



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 4 OF 2018

YUSUF KARAMA TIMIMI.....APPELLANT/APPELLANT

VERSUS

KARAMA MOHAMED TIMIMI.....INTERESTED PARTY

AND

AMINA SHEIKH MOHAMED.....BENEFICIARY/RESPONDENT

RULING

1. By a Notice of Motion dated 14.2.18, Yusuf Karama Timimi the Appellant/Applicant herein seeks stay of execution of the *ex parte* orders (the Orders) of the Hon. Senior Kadhi Sheikh Khamis Ramadhan of 25.1.18 and all other consequential proceedings thereof pending the hearing and determination of the Appeal filed herein.

2. The background of this matter is that Mohamed Karama Abeid (the deceased) died on 15.1.15. Karama Timimi, the Appellant/Applicant is a brother of the deceased. The 2 brothers were business partners and jointly held various properties in Mombasa and Mariakani. By an Originating Summons No. 209 of 2016 (O. S.) in the Kadhi's Court at Mombasa dated 23.9.16 (the Originating Summons) the Appellant/Applicant sought a determination of the estate of the deceased, release from *dhimma* in relation to the estate of the deceased and mode of distribution of the estate to the deceased's rightful shares.

3. There is another matter in the Kadhi's Court, Succession Cause No. 167 of 2015 in respect of the same estate filed by one Ali Mohamed Karama a son the deceased. He sought a determination of the estate of the deceased, his heirs and their respective shares in the estate. He further sought that **Amina Sheikh Mohamed one of the widows of the deceased (the Beneficiary/Respondent herein) be ordered to submit all rent proceeds from January to date for distribution amongst the heirs of the deceased and to surrender to the Court all ownership documents of the properties of the estate. In his judgment of 25.4.17, the Hon. Kadhi determined the assets consisting of the vast estate. He determined that the heirs of the Deceased were 2 widows entitled to 6.25% each, 5 sons entitled to 15.909% each and 4 daughters entitled to 7.954% each. The said Ali Mohamed Karama was dissatisfied with the judgment and preferred Civil Appeal No. 16 of 2017. He also filed an application for stay of execution dated 5.5.17 in the Kadhi's Court and obtained stay orders pending the hearing and determination of the appeal.**

4. Pursuant to an application dated 23.1.18 in O. S. No. 209 of 2016 the Beneficiary/Respondent obtained Orders which directed the Appellant/Applicant to account to the Court for the net monthly profit and 50% thereof in Bamburi Meats Limited, Guraya Butchery and Kasemeni Investments Company Limited. The Orders further directed the Appellant/Applicant to pay to the Beneficiary/Respondent the sum of Kshs. 900,000/= being 3 months remittance for her needs and her children and further to continue remitting the sum of Kshs. 300,000/= to the Beneficiary/Respondent every succeeding month until Appeal No. 16 of 2017 is heard and determined.

5. It is in respect of these orders that the Appellant/Applicant seeks stay and against which the Appeal herein has been filed. The Application is founded on the grounds that the Appellant/Applicant was the Petitioner in O. S. No. 209 of 2016 that **the Beneficiary/Respondent** obtained the Orders which were substantive and final, pursuant to her *ex parte* application dated 23.1.18; that the said application and the Orders were served upon the Appellant/Applicant on 29.1.18 with no indication of *inter partes* hearing; that the Interested Party was also not served and did not participate in the proceedings; that on 8.5.17, stay had been granted in Succession Cause No. 167 of 2015 affecting the estate of the Deceased and O. S. No. 209 of 2016. The position of the Appellant/Applicant was that unless stay is granted, he risks being cited for contempt and execution may issue rendering the filed Appeal nugatory.

6. In her Replying Affidavit, the Beneficiary/Respondent averred that O.S. No. 209 of 2016 and Suit No. 167 of 2015 are substantially different and further that the stay orders in Suit No. 167 of 2015 have little bearing in OS No. 209 of 2016. She further avers that the Application is defective as the Appellant/Applicant has failed to offer security as required by Order 42 Rule 6 (2) of the Civil Procedure

Rules. The Beneficiary/Respondent contends that the Orders gave her and her children interim relief by way of maintenance, upkeep, medical and school fees pending the hearing and determination of Appeal No. 16 of 2017. The Appellant/Applicant failed to disclose to the Court that upon the demise of the deceased, he paid her about Kshs. 300,000/= monthly for upkeep for her and her children which he stopped after a few months leaving them destitute.

7. I have given due consideration to the Application and the rival oral submissions as well as the authorities cited. I have also perused the files in respect of Succession Cause No. 167 of 2015 and Civil Appeal No. 16 of 2017. It is noted that OS No. 209 of 2016 and Suit No. 167 of 2015 are intertwined. They both relate to the estate of the deceased. Succession Cause No. 167 of 2015 was concluded with the judgment of **25.4.17 against which Civil Appeal No. 16 of 2017 was filed on 5.5.17. The judgment was however stayed by the Kadhi's Court pending the hearing and determination of the appeal. Other than the memorandum of appeal, nothing else has been filed. There is no record of appeal filed 1 year later. The main hearing of the OS No. 209 of 2016 is yet to take off.** It is against this backdrop that this application must be considered.

