



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 160 OF 2008**

**IN THE MATTER OF THE ESTATE OF PETRO MUSUNGU IMBOTO (DECEASED)**

**RULING**

**INTRODUCTION**

1. This is a ruling on an application by a respondent Ms. Mariam Omar for refund of monies being Ksh100,000/- alleged to have been deposited in court as bail money to secure her release from civil jail.
2. The court has perused the court file and established that the money was deposited into court not as bail money but as a portion of the estate of the Deceased being proceeds of sale of his car by the deceased's mother after being given the car by the present respondent and two subsequently sharing the proceeds, apparently in the ratio of 100000/- to 150,000/- in favor of the mother of the deceased. The notion of the money having been deposited as bail may have arisen from the proceedings of the court wherein after her default of depositing the Ksh100,000/- proceeds of sale of the motor vehicle, the respondent was arrested and placed in civil jail from which she was only released upon payment of the Ksh.100,000/-. The respondent was released from civil jail on account of payment into court of proceeds of sale of the estate motor vehicle not for payment of bail in the sum of Ksh.100,000/-. For her attendance in court, she was ordered to execute a personal bond of 50,000/- The proceedings of the court set out below demonstrate this.

**THE NATURE OF THE DEPOSIT OF MONEY**

3. The proceedings of the court from the 16<sup>th</sup> October 2008 when the matter came up for a “*Notice to Show Cause upon the present Respondent to show cause why she should not be punished for withholding motor vehicle registration KAZ 276S*” attest to this, as follows:

“16.10.08

***Before Sergon, J.***

*CC Kasungu*

*Ngaira for the Applicant*

*Ngairi Njoroge for the Respondent*

**Ngaira:**

*The Respondent acknowledges having possession of the Motor vehicle.*

**Mariam Shena Omar:**

*I gave the motor vehicle to Khadoro whom she sold to Daniel J. Mwaila.*

**Court:**

*Summons are issued upon Susana Salam Khadoro and Daniel J. Mwaila which summons should be served by a process server with the assistance of Mariam Omar. The Summons to show cause is fixed for hearing on 30/10/08. The trio must present themselves personally before this court.*

**Signed by Sergon, J.**

30/10/08

**Before Sergon, J.**

Cc. Kasungu.

*Ngaira for Petitioner*

*Mrs. Ngoiri for the Respondent*

**Ngaira:**

*We apply for the motor vehicle reg. KAZ 276S to be impounded as issued.*

**Oddiaga:**

*My client purchased the aforesaid motor vehicle and resold it [to] Robert Kamau of Kerugoya. My client is a car dealer.*

**Court:**

*Susana Salama be apprehended and brought to this court on 13.11.08 by the OCPD, Kakamega Police Division. Motor vehicle registration no. KAZ 276S be impounded and brought to this court on 17.11.08 by Traffic Commandant, Kirinyaga District.*

**Signed by Sergon J.**

13.11.08

**Sergon, J.**

Cc. Kasungu.

*Ngaira for the Petitioner*

*Ngoiri Njoroge for Respondent*

*Oddiaga for Mr. Daniel Maina*

**Ngaira:**

We have information that Susan Salama Khadoro is within Town. We apply for a warrant of arrest. The O.C.P.D., Kakamega has not traced the motor vehicle.

**Court:**

A warrant of arrest against Susan Salama Khadoro to be executed by the Court bailiff. Mention on 27.11.08.

**Signed by Sergon, J.**

20.11.08

**Ngaira:**

The warrant of arrest was executed. The Respondent has been concealing the whereabouts of Susan Salama Khadoro. Let her explain whether she had authority to sell the Motor vehicle or any authority to waste the estate. She was in Mombasa and decided to hide from court.

**Mrs. Ngoiri:**

There was an agreement between Susana Salama Khadoro. She received the money.

**Susan Salama Khadoro:**

The deceased was my child. Mariam Omar gave me motor vehicle registration No. KAZ 276S. I sold the aforesaid motor vehicle to a customer secured by Mariam Omar. I received the purchase money. I used the money to meet the funeral expenses of the deceased. I was chased away with Mariam. We shared the money. I was feeling unwell. I was assaulted by the deceased's widow and her children. Please give me one month to bring the money. I will bring ksh.150,000/-

**Mariam:**

I will bring Ksh.100,000/- which I acknowledge receiving.

**Court:**

Mariam Omar is given 30 days ie. By 19.12.2008 to deposit with this court a sum of Ksh.100,000/-. Susana Salama Khador is given upto 19.12.2008 to deposit with this court a sum of Ksh.150,000/-. The warrant of arrest against her is suspended for now until 19.12.2008, when this matter will be mentioned.

