



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 255 OF 2001

IN THE MATTER OF THE ESTATE OF SULEIMAN KASSIM DADA(DECEASED)

SAKINABHAI SULLEIMAN KASSAM DADA.....PETITIONER APPLICANT

VERSUS

1. LATFA SULEIMAN KASSAM DADA

2. ZAINAB SULEIMAN KASSAM DADA

3. KHATUNISA SULEMAN KASSAM DADA

4.FATMA SULEIMAN KASSAM DADA.....RESPONDENTS

RULING

1. The deceased herein died testate on 14th October, 2001 leaving behind a widow by the name Sakinabhai S. Kassim Dada, sons Hussein, Mohamed, Iqbal and Daughters, Latifa, Fatuma, Saida Said, Yasmin and Khatunisa. Vide a will dated 3rd September, 2002, the deceased appointed his wife (widow) as the executrix. The grant was confirmed on 3rd March, 2003 with orders that the estate was to be distributed in accordance with the will.

2. According to the will, the deceased expressed his wishes as follows;

(1) To Sakinabai and Yasmin 2/3, undivided share of Mombasa/Block/XV/101 (Plot 101) constituting of two storey building.

(2) In the event of Yasmin's death, her share was to go to her surviving siblings

(3) To Mohamed his 9/21, share in plot No 3763/VI/MN Portreiz

(4) To all his children, popat bothers milling business

(5) Plot No 570/1/III/MN Mtwapa to be sold. 1/3 of the proceeds to be placed in a trust fund to assist family, relatives, friends and persons in need for welfare and education purposes. The fund was to be dissolved after 15 years whereupon the proceeds to be divided amongst his children.

(6) 2/3 proceeds of sale to be divided amongst his children.

(7) To his children, all funds in his bank accounts after payment of all debts, funeral and testamentary expenses

(8) The deceased's sons were to get double of what daughters got. The deceased also appointed Mohamed, Latifa, Saida and Zainab as trustees for Yasmin who is of sound mind.

3. Pursuant to the said confirmation of grant and sale of Mtwapa property, 5 beneficiaries namely, Khatunisa, Saida, Mohamed, Yasmin and Hussien agreed to develop 16 apartments above the existing shops and apartments on plot No Mombasa/Block XV/101. The apartments were to be divided to each beneficiary according to their contribution.

4. At some point, the executrix sought to be discharged from the role of executorship as in her opinion she had fully completed the distribution of the estate. However, some beneficiaries sought some orders directing the executrix to give a full and accurate statement of

accounts in respect of the estate. The court directed the executrix to submit an accurate and full statement of accounts a fact which she did comply with but disputed by some beneficiaries.

5. Parties were directed to file submissions on the contentious issues which were broken down as follows;

(1) The amount contributed by 5 beneficiaries for the construction of flats on Plot No 101.

(2) The existence of Kshs14,632,597 held in fixed deposit account.

(3) Ksh 6,279,159 in Barclays Bank UK

(4) Popat brothers, milling business.

(5) Yasmin's shares

6. Having considered respective parties' submissions, the court delivered its ruling on 5th March, 2021 directing as follows;

(a) the executrix shall forthwith distribute of Ksh 14,846,797 and Kshs 6,279,159 shall be shared amongst the beneficiaries in accordance with the will of the deceased.

(b) this matter shall be mentioned on 16th March, 2021 for directions on the taking of viva voce evidence.

(i) From the executrix on the administration of the estate

(ii) On the cost of construction of the plots on Mombasa /Block XV/101 and contribution of each of the 5 beneficiaries

(iii) On the operations of Popat brothers milling business

(iv) Yasmin's shares

(v) From the executor funds in the fixed accounts.

7. Aggrieved by the said orders, the petitioner (executrix) moved to this court under summons in general form dated 26th March,2021 and filed on 29th March,2021 seeking orders as follows;

(1) Spent;

(2) That pending the hearing and determination of this application, the court be pleased to grant a temporary stay of execution of part 3 of the ruling and orders made by the court on 17th February, 2021 and delivered on 5th March, 2021 in so far as the same directed the petitioner to forthwith distribute Ksh 14,846.279 and Ksh 6,279,159 amongst the beneficiaries in accordance with the will of the deceased.