8. Grant of stay of execution of an order pending appeal is discretionary. Order 42 rule 6 (2) contains the factors that the Court must consider in exercising its discretion in determining whether or not to grant a stay of execution:

"(2) No order for stay of execution shall be made under subsection (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant"

9. Was the Application for stay made without considerable delay? The Orders were made on 25.1.18. The Application for stay was filed on 14.2.18, less than 30 days after the Orders were made. I am satisfied that the Application was filed without unreasonable delay.

10. On the issue of substantial loss, the Appellant/Applicant, argues that the fact that he was not given an opportunity to be heard, he was condemned unheard and that that amounts to substantial loss. The Court does note that the Application was heard *ex parte* and the Orders granted. In J M K v M W M & another [2015] eKLR, the Court of Appeal observed:

"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456, Nyarangi, JA asserted at page 459:

"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."

At **page 460** the learned judge added:

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

And in MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206, at page 210, this Court stated as follows:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

11. From the foregoing holding, the requirement to accord a party the right to be heard, which is a rule of natural justice, cannot be overemphasized. As the Court of Appeal observed, it is important to hear a person who is likely to be adversely affected or prejudiced by a decision before it is made. The record shows that the Application was heard *ex parte* without the participation of the Appellant/Applicant. The Appellant/Applicant asserts that he suffered loss by reason of not being heard. He is also apprehensive that any money paid to the Respondent/Beneficiary will not be recovered thereby occasioning him substantial loss.

12. As I consider whether to exercise my discretion to grant the orders sought, I must tie the above with the principle of substantial loss set out in Order 42 Rule 6 of the Civil Procedure Rules. In Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63, that;

"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."

13. The Orders directed the Appellant/Applicant to account to the Court for the net monthly profit and 50% thereof in Bamburi Meats Limited, Guraya Butchery and Kasemeni Investments Company Limited. The Orders further directed the Appellant/Applicant to pay to the Beneficiary/Respondent the sum of Kshs. 900,000/= being 3 months remittance for her needs and her children and further to continue remitting the sum of Kshs. 300,000/= to the Beneficiary/Respondent every succeeding month until Appeal No. 16 of 2017 is heard and determined. In the OS No. 209 of 2016, the Appellant/Applicant pleaded that he co-owned the above businesses with the deceased. The

Appellant/Applicant has not demonstrated how accounting to the Court for the deceased's 50% of the net profit will cause him substantial loss or indeed paying to the Beneficiary/Respondent and her children the sum ordered from the estate's share of the businesses. The Appellant/Applicant has a duty to do more than merely state that substantial loss will or has resulted. He must prove specific details and particulars of the substantial loss that he has or stands to suffer if the orders sought are not granted. This he has not done.

14. The Appellant/Applicant contends that there is reasonable fear that any money paid to the Beneficiary/Respondent will not be paid back thus the Appeal herein will be rendered nugatory if the orders sought are not granted. In the case of Cannon Assurance Company Ltd v Isaiah Makutwa Kubondo [2017] eKLR, Jaden, J. cited the following holding of the Court of Appeal in Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a 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 applicant 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 – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

15. From the foregoing holding of the Court of Appeal, it is clear that the Appellant/Applicant bears the legal duty to prove that the Appeal herein will be rendered nugatory because the Beneficiary/Respondent would be unable to pay back the amount ordered by the Hon. Kadhi. The Beneficiary/Respondent and her children are legal heirs of the deceased, a fact that is not disputed. The Court notes that the estate of the deceased is indeed vast. My own view is that any amount paid to the Beneficiary/Respondent and her children as interim relief pending the hearing and determination of the Appeal herein and Civil Appeal No. 16 of 2017 if it is ever prosecuted, will be taken into account during the distribution of the estate of the deceased. The Appellant/Applicant's fear and apprehension is therefore unreasonable and unfounded.

16. Having taken all factors into account herein and balancing the interests of the parties, I find that if the orders sought herein are granted there is a likelihood that the Beneficiary/Applicant and her children as heirs of the deceased will suffer great prejudice. In the result I decline to grant the orders sought. The justice of the case requires that the Appeal herein be heard expeditiously. I therefore direct that the Appeal be fixed for hearing on priority basis. There shall be no order as to costs

DATED, SIGNED and DELIVERED in MOMBASA this 31st May 2018

M. THANDE

JUDGE

In the presence of: -

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

.....**for the Interested Party**

.....**Beneficiary/Applicant**

.....**Court Assistant**