



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. E1432 OF 2020

IN THE MATTER OF THE ESTATE OF ADAM SYNGIDURA MARJAN (DECEASED)

FATUMA DAFALA APPELLANT / APPLICANT

V E R S U S

HALIMA MWIMA NOOR.....RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated **8th December 2020** by which **FATUMA DAFALA** (the Appellant/Applicant) seeks the following orders:-

1. SPENT

2. SPENT

3. THAT this Honourable Court be pleased to grant the Applicant stay of any consequential proceedings, pending hearing and determination of the intended Appeal by the Applicant against the Ruling of the Kadhi's Court dated 4th November 2020 and delivered on 4th December 2020.

4. THAT the cost of this Application be provided for.

(2) The Application was premised on **Sections 47, 48(2), 50(2), 50A, 66** and **26** of the **Law of Succession Act**, **Section 79G** of the **Civil Procedure Act**, **Section 3A** of the **Civil Procedure Act**, **Order 50 Rule 1** of the **Civil Procedure Rules** and all other enabling provisions of law and was supported by the affidavit of even date sworn by the Applicant.

(3) The Respondent **HALIMA ABDI NOOR** opposed the Application and filed a Replying Affidavit dated **2nd January 2020**. The Application was canvassed by way of written submissions. The Applicant filed her written submissions dated **3rd February 2021**, whilst the Respondent filed the written submissions dated **12th February 2021**.

BACKGROUND

(4) This matter revolves around the Estate of the late **ADAM SYNGIDURA MARJAN** (hereinafter referred to as the '**Deceased**') who died intestate on **2nd August 2020**. On **15th October 2020** the Respondent petitioned the Kadhi's Court seeking Letters of Administration to the estate by virtue of being the **2nd** wife of the Deceased.

(5) The Applicant and one **YUSUF SYNGIDURA** a son of the Deceased by his first wife (also Deceased) filed an Affidavit of Protest with the Applicant claiming that she was the **3rd** wife of the Deceased. On **4th December 2020**, the **Hon. Kadhi** delivered a Ruling dismissing the Protest filed by the Applicant and **MR. YUSUF SYNGIDURA**. Thereafter on **18th January 2021** the Respondent obtained a Grant of Letters of Administration Intestate. The Applicant avers that using the said Letters of Administration Respondent is proceeding to collect and gather the estate of the Deceased to the prejudice of the Applicant and the children of the **1st** wife of the Deceased. She seeks a Stay of Execution of the Letters of Administration granted to the Respondent pending the hearing and determination of her Appeal. As stated earlier the application for stay was opposed by the Respondent.

ANALYSIS AND DETERMINATION

(6) I have carefully considered the Affidavits on record, the material / documents filed in this matter as well as the written submissions filed by both parties.

(7) The Applicant is aggrieved by the Ruling of the **Hon. Kadhi** which she claims was delivered on **4th December 2020** but was backdated to **4th November 2020**. She submitted that allowing the Grant issued to the Respondent to stand will prejudice the Applicant and cause her substantial loss as the estate will be distributed to her prejudice as the 3rd wife of the Deceased. That she has an arguable appeal with high chances of success. That unless the orders sought are granted the Applicant stands to suffer irreparable harm.

(8) On her part the Respondent urged the Court to take judicial notice of the fact that the Applicant had filed another Appeal over the same matter vide **Miscellaneous Application Number E061 of 2020** which was filed by the firm of **Onyango, Ndolo & Company Advocates** who were previously on record for the Applicant. The Respondent submitted that the Applicant had not demonstrated likelihood of irreparable harm and had not met the threshold required for the grant of a stay pending Appeal.

(9) **Order 42 of the Civil Procedure Rules, 2010** sets out the conditions that must be met in order to merit an order of stay pending Appeal as follows:-

(i) that substantial loss may result to the Applicant unless the order is made;

(ii) that the application has been made without unreasonable delay; and

(iii) that the Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

(10) Firstly in order to merit an order of stay pending Appeal it must be shown that an Appeal has in actual fact been filed. Annexed to the Applicant's Supporting Affidavit is a Memorandum of Appeal dated **8th December 2020**. As such I am satisfied that there is an Appeal filed in this matter. I also note that the decision of the **Hon. Kadhi** was rendered on **4th December 2020** and the present application was filed on **8th December 2020**, barely **four (4) days** after the date of Ruling, I am therefore satisfied that this application was filed in a timeous manner.

(11) The Applicant submits that she is likely to suffer irreparable harm if the Court fails to stay the proceedings in the **Kadhi Court** during the pendency of her Appeal. That she stands to lose her rightful inheritance as one of the widows of the Deceased.

(12) As I understand it the question of whether or not the Applicant is the 3rd wife of the Deceased and therefore a beneficiary to his Estate is one which is yet to be determined by the **Hon. Kadhi**. The question of whether the Marriage Certificate presented by the Applicant to the **Kadhi Court** was genuine or not is a matter yet to be determined. To stay the proceedings before the question of the status of the Application in relation to the Deceased has been determined would defeat the very purpose that the Applicant is seeking to achieve.

(13) The Applicant can only plead "**irreparable harm**" if it had already been determined that she was infact the 3rd wife of the Deceased. This determination is yet to be made. The **Kadhi** in his Ruling stated that there were pending issues which were yet to be determined one such issue being the status of the Applicant. To stay the proceedings would only delay the determination of a critical limb of the Applicant's case. If it is finally determined that the Applicant is indeed the 3rd wife of the deceased then the Grant may be rectified to include her either as co-administrator or as a beneficiary to the estate. In my view there is no harm in the collection and preservation of the estate proceeding pending a determination on this critical issue.

(14) The Grant issued to the Respondent is yet to be confirmed thus the Applicant has no legal authority to distribute and / or dispose of the estate.

(15) In the circumstances I find that the Applicant has failed to prove this limb of irreparable harm.

(16) Finally I find no grounds upon which to grant a stay pending appeal in this matter. The Application herein is dismissed in its entirety. This being a family matter I make no orders on costs.

Dated in **Nairobi** this **31st** day of **May, 2021**.

MAUREEN A. ODERO

JUDGE