

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

Civil Appeal 162 of 2004

MOHAMED SHEIKH OMAR DAHMAN Sued as the personal representative of

SHEIKH OMAR BIN DAHMAN APPELLANT
AND

ESHA AHMED BIN DAHMAN1ST RESPONDENT
RUGEYA AHMED BIN DAHMAN2ND RESPONDENT
NUR SHEIKH AHMED BIN DAHMAN3RD RESPONDENT
SHEIKHA BINTI SHEIKH AHMED BIN DAHMAN4TH
RESPONDENT

*(An Appeal from a Ruling and Order of the High Court of Kenya at Mombasa (Maraga, J) dated 28th
November, 2003*

In

H.C.C.C.No. 367 of 1999

JUDGMENT OF THE COURT

Having listened to the arguments of Mr. Anjarwalla, learned counsel for the appellant Mohamed Sheik Omar Dahman sued as the personal representative of Sheik Omar Bin Dahman, we remain wholly unconvinced that the orders made by Maraga J, in his Ruling dated 28th November, 2003, are wrong and ought to be set aside as the appellant asks us to do. The two issues raised before Maraga, J were whether the claim made in the superior court were time-barred and whether the affidavit or some parts of the affidavit filed in support of the originating summons ought to be struck out. But both parties agreed before the learned Judge that those issues, particularly that relating to the claim being time-barred had been raised twice before, once before Commissioner of Assize Shah and secondly before Commissioner of Assize, Mrs. Tutui. In disposing of the matter raised before him Commissioner of Assize Shah had held as follows: -

“I have perused the preliminary objection. I agree with Dr. Khaminwa that Ground No. 1 is vague and imprecise. It is not capable of proper application. Ground No. 2 may have substance but as a point of law I need to be satisfied that an executor of an estate of a deceased executor is not liable to the beneficiaries in the earlier estate for accounts and matters arising therefrom. No law has been cited and this point is not amenable to summary disposal. Ground No. 3 is a factual point and not a point of law. All in all, therefore, the preliminary objection fails and directions are to be given on a date to be fixed in the registry.”

The appellant had, through his then advocates M/s J.N. Matemu & Co. Advocates filed a “NOTICE OF PRELIMINARY OBJECTION” and among the three grounds stated in the notice, the first one was:-

“THAT the application emanates from a suit that is already time barred and the provisions of Law relating (sic) challenging testamentary bequests has not been complied with.”

That was the preliminary objection which Commissioner Shah rejected. True the Commissioner did not specifically deal with the issue of the claim being time barred, but that issue was the first ground of objection and if,

“All in all, therefore, the Preliminary Objection fails”

that issue also failed. There was no appeal from that decision; nor was there ever an application for review of decision. The next time the matter was raised before Commissioner Tutui, she dealt with it as follows:-

“I have read the grounds relied upon in the earlier objection raised before Commissioner K. Shah and note that they are repeated in the current grounds of objection. The subject matter of the suit herein involves the distribution of an estate. The parties are blood relations. I am inclined to agree with Dr. Khaminwa that Preliminary Objections must come to an end at one stage to give way to the substantive issues to be decided upon. The court on 25th May, 2000 directed that the matter be set down for directions and once more I call upon the parties herein to proceed with the directions and set down the suit for hearing. The objection by Dr. Khaminwa is sustained.”

The order of Commissioner Tutui specifically referred to the order which had been made earlier on by Commissioner Shah. As we have said the parties agreed before Maraga, J that the issues raised before him had been previously raised before the two Commissioners. In these circumstances, we can find no fault with Maraga, J’s conclusion that those matters were res judicata. Like the Judges of the superior court, we also think the substantive claims raised in the originating summons, irrespective of their merit, should be disposed of by way of a hearing. We accordingly order that this appeal be and is hereby dismissed with costs. Those shall be our orders in the appeal.

Dated & delivered at Nairobi this 13th day of October, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.