



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1213 OF 2010**

**IN THE MATTER OF THE ESTATE OF MOHAMED ISMAIL IBRAHIM (DECEASED)**

**BETWEEN**

**SHARATH HALEY NEAVE (also known as**

**SHARATH ISMAIL IBRAHIM).....1<sup>ST</sup> OBJECTOR**

**SHAREEN STEFANI NEAVE (also known as**

**SHAREEN ISMAIL IBRAHIM).....1<sup>ST</sup> OBJECTOR**

**AND**

**HAFIZA KHANAM ISMAIL.....PETITIONER**

**RULING**

1. On 11<sup>th</sup> July 2016 this court delivered a ruling in which a grant of probate with Will annexed was issued to the petitioner Hafiza Khama Ismail. It was found that the objectors were not the daughters of the deceased, and not beneficiaries of his estate. The objectors were aggrieved by the decision and filed an appeal to the Court of Appeal. The notice of appeal was lodged on 15<sup>th</sup> July 2016. On 30<sup>th</sup> April 2018 they filed the present motion seeking the stay of the hearing of the application of the confirmation of the grant until the appeal is heard and determined. It is material to point out that in the ruling that is subject of the appeal, the court directed the petitioner to file an application within 60 days to confirm the grant. That application was filed on 28<sup>th</sup> September 2017. The objectors fear that if stay is not granted the application to confirm the grant will be heard and the estate shared out to their exclusion. The estate was estimated in the petition to be worth about Kshs.40 million. It comprised shares in companies, monies in various accounts, a plot in UK and a house in Kenya on LR No. 209/7466.

2. The petitioner opposed the application. It was her case that the objectors had taken one year and nine months to file the application for stay; that since the filing of the appeal they had not served the record of appeal; and, therefore, the application was only calculated to frustrate the confirmation of the grant and the subsequent distribution of the estate of the deceased.

3. The counsel for the petitioner filed written submissions on the application. I have considered them.

4. Under **Order 42 rule 6** of the **Civil Procedure Rules**, the provision under which the application was brought, no stay of execution or proceedings pending appeal shall be made unless 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 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.

5. The objectors are exercising their right to appeal the decision of this court. But, that has to be balanced against the ruling granted in favour of the petitioner who is entitled to proceed to confirm the grant and distribute the estate left by the deceased (**M/s Fort Reitz Maternity –v- James Karanga Kabia, Civil Appeal No. 63 of 1997**). In the authorities cited by the petitioner, especially in **Christopher Ndolo Mutuku & Another –v- CFS Stanbic Bank Ltd HC (Commercial and Admiralty Division at Nairobi) CC No. 74 of 2011**, it was emphasised that in dealing with the application for stay of proceedings pending appeal the court is dealing with the exercise of judicial discretion whose sole intention is to do justice to the parties given all the facts of the case. The court will consider, among other things, the need for expedition in

the disposal of the case, and the optimum utilisation of the scarce judicial time. Lastly, the court has to consider whether the application has been brought timeously.

6. In the Matter of the **Estate of Njoroge Kungu (Deceased), Kungu Muthua –v- James Icharia Kungu, HC Succession Cause No. 3051 of 2012** at **Milimani Law Courts** the court was dealing with a similar application when it observed that the requirement of proof that the application was brought within reasonable time and without undue delay plays the role of protecting the interests of both the applicant and the respondent. It protects the applicant's right to appeal the decision that has aggrieved him, but also protects the interests of the respondent in whose favour the orders were issued. The court has to consider the time the applicant took to file the application for stay of the decision.

7. But the more important question is what loss or prejudice the applicant will suffer if the application for stay is not allowed. It is not just any loss or prejudice that is the issue.

8. It was to be considered that, in seeking stay, the applicant is asking that the subject matter of the case be preserved pending the hearing and determination of the appeal. He is saying that if the application for stay is not granted, the appeal if successful, will be rendered nugatory (**Otieno –v- Ougo & Another (No. 2) [1987]KLR 400**).

9. It cannot be denied that the objectors were not prompt in bringing this application. One year and nine months was a long time. No proceedings were required to file this application, after the notice of appeal was filed. It was submitted on behalf of the petitioner that there was gross and inexcusable delay in filing the application for stay. Should the application be granted under the circumstances?

10. Before that is decided, I appreciate that if the application is not allowed, the petitioner will proceed to confirm the grant and share the estate of the deceased. The objectors' case was that they were daughters of the deceased who were entitled to benefit from the estate. The court found against them, and this is why they are challenging the decision on appeal. If the grant is confirmed and the estate is distributed, even if the appeal were to succeed, they will have nothing to share. The appeal will have been rendered nugatory. Bearing this in mind, and considering that the objectors delayed in bringing the application, I make the following orders:-

- (a) the objectors shall have stay of proceedings of 90 days to enable them ask for, and obtain stay in the Court of Appeal;
- (b) if the 90 days elapse, and they have no stay from the Court of Appeal, the petitioner shall proceed to have the application for confirmation heard and determined; and
- (c) because the objectors have been indulged, they will pay the costs of this application.

**DATED and DELIVERED at NAIROBI this 18<sup>TH</sup> day of DECEMBER 2018.**

**A.O. MUCHELULE**

**JUDGE**