

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO 267 OF 1997

MUTHUIAPPLICANT

VERSUS

MUTHUI.....RESPONDENT

RULING

The applicant, Esther Muthoni Muthui, one of the beneficiaries in the estate of the late Samuel Muthui Ngabu, brought this motion dated and filed on 2nd April, 2003 under a certificate of urgency, pursuant to o XLI rule 4 of the Civil Procedure Rules. She seeks for orders that the enforcement of the judgment given herein on the 12th March, 2003 be stayed pending the hearing and determination of the intended appeal in the Court of Appeal and, that the officer commanding Eldoret police station be commanded to ensure compliance of the orders made pursuant to this application.

The grounds upon which the application has been brought to this court are set out in the body thereof, but, principally, are, that the judgment of 12th March, 2003 did not distribute the deceased's shares in Highlands

Inn Limited. That notwithstanding, the 1st respondent has interfered with the running of the said business which may occasion the applicant substantial loss if a stay is not granted. The application is supported by the affidavit of Esther Muthoni Muthui, sworn on the 2nd April, 2003 which amplifies the grounds for the application and adds that unless a stay is granted, the properties distributed to the various beneficiaries may get transferred to them and thus render the intended appeal nugatory.

The application was vigorously opposed as having no merits and an abuse of due process of the Court. It was contended on behalf of the 1st respondent that no transfer of any properties may take place without the consent of the co-administrator, the applicant herein, or an application being made for that purpose to the deputy registrar. More importantly, that the applicant holds only one share in Highlands Inn Limited while 99 shares are held by the house from which the 1st respondent comes.

From the outset, I have to state that by the time this application was brought to court, it was known that the 1st respondent had already taken possession of the premises upon which Highlands Inn Limited had been carrying on its business. It is also clear from the nature of the application and the parties thereto that the crux of dispute in this application is not the general impact or effect of the judgment dated 21st March, 2003 but one over the control of the business in question. That's why, in my view great pain was taken to evaluate economic rent on the premises on which it operates.

Unfortunately, the applicant did not give a full or any accounts of the income from the business to enable this court determine whether or not she might suffer irreparable loss. Be as it may, and much as this court, even on meritorious grounds would issue an order of stay, where the act complained of has already been effected, prayer for a stay is not tenable.

A stay is meant to prevent a breach of a party's legal right before it takes place.

However, even if an application of that nature were applicable herein, there is the issue as to whether its refusal would render the intended appeal nugatory. I dare say not. Firstly, the 1st respondent would be in a position to account over for the business proceeds, whether or not under compulsion of law, in the event that the appeal be successful. Secondly, it is admitted that out of 100 shares, the applicant holds only one

share and hence her stake in the said business cannot, by any stretch of imagination be said or described as substantial. Loss to her, if any, would not be substantial or irreparable. Lastly, the 1st respondent is in possession of the premises which was distributed to him in the judgment of this court, and is already carrying on with the business of the Highlands Inn Limited, and at best, this court may only make orders that will bar him from disposing off of that business.

The upshot of this ruling is that with regard to other assets of the deceased's estate, status quo may be maintained and preserved as they existed prior to the date of the aforesaid judgment. But with regard to the Highlands

Inn Limited and the premises upon which it stands or operates, the status quo that is feasible is the one that subsisted as at the date of hearing of this application and to date. Such status quo be preserved pending the hearing and determination of the intended appeal. Costs to follow the results of the appeal. Orders are in the above terms.

Dated and delivered at Nairobi this 8th day of May, 2003

G.E.O. TUNYA

.....

JUDGE