving the 2nd respondent first priority to purchase their shares were not heard. Lastly, they will be asking whether an administrator of an estate, as a trustee, could take over or purchase the interests of other beneficiaries without their express concurrence.

The 1st respondent does not oppose the application. In fact he positively supports it.

However the 2nd respondent is of a completely different mind. He perceives the application as an afterthought and submits that the applicants were all along aware of the order giving him the first priority to purchase their interests; that they were represented by an advocate in the proceedings; that they were involved in the valuation of the suit property and that they are guilty of inordinate and unexplained delay in making the application. As regards the merits of the intended appeal, the 1st respondent retorts that it is frivolous and is not arguable, not the least because along the way, parties recorded a consent order which they cannot resile from in the absence of fraud or mistake. He further laments that he will suffer prejudice because he has already mobilized the money to buy out the other beneficiaries and that this litigation must now come to an end. Lastly the 2nd respondent makes a peculiar argument that the application before us is unknown in law because it is neither an appeal nor, an application for review, nor a reference. The 2nd respondent has relied on a number of authorities, such as ***Standard Chartered Bank Ltd & Another v. Abok & Another* [2005] 1 EA 373**; ***Ongeri & Another v. Kyenze* [2009] 1 EA 352** and ***Jayantkumar Vrajlal Shah & Another v. Midco Holdings Ltd & Another, CA No. Nai. 63 of 2000***, which we find to be relevant to an application for extension of time under rule 4 of the Court of Appeal Rules rather than rule 39 under which this application is brought.

We have duly considered this application and the submissions of counsel. To begin with the 2nd respondent's last point, **Rule 39 (b)** provides as follows:

“Where an appeal lies with leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within 14 days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within 14 days of such refusal. (Emphasis added).

The essence of that rule is that a party who has applied to the High Court for leave to appeal to this Court and whose application has been refused, is free to make another application in this Court for leave to

appeal, within 14 days of the refusal by the High Court. In this case, Thande, J.'s ruling was delivered on 21st April 2016 and this application was lodged on 5th May, 2016, which was on the 14th day from the date of the ruling.

The jurisdiction of the Court under Rule 39(b) is an original jurisdiction, much like the jurisdiction of the Court under Rule 5(2)(b) which allows the Court to hear applications for stay of execution, stay of proceedings or injunctions, notwithstanding that similar applications have been heard and denied by the High court. The application before the Court is therefore not an appeal, a reference or application for review of the decision of the High Court.

Turning to the merits of the appeal, it is not disputed that outside section 47 of the Law of Succession Act, that Act does not provide for leave to appeal from the High Court to this Court, and therefore leave was required. That indeed is the reason why the two applications were made before Thande, J. (*See Makhangu v. Kibwana [1995-1998] 1 EA 175*).

The main consideration in determining whether to grant or refuse an application for leave to appeal is whether the intended appeal raises issues which merit serious consideration. In *Sango Bay Estate Ltd & Others v Dredner Bank A. G. [1971] EA 17, Spry V-P*, speaking for the former East Africa Court of Appeal, stated thus:

“As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration...”

And in *Machira t/a Machira & Company advocates v Mwangi & Another [2002] 2 KLR 391*, this Court stated that granting or refusing an application for leave to appeal is a matter within the discretion of the court; that the court ***will only*** refuse leave if it is satisfied that the applicant has no realistic prospects of success on appeal; and that the court can grant leave ***even when it is not so satisfied*** where the issue is of public interest or raises a novel point requiring clarification.

Having carefully considered the issues that the applicants propose to raise in their intended appeal, we are persuaded that they are not frivolous and deserve to be heard and determined on merit by this Court. As the Court stated in *Machira t/a Machira & Company advocates v Mwangi & Another*, even a single issue that merits serious judicial consideration, will suffice.

In the circumstances we allow this application and grant the applicants leave to appeal to this Court. As regards the prayer for consequential orders regarding the filing of the intended appeal, we direct the applicants to file and serve the Notice of Appeal within seven days from the date of this ruling. In the interest of expediting the hearing and determination of the intended appeal, the applicants shall file the record of appeal within 30 days from the date of filing of the Notice of Appeal. Costs of this application shall abide the result of the intended appeal. It is so ordered.

Dated and delivered at Mombasa this 14th day of October, 2016

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