**Signed by Sergon, J.**

4. On 19.12.2008, Sergon, J. adjourned the matter upto 23.2.2009 on request of the respondents Mariam Omar and Susana Salama Khadoro for extension of time to deposit the money. The court warned the two that 'in default the duo will be put to civil jail on 23.2.2009 of 30 days.'
5. On 23.2.2009, when it was reported by Counsel for the petitioners that the respondents had not deposited the sums of money, and with Mariam requesting for a further indulgence and stating that she had only ksh.10,000/- to pay to court and that Susana was very sick, the court made orders as follows:

**Court:**

***I am satisfied that Susan Salama Khadoro and Mariam Omar are not serious in refunding the money they have taken from the proceeds of sale of the deceased's estate's assets. The***

***duo are convicted and sentenced to serve 30 days in civil jail. Mariam Omar to start her sentence right away. A warrant of arrest is issued against Susana Salama Khadoro.***

***Signed by Sergon, J***

***23<sup>rd</sup> February 2009.”***

6. On the 24/02/2008 the Judge in Chambers made the following note and orders

***“24.02.2008***

***In Chambers***

***Now that Mariam Omar has deposited in Court the sum of Ksh.100,000/-, she should be released upon signing a personal bond of Ksh.50,000/- before the D/R. Mention on 2/3/2009. For further orders and directions. I direct the person who had been ordered to execute the warrant to appear before this court on 2/3/09 to give an update. Mention to issue on all parties concerned.***

***Signed by Sergon, J.”***

7. The subsequent proceedings of the Court before Ibrahim J. (as he then was) on 16.2.2010, the proceedings appeared to perpetuate the notion of deposit of ksh.100,000/- being bail money when the attendance to court of the respondent was pegged to her liability to forfeit the money, as follows:

***“Order:***

***This matter will be heard on 14/4/2010. The respondent shall duly attend court; in default she will forfeit the deposit of Ksh.100,000/- to the Court for the benefit of the Estate. I do order the traffic Commandant at Vigilance House to procure the impounding of the motor vehicle registration No. KAZ 276S anywhere in the Republic of Kenya and to hold it to this court’s orders.***

***Signed by Ibrahim, J.”***

8. The motor vehicle was never impounded and after several court appearances the matter was stood over generally. The matter finally stalled when the counsel for petitioner successfully applied to cease acting for the petitioners upon the discovery that the petitioners had filed parallel succession proceedings at Kakamega High Court being Succession Cause No. 183 of 2008, as shown in the Kenya Gazette Notice No. 6947 of 25<sup>th</sup> June 2008 by the Deputy Registrar, Kakamega. An formal application by Counsel for the petitioners to cease acting was heard and granted on the 7<sup>th</sup> September 2011.
9. Upon request for mention before the Court by the Respondent through letter dated 06/7/2012, the mention was fixed for the 11/9/2012 and 16/10/2012 on both dates nothing is recorded to have taken place. However, on 13<sup>th</sup> November 2012 by an Internal Memo of that date to the Deputy Registrar, Kakamega, this Court (Odero, J.) requested the Deputy Registrar to deal with the matter as follows:

***“This succession cause was filed in the Mombasa High Court on 3<sup>rd</sup> June 2008. Subsequently on of the petitioners later filed a Succession Cause over the same estate at the Kakamega High Court. This multiplicity of suits can only lead to confusion.***

***Please bring this fact to the attention of the Judge with a view to staying the matter in Kakamega so that the Mombasa Succession Cause can be concluded.”***

10. Subsequent efforts of this court through the Deputy Registrar, in writing and by telephone, to get the status or any information on the Kakamega succession proceedings have been unsuccessful so far. There has also been no action in this matter by the petitioners, saving the request for refund of the money by the respondent, since the Counsel for the petitioners ceased acting for the petitioners on 7/9/2011. The court is not able to determine whether the estate of the deceased has been administered and to what extent, although it continues to hold the sum of Ksh.100,000/- part of proceeds of sale of the estate Motor vehicle.

### **CONCLUSION**

11. The respondent asserted that she was a wife to the Deceased. If so, she is entitled to share in the deceased's estate. She can only do so by putting her claim as an heir/beneficiary or dependant in this proceedings or the Kakamega proceedings, as she may be advised, depending on the respective state of hearing and determination and or which was filed first and which, therefore, should in terms of *sub judice* rule be first determined. The respondent must therefore take advise from her legal advisors at how to pursue her interest, as a beneficiary or dependant of the estate by virtue of her being a widow of the deceased, in the sum of money which she paid into court and which the Court has determined was not a bail deposit but rather proceeds of sale of deceased's estate property.

### **ORDERS**

12. Accordingly, having found that the money paid in to court was proceeds of sale of an asset of the Estate, the Court cannot treat it as bail money for the attendance of the respondent/applicant refundable to the depositor upon determination, dismissal or the termination of the succession proceedings. It is part of the estate of the Deceased to be distributed in accordance with the orders of the Succession Court. The respondent's request for the refund of the sum of Ksh.100,000/- deposited into Court on 24<sup>th</sup> February 2009 vide Deposit Receipt NO. B457447 by Mariam Shennah Omar is declined.

13. The money will therefore fall to be disposed of by orders of the Succession Court upon motion for that purpose. The respondent/applicant may move the Court with notice to the petitioners for suitable orders for her provision from the money deposit and other assets of the Estate of the Deceased, in her capacity as beneficiary or dependant, as she may be advised, in accordance with the Law of Succession Act..

**DATED SIGNED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JUNE 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Ms. Mariam Omar in person for the Applicant

Linda - Court Assistant.