(3) That pending the hearing and determination of the intended appeal, this court be pleased to grant a stay of the ruling and orders made by the court on 17th February, 2021, and delivered on 5th March, 2021 in so far as the same directed the petitioner to forthwith distribute kshs 14,846,270 and Ksh 6,279,159 amongst the beneficiaries in accordance with the will of the deceased.

(4) That the orders in 2 and 3 above be made subject to such conditions as the honorable court shall deem fit to impose.

8. The application is anchored on the grounds set out on the face of it and averments contained in the affidavit in support sworn on 26th March, 2021 by the applicant/executrix in which she adopted the content of the affidavit sworn by one Suleiman on 12th March,2020.

9. She stated that the court erred in treating the constructed apartments on plot No Mombasa/Block/XV/101 as comprising the estate of the deceased. She further stated that, after selling Mtwapa property, she distributed the proceeds to entitled beneficiaries according to the will hence it was the duty of those beneficiaries to spend their respective shares as they deemed fit.

10. That any interest accruing from the money deposited to the fixed deposit account only belonged to those beneficiaries who had voluntarily deposited their portion of the estate account and that each depositor was at liberty to withdraw his or her share of the deposited amount on a private basis.

11. She averred that, it would be unfair to have the interest accrued from the money held on the fixed account distributed to all the beneficiaries in accordance with the will. That the sum of Kshs14,845,279 does not exist as the same was shared out to each beneficiary according to individual contribution in the fixed deposit account.

12. She further contended that, the court having acknowledged that the issues at hand regarding distribution of the estate was hotly

contested, the court called for parties to render viva voce evidence to prove how the estate was distributed hence the order to distribute cash amongst them Kshs14,848,279 was contrary to this spirit.

13. To prove that she intended to file an appeal challenging the order, she filed a notice of appeal and a draft memorandum of appeal. She claimed that her advocate was awaiting typed court proceedings to formally lodge an appeal (See annexure SSKD-1).

14. Regarding Ksh 6,279,159 in a foreign account, she contended that she had assigned the second respondent to follow up but she had not done so hence she cannot be blamed for non-compliance.

15. In response, Latifa Suleiman Kassim Dada 1st respondent with authority from the 2nd 3rd and 4th respondents swore an affidavit on 14th April, 2021 stating that the executrix was being used and manipulated by their younger brother Mohamed Shaf Suleiman who has hidden her from being accessed by the respondents.

16. She contended that an appeal should not be used to frustrate and abuse the cause of justice by further delaying the case. That the grounds of appeal stated are not meritorious hence cannot be used to obtain stay of execution orders.

17. She averred that the applicant will not suffer any substantial loss by distributing interest accrued from the proceeds comprising the estate. That the said amount was certified as such by the appointed Auditor who filed a report to that effect.

18. When parties' respective counsel appeared in court, they agreed to file submissions in disposing the matter.

Applicant's submissions

19. Through the firm of Wanjiku Mohamed LLP Advocates, the applicant filed her submissions dated 3rd March, 2021. The applicant reiterated the averments contained in the affidavit in support. It was submitted that the applicant has not established the requirements set out under Order 42 rule 6(2) of the Civil Procedure Rules to warrant grant of the orders sought.

20. On the issue of proof of substantial loss, counsel submitted that the applicant has proved that failure to grant the orders sought will negate the core of the intended appeal.

21. According to the applicant, she is likely to be committed for contempt of court if she does not honor the order for distribution and payment of money which does not exist hence the likely substantial loss. That the chances of recovering the said amount from the respondents if paid will be minimal should the appeal succeed. She opined that the respondents will not suffer any loss if the order of stay is granted.

22. Considering the duration taken to file the application, it was contended that the same was within 23 days which period is reasonable. It was further contended that the appeal will be rendered nugatory should the orders be denied.

23. Touching on the distribution of the Kshs14,86,279, she contended that some beneficiaries will benefit twice and those who had deposited their share which is the source of the interest will lose out.

