



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 7 OF 2018

HABIBA GUYO..... APPELLANT

VERSUS

ALI MOHAMMED MAGAGAJA.....RESPONDENT

AND

SBM BANK (K) LTDAFFECTED PARTY

RULING

1. By an application dated 19.2.19, Habiba Guyo, the Appellant seeks the following:

1. *Spent*

2. *THAT this Honourable Court be pleased to cite for contempt of Court the manager, SBM Bank (K) Limited, Diani Branch, for failing, refusing an neglecting to comply with the orders of court of 23rd January, 2019 despite having sufficient notice of the same and ability to comply.*

3. *THAT this Honourable Court be pleased to find that the Respondent together with SHABAN MAGAGAJA, MANDISHI MAGAGAJA, MARIAM MAGAGAJA, MWANAJUMA MAGAGAJA, MOHAMED HAMISI MAGAGAJA, ABDALLA MOHAMED MAGAGAJA, FATUMA MAGAGAJA and MOHAMED MOHAJI are in intermeddlers in the estate of the deceased.*

4. *THAT upon finding the above, this Honourable Court be pleased to order that the persons mentioned on prayer 3 above, provide a full account of the monies and properties in their possession.*

5. *THAT this Honourable Court be pleased to find that SBM Bank (K) Limited as negligent for knowingly, intentionally, fraudulently and negligently aiding in the intermeddling of the deceased's estate.*

6. *THAT the Honourable Court be pleased to order and direct the said bank to pay damages for negligence to the estate of the deceased to be assessed by this Honourable Court.*

7. *THAT costs of this Application be provided for.*

2. The grounds upon which the Application are premised are that this Court by a consent order of 23.1.19 (the Order) directed that Kshs. 126,800/= be released from the estate of the deceased, for payment of school fees and school related expenses of the deceased's minor children. The order was extracted and served upon SBM Bank (K) Limited Diani, Branch, (the Bank) where the deceased's account is held. The account receives monies generated from the deceased's estate. In spite of confirming receipt of the order and promising to comply with the same, the branch manager unreasonably, willfully and deliberately refused to do so. The Bank is therefore in contempt of said orders of this Court.

3. The Applicant further alleges that the despite being aware of the death of the deceased, the said Bank changed signatories to the account. The Bank has illegally issued cheque books for the said account and honoured over-the-counter cheques and has also given overdrafts on the same account. The Bank ought to compensate the estate for the loss of over Kshs. 5 million occasioned by its actions.

4. The Applicant further contends that since the demise of the deceased, the Respondent together with his siblings Shaban Magagaja,

Mandishi Magagaja, Mariam Magagaja, Mwanajuma Magagaja, Mohamed Hamisi Magagaja, Abdalla Mohamed Magagaja, Fatuma Magagaja and one Mohaji Mohamed have intermeddled with the estate of the deceased. Not being personal representatives of the deceased, they have withdrawn over Kshs. 5,524,000/= from the deceased's bank account and should account for the same. The Applicant claims that as a result of the actions of contempt of court and intermeddling by the Bank, the Respondent and his siblings, the deceased's minor children are suffering for lack of basic provisions. The Applicant urged that the Application be allowed as prayed.

5. The Respondent has by his replying affidavit sworn on 29.3.19 opposed the Application. He avers that the Bank account belongs to Magagaja Farm a family business of which the deceased was the Chairman. Being a running business with recurrent expenditure and bills, it was critical for new signatories to be appointed to operate their account for the benefit of the estate. He further averred that at a family meeting held on 8.2.11 presided over by the Diani Location Assistant Chief, he and 3 other members of the family were selected to become the bank account signatories.

6. The Respondent further alleged that prior to his demise, the deceased had, on authority of the family, obtained a financial facility of Kshs. 750,000/- from Agricultural Finance Corporation for purchase of a Yamaha out board engine, fishing nets, tackle and bait. The amount was paid to the deceased and Shaban Mohamed Magagaja jointly, for the benefit of the family business. The said loan facility has continued to be serviced by the signatories of the bank account on behalf of the family. All withdrawals made by the Respondent from the bank account have been fully authorized by all family members, and are for the benefit of the estate and beneficiaries.

7. The Respondent has further claimed that the Applicant was divorced on 25.10.16 and was therefore not a wife of the deceased at the time of his demise. He further claimed that the Applicant's minor children were all born out of wedlock and cannot inherit under Islamic law. The position was similarly set out in the Kadhi's judgment. To the Respondent therefore, neither the Applicant nor her children can derive any benefit from the estate. The Respondent further accuses the Applicant of seizing, to give effect to the consent order, several cattle and a motor vehicle of the estate, to the exclusion and detriment of the other beneficiaries.

