



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
SUCCESSION CAUSE NO. 380 OF 2008

ABDISATAR HAJI MOHAMED

ASHA MOHAMEDAPPLICANTS

VERSUS

OMAR MOHAMED

**ALI AHMED MOHAMED
RESPONDENTS**

RULING

1. By a Notice of Motion dated 25.2.16 and filed under Certificate of Urgency, the Appellant/Applicant sought the following orders:

- a) Spent;
- b) That pending the hearing and determination of the appeal preferred from the ruling/order of this Honourable Court dated 11.2.16 there be a stay of execution and or (sic) the said order.
- c) Spent.
- d) That there be an order for the costs hereof.

2. The Application is founded on the grounds set out on the face of the application and on the facts set out in the affidavit of Abdisatar Haji Mohamed, one of the Applicants sworn on 24.2.16. In that Ruling, the Court made the following orders:

- a) That Abdi Satar Haji be and is hereby restrained whether by himself, his agents, servants or representatives from in any manner meddling in the administration of the estate of the late Haji Mohamed Adam or any manner interfering with the estate or properties comprised thereof;
- b) That Abdi Satar Haji be and is hereby ordered by himself, his agents, servants or representatives to deposit in Court all the title documents which he is holding in respect of property forming part of the estate of the late Haji Mohamed Adam;
- c) That Fatuma Mohamed and Asha Mohamed do produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings

therewith from 12.7.00 up to the date of the account within 60 days of the date hereof;

d) That this matter be mentioned on 24.5.16 to confirm compliance and for directions;

e) That costs shall be in the cause.

The Applicant's Case

3. The Applicant being dissatisfied with the Court's decision filed a Notice of Appeal on 19.2.16 under Rule 74 of the Court of Appeal Rules.

4. In paragraph 4 of the Supporting Affidavit, the Applicants set out in detail the grounds upon which they intend to rely on in the Appeal. They further state that the Appeal raises substantial grounds for determination. It is the Applicants' case that there is a likelihood that the affairs of the estate may be fundamentally interfered with or altered if the orders sought are not granted thereby prejudicing the appellate process and occasioning substantial loss to the Applicants and other beneficiaries of the estate.

5. In his oral submissions before Court, Mr. Kurgat for the Applicants prayed for stay of the order of this Court pending the filing and hearing of the appeal. The reasons he gave for seeking stay are that all the parties herein are Muslims and that Muslim law applies to them under Article 170 of the Constitution. He submitted that this is an arguable issue which would be rendered nugatory if the stay is not granted. He cited the case of *Nguruman Limited v. Shimpole Group Ranch & Another* [2014] eKLR where the Court of Appeal said that if an order is a positive one then there is need to grant stay to avoid the matter being rendered nugatory.

6. Counsel further relied on the case of *Ashraf Abdu Kassim v Karar Omar & 3 others* [2014] eKLR and said that the point of Islamic law would be argued at the Court of Appeal. On the issue of irreparable damage, Counsel cited the case of *Reliance Bank v. Norlake Investments Ltd East Africa Law Reports* [2002] 1 EA 218 (CAK) and *Kenya Breweries Limited v Kiambu General Agencies Limited* and argues that if the orders sought are not granted, there will be irreparable damage. He also cited the cases of *Bull v. Rent Restriction Tribunal 1982* and *Kenya Shell Limited 1986 KLR* though he did not state the relevance of these cases.

7. In response to the Replying Affidavit, Counsel argued that the Respondents did not address the issue of stay but have speculated on the intention of the Applicants.

The Respondents' Case

8. In his Replying Affidavit sworn on 9.3.16, Ali Ahmed Mohamed one of the Respondents states that the orders of the Court of 11.2.16 did not amount to a revocation of any grant; that the orders were aimed at preserving the estate and ensuring accountability and law and order in the administration of the estate. He claims the application betrays a desire to perpetuate illegalities, lawlessness and lack of accountability in the administration of the estate. He further claims that despite being served with the court order, Abdisatar Haji Mohamed is still meddling with the estate. It is the Respondents' argument that there are no valid grounds established to warrant granting the orders sought.

9. In his submissions on behalf of the Respondents, Mr. Omondi urged the Court to dismiss the Application. He submitted that the issue of whether or not Islamic law should have been applied as set out in paragraph 4 of the Supporting Affidavit does not assist the Court. He argued that what the Applicants must show is whether there will be substantial loss and they must also provide security. He argued that whether the appeal has prospect of success in for an application for stay in the High Court and not the Court of Appeal.