24. The applicants promised to abide by any conditions the court may deem fit and that the likely consequences of not granting the order are so grave than those of granting the same hence sufficient reason to so grant and therefore preserve the subject of the appeal. In support of this proposition, counsel made reference to the holding in the case of **HG E V S M (2020) e KLR** where the court emphasized that the purpose of stay of execution is to preserve the subject matter.

Respondents' submissions

25. The respondents filed their submissions on 10th May, 2021 through Asige and Co. Advocates who contended that the contested sum of Kshs14,632,597 is part of the estate as confirmed by the appointed Auditor hence the applicant will not suffer loss by distributing what belongs to the estate and by extension the beneficiaries. Mr Asige submitted that cash in UK Bank (6,279,159 is in the control of the applicant hence no harm in distributing the same.

26. Touching on the validity of the notice of appeal filed herein, counsel submitted that the notice of appeal referred to is not signed and authorized by the Deputy Registrar. That without a notice of appeal properly filed in court the same cannot confer jurisdiction on the court to issue the orders sought.

27. Learned counsel submitted that there is no proof of any substantial loss likely to be suffered. According to Mr. Asige, the applicant will not suffer any substantial loss by executing a lawful order by distributing what duly belongs to the estate. In support of this contention, counsel referred to the holding in the case of **James Wangalwa and another vs Agnes Naliaka Cheseto(2012) eKLR**. Mr Asige contended that this is an old matter which commenced the year 2001 hence the applicant ought to execute her mandate in accordance with Section 83 (g)& (h) of the Law of Succession.

Analysis and determination.

28. I have considered the application herein, affidavit in support and the response thereof. I have also considered submissions by parties' respective counsel. The application herein has been filed under general form pursuant to Section 47 and 92 of the Law of Succession Act and rule 73 of the Probate and Administration Rules of the same Act. The application is seeking stay of execution of the orders made pursuant to

the ruling delivered on 5th March,2021.

29. Before I endeavour to substantively determine the application, I wish to clarify on the issue of lack of jurisdiction made by the respondent on account of an invalid notice of appeal filed in court by the applicant without bearing the author's signature nor being endorsed by the Deputy Registrar pursuant to Order 42 Rule 15(1) of the Civil Procedure Rules. Order 42 rule 15 (1) of the Civil Procedure Rule provides that;

“when a memorandum of appeal is lodged the court to which such appeal is preferred shall send notice of the appeal to the court from whose decree the appeal is preferred”

30. According to Mr Asige, there is no valid notice of appeal to confer jurisdiction upon the court to exercise discretion to entertain the application and issue any orders it may deem fit. Indeed, jurisdiction is everything and without it a court cannot move any further step. See **Owners of Motor vessels “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) e KLR.**

31. Upon perusal of the court record, the copy of a notice of appeal filed on 18th March, 2021 is duly signed. It would appear the respondent's copy may not have been signed. However, what matters is the court's record or copy. On the other hand, I note that the same is endorsed by the Deputy Registrar who has signed and duly stamped the same. To that extent, Mr. Asige's submission on court's lack of jurisdiction is without merit.

32. Although Order 42 of the Civil Procedure Rules is not specifically provided for in succession matters pursuant to Rule 63 of the Probate and Administration rules, the same principles applicable in granting stay of execution orders can apply under Section 47 of the Law of Succession and rule 73 of the Probate and Administration rules.

33. Section 47 of the Law of Succession provides;

“The high court shall have jurisdiction to entertain any application and determine any dispute under this Act and pronounce such decrees and make such orders as may be expedient.

34. Rule 73 of Probate and Administration rules also does provide;

“nothing in these rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

35. It is clear from the two provisions quoted above that the court has wide discretionary powers to grant or not to grant stay of execution orders if the interest of justice demands. See **Absolom Dova Vs Tarbo Transporters (2013) e KLR** where the court stated that;

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospect that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

36. According to numerous judicial precedents, before a court would consider to grant or not to grant an order for stay, a party seeking such order must prove that; he is likely to suffer substantial loss should the court decline to grant such order for stay; the application seeking such order has been filed within reasonable time and sufficient security has been deposited.