8. Abdulhakim Said, the Relationship Manager of the Bank's branch in Nyerere Avenue, Mombasa and formerly the Bank's Branch Manager, Diani Branch confirmed that the deceased operated a corporate account under the name and style of Magagaja Farm. At the time the Order was served upon the Bank, the account No. 0040000087 was in the negative as it had surpassed its overdraft limit and therefore the Order could not be satisfied. This was unlike on 15.8.17 when the payment of Kshs. 50,000/= was made as the overdraft was not overdrawn.

9. Abdulhakim Said further averred that the revolving overdraft facility of Kshs. 700,000/= was renewed on 27.11.17. The renewal was done on the strength of the letter the Bank received from the Deputy County Commissioner, Msambweni dated 15.2.17 which was accompanied by the deceased's burial permit and death certificate and minutes of a family meeting. Further, because the bank account continued to receive payments from creditors mainly hotels from within Diani, he made the decision to keep the bank account operational. Additionally, the family also appointed signatories to the bank account hence the management of the business and by extension the accounts held by the business were sustained. The Bank's actions were solely for the benefit of Magagaja Farm, the account holder whose authenticity was confirmed by the Deputy County Commissioner. As a demonstration of its commitment to facilitate the smooth running of the business, the Bank did at the request of the Applicant's lawyer's advocates vide their letters of 28.8.12 and 7.9.18 release funds for payment of electricity and for managing the business.

10. Parties filed their written submissions together with authorities as directed by the Court. The Applicant abandoned prayer 2 of the Application. She says she was able to dispose of some of the assets in execution of the consent order of 23.1.19. The Applicant listed the following 5 issues for determination by the Court:

- i) Whether the Respondent and the persons listed in prayer 3 of the Application are intermeddlers.
- ii) Whether the said persons must give account of the monies and properties in their possession.
- iii) Whether the Bank is negligent in knowingly aiding in the intermeddling of the deceased's estate.
- iv) Whether the Bank is liable for payment of damages to the estate of the deceased for such negligence.
- v) Whether costs should be awarded to the Applicant.

11. As the Court commences to consider the issues, it must be noted that the lower Court record is not before this Court. It is therefore not known to this Court what transpired in that Court. All that is before this Court is the memorandum of appeal from which it is noted that the issue of the beneficiaries of the estate of the deceased is not settled. Indeed in her memorandum of appeal the Applicant states that the Hon. Kadhi erred in law and fact in that he failed to determine beneficiaries of the estate of the deceased. He also failed to determine the properties forming the estate. Additionally, he failed to determine the mode of distribution of the estate of the deceased and the specific shares of each beneficiary.

12. Given the above grounds as contained in the memorandum of appeal, can the Court possibly consider and determine whether the Respondent and the persons listed in prayer 3 are intermeddlers and whether they should give account of the properties in their possession? The Court finds that these are the very issues that have been raised in the memorandum of appeal. These matters are therefore best left for consideration and determination in the Appeal. To delve into the parties' rival arguments in respect of the said matters and to make a determination thereon at this stage, will in my view short circuit and preempt the outcome of the Appeal pending before this Court.

13. What about the role of the Bank? Can this Court entertain the questions whether the Bank was negligent by aiding the alleged intermeddling with the estate of the deceased and whether the Bank is liable to pay damages to the estate for its alleged negligent acts? The Court is of the view that these are new matters that were not raised in the memorandum of appeal. The Applicant, having invoked the appellate jurisdiction of this Court, cannot raise these new issues by way of an application in this Court sitting as an appellate Court.

14. For this Court to deal with the issue of the Bank's alleged negligence, the Applicant must demonstrate that the same had been dealt with in the lower Court. This, the Applicant has not done. It is trite law that before an issue is raised in an appeal, it must first be the subject matter in the trial Court. This was the holding in Geoffrey M. Asanyo & 3 others v Attorney General [2018] eKLR, where the Supreme Court had this to say about a matter before it that had not been dealt with in the lower superior courts:

“Firstly, it is trite that a matter coming on appeal to this Court must have first been the subject of litigation before the High Court and risen through the judicial hierarchy on appeal ...”

15. The Court notes that the Applicant filed the memorandum of appeal herein in February 2018. The record of appeal is yet to be filed. To move this matter forward, it is necessary that the Applicant files the record of appeal so that the appeal is heard and determined expeditiously.

16. The upshot of this Ruling is that the Application dated 19.2.19 lacks merit and the same is hereby dismissed. I direct that each party bears own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 27th day of September 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... **for the Respondent**

..... **for the Affected Party**

..... **Court Assistant**