



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

HCCC NO. 156 OF 2012

FEISAL MOHAMED

(Administrator to the Estate of MARY NJERI).....**PLAINTIFF/RESPONDENT**

VERSUS

FAUD MOHAMMED ALI

(Administrator to the Estate of Mohamed Ali).....**DEFENDANT/APPLICANT**

RULING

A. Introduction

1. This is a ruling for the application dated 8/07/2019 in which the applicant seeks stay of judgement delivered on the 8/03/1994 and the decree of 5/04/2012 pending hearing and determination of Nairobi Kadhis Court Succession Case No. 14 of 2019 with respect to title no. Embu/Municipality/498. The applicant also seeks stay of any further proceedings in this matter until the determination of Nairobi Kadhis Court Succession Case No. 14 of 2019.
2. It is the applicant's case that Mohamed Ali and Mary Njeri jointly owned property title no. Embu/Municipality/498 and after their death in 18/12/2018 and 13/09/2017 and subsequently by dint of section 61 of the Land Registration Act registration of any transfer can only be through transmission or transfer by personal representation upon confirmation of grant.
3. The applicant further states that with exception to the application for letters of administration ad litem for purposes of suing or defending suit by the respondent, no succession cause has been filed in respect of the estate of Mary Njeri.
4. The applicant further states that the main succession proceedings in respect of the estate of Mohamed Ali were filed in Nairobi Kadhis Court Succession Case No. 14 of 2019 and restriction orders in respect of the suit property title no. Embu/Municipality/498.
5. The applicant further states that under sharia law, Mary Njeri having pre-deceased Mohamed Ali then he was entitled to benefit from the estate of Mary Njeri. Further it is stated that the respondent, being administrator ad litem over the estate of Mary Njeri is laying a claim to benefit from the estate therein as well as that of Mohamed Ali.
6. The applicant states that succession questions arise before this court and since this court is not sitting as a succession court, it should down its tools and await for any further judgement from the succession court being the Nairobi Kadhis Court Succession Case No. 14 of 2019.
7. The applicant further states that the application by Mary Njeri (now deceased) to have the Deputy Registrar execute requisite transfer forms on behalf of Mohamed Ali (deceased) is overtaken by events through operation of law and thus cannot be granted.
8. The applicant in a further affidavit deposed on the 30th October 2019 stated that he had since come to learn that there was a succession cause filed in respect of the Estate of Mary Njeri by Mohamed Ali that was pending before the Muranga Kadhis Court specifically Succession Cause No. 2 of 2018.
9. In rejoinder, the respondent file grounds of opposition dated 5th August 2019 in which he states that the instant application is res judicata. Further, the respondent states that the matter pending Kadhi's Court will not reverse the judgement of this Court dated 8/3/1994 as it relates to the estate of Mohamed Ali Abdalla and not Mary Njeri.

B. Applicant's Submissions

10. It is submitted that the instant application is not res judicata as the issues raised directly or substantially in the former applications. The applicant submits that the instant application seeks to stay the judgement of this court dated 8/3/1994 pending determination of the Kadhis Court Succession cases as that decision shall have ramifications on the share or holding of the property whereas their previous application sought stay and setting aside of the judgement delivered on 8/3/1994 and consequential orders of 5/4/2012 and for the applicant to defend the matter.

11. The applicant further submits that the succession proceedings for the two estates are pending before the Kadhis Courts and as the current parties hold letter of administration ad litem with no confirmed grants, no partitioning or transfer of the suit land can be effected. Further, it is submitted that as Mohamed Ali died after Mary Njeri, he is entitled to inherit from the estate of Mary Njeri under Islamic Law.

12. It is further submitted that since there are already interim preservation orders emanating from Nairobi Kadhis Court Succession Case No. 14 of 2019, it is in the interest of justice to allow the instant application.

13. The applicant submits that no request or demand has been made to him to execute or transfer or partition documents as he can only have locus to execute such transfer or partition documents upon confirmation of grant. Reliance is placed on the case of **Re Estate of Hezekiah Mathara Gathende (deceased) [2010] eKLR** where it was held that provisions of the law give no room for discretion by the court to allow such a sale some estate properties before the confirmation of grant.

C. Analysis & Determination

14. This court has gone through the evidence tendered and affidavit filed in this cause as well as the submissions filed by the applicant in support thereof. It is my considered view that the issues for consideration herein are *whether the instant application is res judicata and also whether the applicant is entitled to orders for stay of judgment in this case pending determination of Nairobi Kadhis Succession Cause No. 14 of 2019.*

15. It is the applicant's case that there is a pending application dated 14/11/2016 in this instant suit where the deceased Mary Njeri had moved court for the Deputy Registrar to sign transfer documents in her favour after the deceased Mohamed Ali refused to sign the documents as emanated from the judgement of this court of 8/03/1994.

16. The applicant states that proceedings in this court should be stayed pending the determination of the succession proceedings before the Kadhis Court as the same is likely to have an effect on the sharing of property title no. Embu/Municipality/498. In any case, the applicant states that neither he nor the respondent has any powers to transact with Embu/Municipality/498 as the grants they hold are merely for purposes of instituting or defending suits and have not been confirmed. The respondent opposes the application on the grounds that its res judicata.

17. On whether the instant application is res judicata it is my considered opinion that the instant application is not res judicata as the instant application seeks to stay the judgement of this court dated 8/03/1994 pending determination of the Kadhis Court Succession cases as that decision shall have ramifications on the share or holding of the property whereas their previous application sought stay and setting aside of the judgement delivered on 8/03/1994 and consequential orders of 5/04/2012 and for the applicant to defend the matter.

18. The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions such as **Daniel Walter Rasugu Nbi HCCC No 15 of 2006; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000; and Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR.** The guiding legal principles gathered from these cases may be summarized as follows: -

“The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.

The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.

In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.

In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

19. Applying the foregoing test, the court is aware that the parties herein are children of a husband and wife who were co-proprietors of plot L.R. No. 112/498 in equal shares. The respondent represents his mother Mary Njeri who predeceased one Mohamed Ali Abdalla who is represented by the applicant. It has been submitted before this court that there exists two succession proceedings in Kadhis Court in Muranga and Nairobi.

20. In Muranga Kadhis Court Succession Cause No. 2 of 2018, Mohamed Ali had petitioned court for letter of administration over the estate of his deceased wife Mary Njeri. Before the matter was concluded, Mohamed Ali passed on necessitating the filing of Nairobi Kadhis Court Succession Case No. 14 of 2019 by the applicant herein.

21. It is my considered view that the subject matter of the instant suit, property title no. Embu/Municipality/498 is now subject of succession proceedings in Kadhis Court in Muranga and Nairobi. In my considered view, no transactions can be carried out on the suit property pending the confirmation of grant issued to the parties in this application herein. As this court is not a probate court, it lacks jurisdiction to entertain

any proceedings touching on the suit property pending the determination of the cases before the Kadhis Courts.

22. In the interest of justice, proceedings in this case and any order affecting ownership of LR. No. Embu Municipality/1112/498 must be put on hold pending distribution of the estate of the deceased parties namely Mohamed Ali Abdalla and Mary Njeri.

23. The application dated 8/07/2019 is meritorious. It is hereby allowed to the effect that there be a stay of further proceedings in this suit pending hearing and determination of Nairobi Kadhis Court Succession Case No. 14 of 2019.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Kassim for Applicant

Mr. Omulama for Ms. Ndorongo for Respondent/Plaintiff