37. In the case of **Vishram Ravji Halai Vs Thornton and Turpin Civil Appeal No Nairobi 15 of 1990 (1990) KLR 365** the court of appeal stated that, whereas the court of appeal's power to grant a stay pending appeal is unfettered, the high court's jurisdiction to do so under Order 41 rule 1 of the Civil Procedure Rules is fettered by three conditions namely; establishment of a sufficient cause, satisfaction of substantial loss and furnishing of security. Further, that the application must be made without unreasonable delay.

38. Besides the above conditions, for purposes of stay of execution pending appeal, the applicant must prove that the appeal is arguable and that the same may be rendered nugatory should the orders not be granted. See **Kenya Shell Limited Vs Kibiru (1986) KLR 440** where the court expressed itself as follows;

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

39. Before I consider the salient issue as to whether the applicant will suffer substantial loss if the orders are not granted or that the appeal will be rendered nugatory, I wish to dispense with the issue of time factor in filing the appeal and deposition of security.

40. The impugned orders were issued on 5th March, 2021 and this application filed on 29th March,2021 translating to 23 days. That period is perfectly within the stipulated period. As to furnishing security, none of the parties submitted on the same. However, the same is within the discretion of the court which in the circumstances of this case I do not find it convenient as it shall be burdensome on beneficiaries who are seeking to share out their father's estate.

41. As to the issue of substantial loss, one would have to look at the issues in controversy. Basically, it is the money that is in contention. The first amount is ksh 6,279,159 which is in a UK Barclays Bank account. According to the deceased's will, his children were to share all monies in bank accounts with sons getting double the daughters entitlement.

42. The money in question is still lying in the UK Bank account. Under Section 83 of the Law of Succession, the executrix is under obligation as the administrator of the estate to distribute the funds to beneficiaries in accordance with the will. She cannot run away from that responsibility by shifting the responsibility to the second respondent. I do not find any harm in executing the order hence no substantial loss will arise. The executrix may need to seek resealing of the grant in UK, access funds and then distribute the same as per the impugned court order.

43. As to the contentious sum of Ksh 14,632,597, the court found that it comprises part of the estate. The applicant claims that the money was out of a few beneficiaries' deposits after the sale of Mtwapa property to which each beneficiary got his or her share. It is this amount which forms the core of the intended appeal. By all means, the subject matter of the appeal must be preserved. To do so, parties must be given an opportunity to exhaust their right of appeal which underpins the right to access to justice. Indeed, if the court does not grant the orders, the applicant will risk committal to civil jail which amounts to substantial loss in terms of curtailment of one's liberty not capable of adequate monetary compensation should the appeal succeed.

44. Equally, I do not find any prejudice to be suffered by the respondents should the orders of stay be granted. Further, the applicant stated that the respondents will not be able to refund the money should the appeal succeed. The respondents have not countered this assertion nor have they established that if paid and the appeal succeeds they will be able to refund.

45. To fortify this position, I draw guidance from the holding in the case of **National Industrial credit Bank Ltd vs Aquinas Francis Wasike(2006)eKLR** where the court of appeal held that ;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an appellant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”.

46. In the circumstances of this case, the respondents did not controvert the applicant's allegation that they may not be able to refund the money if paid and the appeal succeeds. Based on that ground alone, it's clear that the appeal might be rendered nugatory.

47. As to whether the appeal is arguable, I wish not to delve so much on the same as that will be for the appellate court to determine. However, the question whether the respondents are entitled to part of the contested amount is a critical issue in the intended appeal.

48. In a nutshell, I do not find any prejudice if the orders sought are granted. The money in question is well preserved. Accordingly, I do hereby grant orders as follows;

(a) stay of execution in terms of prayer 3 but indicated prayer (5) which I believe is a mistake pending hearing and determination of the intended appeal is allowed;

(b) that order (a) above is subject to the appellant filing the intended appeal within 30 days in default the stay order shall lapse;

(c) the Deputy Registrar to ensure typing of the proceedings within the shortest time possible.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF AUGUST, 2021

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J. N. ONYIEGO

JUDGE