10. Counsel further submitted that the orders made by the Court on 11.2.16 were aimed at preserving and securing the estate and that granting a stay would not preserve the estate or ensure proper administration thereof. He further argued that the Court ordered accounts and wondered why anyone who claims to be

lawfully administering the estate want to stay the giving of accounts. Counsel further submitted that the test for irreparable loss is not to the litigants but to the estate and a stay may cause the estate to suffer.

11. It is the Respondents case that the Application seems to be premised on the supposition that Grant was revoked whereas this is not the case. He further submitted that the cited authorities refer to different principles.

12. Counsel prayed that the Application be dismissed with costs and the time frames set by the Court orders be upheld in the interests of the estate.

Determination

13. The Law of Succession Act does not have specific provisions on stay of execution. However Section 47 of the Law of Succession Act gives this Court wide powers as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient”

14. Rule 73 of the Probate and Administration Rules under which the instant application is brought goes on to provide:

“Nothing in these Rules shall limit or otherwise affect the inherent power 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”.

15. The above provisions empower this Court to entertain and determine this Application for stay of execution of the orders of 11.2.16 pending appeal. However, the orders sought are discretionary and the Applicant must satisfy this Court that the same are merited.

16. The Applicants state that “the substratum of any appeal preferred from the aforesaid order would dissipate unless the stay sought herein was granted, with substantial loss to the Applicant.” The Applicants further state that there is a likelihood that the affairs of the estate may be fundamentally interfered with or altered in the event that the orders sought to be appealed against were executed and/or given effect, thereby prejudicing the appellate process. That in effect would in all likelihood constitute and/or engender substantial loss to us and the other beneficiaries.”

17. This is denied by the Respondents who argue that the orders were aimed at preserving the estate and ensuring accountability and law and order in the administration of the estate. The orders appealed against restrained one of the Applicants **Abdisatar Haji Mohamed** from intermeddling in the estate and ordered him to deposit in Court all title documents he is holding in respect of property of the estate. The orders further ordered production of accounts. If the orders sought herein are not granted, what is expected to happen is that intermeddling in the estate will cease, the title documents will be deposited in Court and accounts will be produced in Court. This cannot in my view result in substantial loss to the Applicants, other beneficiaries nor indeed to the estate herein.

18. Further, other than claiming a likelihood of substantial loss to them and the other beneficiaries, the Applicants have not demonstrated how that loss will be occasioned. This is a vague statement not having any details. It is not enough for the Applicants to merely state that substantial loss will result or that in all likelihood the affairs of the estate may be fundamentally interfered with or altered. They must provide specific details and particulars of the potential loss, which they have not. In the absence of such details and particulars, the Court finds that it would not be in the interest of the estate to allow this application for stay of execution pending appeal.

19. I now turn to the authorities cited to consider the circumstances under which stay orders were made in those cases. The case Abdu Kassim v Omar & 3 Others [2014] eKLR addresses the jurisdiction of the

High Court in a succession matter where the deceased and all claimants were Muslims. I find that this case is of no relevance in the instant application. To consider at this stage the issue of the jurisdiction of this Court as well as the contents of paragraph 4 of the Supporting Affidavit would in my view preempt the appeal for which notice has been filed.

20. Counsel cited Nguruman Limited v. Shimpole Group Ranch & Another [2014] eKLR where the Court of Appeal said that if an order is a positive one then there is need to grant stay to avoid the appeal matter being rendered nugatory. It is my view that in that case, it was demonstrated that substantial loss would have been suffered if the order for stay was not granted. Counsel further argued that if the orders sought are not granted, there will be irreparable loss and to buttress his argument, he relied on the cases of Reliance Bank v. Norlake Investments Ltd East Africa Law Reports [2002] 1 EA 218 (CAK) and Kenya Breweries Limited v Kiambu General Agencies Limited. As stated above, the Applicant has not demonstrated to this Court that if the orders sought herein are not granted substantial loss would be suffered.

21. In the final analysis, I am not convinced that a case has been made out for grant of the prayers sought in the Motion dated 25.2.16 and the same is dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED in MOMBASA this 30th day of March, 2016.

M. THANDE

JUDGE

In the presence of: -

..... for the Applicants

..... for the Respondents

..... Court Assistant