



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL CASE NO.304 OF 2003

RAMESH POPATLAL SHAH :::::::::::::::::::::1ST PLAINTIFF

SUREKHA SHOBHAGCNDARA SHAH :::::::::::::::::::::2nd PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK :::::::::::::::::::::1ST DEFENDANT

GODFREY GITHINJI KAMIRI :::::::::::::::::::::2nd DEFENDANT

PARAMOUNT UNIVERSAL BANK LTD :::::::::::::::::::::3RD DEFENDANT

BARCLAYS BANK OF KENYA LTD :::::::::::::::::::::4TH DEFENDANT

GIRO COMMERCIAL BANK LTD :::::::::::::::::::::5th DEFENDANT

FINA BANK LIMITED :::::::::::::::::::::6TH DEFENDANT

RULING

This is an Application expressed to be brought under the provisions of Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Plaintiffs are the Applicants and they sued in their capacity as Administrators of the Estate of the late Shobhgchandra Ratilal Shah. They seek a stay of execution pending ascertainment and collection of the deceased's assets and sanction of distribution thereof in High Court Succession Cause No. 495 of 2003. The stay is sought on the grounds that:

- 1. The Adminis trators of the deceased estate are still in the process of collecting and preserving the estate of the deceased.**
- 2. The progress of collecting and preserving the estate of the deceased is under supervision of this Honourable Court in High Court Succession Cause NO. 495 of 2003.**
- 3. Execution will interfere and intermeddle in the administration of the estate and prejudice the entire body of creditors.**
- 4. It is just and equitable to grant an order of stay of execution.**
- 5. The Defendants will not suffer any prejudice.**

The Applicants have filed a supporting affidavit of Surekha Shabthaghadra Shah one of the Administrators.

The application is opposed and Counsel for the 5th and 6th Defendants has filed Grounds of Opposition. The 3rd Defendant did not file any response to the application but using the discretion I have under Order L Rule 16 (3) I allowed Counsel for the 3rd Defendant to respond in respect of matters of Law only. In support of the application Counsel for the Applicants expounded on the Grounds in the body of the Notice of Motion and in the supporting affidavit aforesaid. Counsel emphasized that a statement of affairs of the estate of the deceased has not been filed. It is from the statement of affairs that the debts by the estate may be ascertained and a decision on priority made. In Counsel's view execution in this case will amount to intermeddling with the administration of the deceased's estate.

It was further argued that the estate may not even be solvent and payment now may adversely affect other creditors. The payments to the 3rd, 5th and 6th Defendants are not priority payments Counsel so argued. Reliance was placed on the observations of Kuloba J. at page 35 of his Judicial Hints and also on the Law of Succession by Parry & Clark pages 249, 250 and 280 for the proposition that the Court has inherent jurisdiction to stay execution as sought in the application. Counsel for the 3rd, 5th and 6th Defendants in opposing the Plaintiff's application submitted that it is the applicants who came to Court seeking orders against the Defendants. They must have known that if they lost, costs would be payable by the estate. In Counsel's view execution of a lawful order cannot amount to intermeddling in the administration of the deceased's estate. There is also no evidence of insolvency of the estate.

The usual grounds for stay of execution have not been established. In Counsel's view the Administrators can pay and render an account to be taken into account during distribution of the assets of the deceased. It was submitted that this application has been brought in bad faith especially as the Administrators themselves and managers have been paid Kshs 480,000/= as fees.

Having set out the rival arguments I take the following view of the matter. The Applicants have invoked the Courts inherent jurisdiction. They were perfectly entitled to do so. The gist of the Applicant's application is that the status of the deceased's estate is not clear. It may turn out to be insolvent. The debts have not been fully established. The Defendants claim may not be a priority. In my view these considerations are irrelevant should the 3rd 5th and 6th Defendants decide to execute to recover their costs. The Applicants instituted these proceedings. Costs should have been anticipated in the event of losing the suit. This is what happened in this case.

I do not find it reasonable that Defendants who have succeeded in this case should now await the conclusion of the Succession Case. I agree with Counsel for the 3rd, 5th and 6th Defendants that payment of sums due to them can be made and the Applicants can render an account. Execution for these sums cannot amount to intermeddling in the administration of the estate of the deceased. It is irrelevant that the 3rd, 5th and 6th Defendants are banks. The Law applies equally to all litigants.

In the result the Plaintiffs' application by way of Notice of Motion dated 17th March 2004 is dismissed in its entirety with costs.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of: