



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION CAUSE NO 15 OF 2017**

**IN THE MATTER OF THE ESTATE OF SUDHA RAJNIKANT SHAH**

**AND**

**IN THE MATTER OF AN APPLICATION BY**

**RONAK RAJ SHAH AND ASHOK KHETSHI SHAH**

**(As Executors of the Estate of SUDHA RAJNIKANT**

**SHAH –Deceased)..... PETITIONERS**

**VERSUS**

**PRASHANT RAJNIKANT SHAH.....1<sup>ST</sup> CAVEATOR**

**SONAL RAJNIKANT SHAH.....2<sup>ND</sup> CAVEATOR**

**SHAKUNT RAJNIKANT SHAH.....RESPONDENT**

**RULING**

1. In his Summons dated 16<sup>th</sup> November 2020 and filed on 17<sup>th</sup> November 2020, the Respondent sought that the order that was issued by Cherere J on 21<sup>st</sup> July 2020 for the deposit of his passport into court be varied. He swore his Affidavit in support of his application on 16<sup>th</sup> November 2020.

2. He stated that the Learned Judge had directed that he deposits his passport into court and that he be at liberty to apply for the release of the same if and when the need arose. He averred that the need had arisen as he was embarking on business travels to secure business opportunities for his company, Atlantic Limited. He attached several emails as proof of the proposed business engagement.

3. He contended that court orders secured the funds that were in dispute and that the continued detention of his passport by the court pursuant to an order which he said was obtained on the basis of unproven allegations of intermeddling and on a misplaced notion that he was about to flee his homeland, was unnecessary and inconsequential.

4. It was his averment that although the 1<sup>st</sup> Applicant had admitted on oath that he was withholding from (sic) the deceased's assets and had not faced any consequences, there was inequity and injustice in the continued detention of his passport. He thus urged this court to allow his application as prayed.

5. The Petitioners indicated that they were not opposing the said application. On the other hand, the 1<sup>st</sup> Caveator herein swore a Replying Affidavit on 5<sup>th</sup> December 2020 on his own behalf and on behalf of the 2<sup>nd</sup> Caveator herein. The same was filed on 7<sup>th</sup> December 2020.

6. The Caveators stated that they obtained orders for the deposit of the Respondent's passport into court as the Respondent's wife had successfully applied for and processed a United Kingdom (UK) Settlement Permit which allowed her, the Respondent herein and their children to settle permanently in the United Kingdom, a fact that the Respondent had not denied. They averred that the Respondent's intention was to remove himself from the jurisdiction of this court as a result of which its orders would not be enforceable.

7. It was their further contention that on 31<sup>st</sup> July 2020 the Respondent applied to have the orders of the Learned Judge varied on the ground that he had no plans to travel out of the country and that the subject matter of the dispute had been secured by a court order but that he had not prosecuted the same to date. They pointed out that the same was a replica of the present application.

8. They were categorical that the emails that were attached to the Respondent's application were a scheme for the Respondent to leave the country and were not genuine. He therefore asked this court to dismiss the present application with costs.

9. The Respondent's Written Submissions were dated and filed on 14<sup>th</sup> December 2020 while those of the Caveators were dated and filed on 4<sup>th</sup> January 2021. The court carefully analysed the respective parties' Written Submissions and noted that they contained accusations and counter-accusations of intermeddling of the deceased's estate by both the Respondent and the 1<sup>st</sup> Caveator.

10. The court exercised restraint in addressing the submissions in that regard because there was a danger in getting in the merits or otherwise of the 1<sup>st</sup> Petitioner's Notice of Motion application dated 10<sup>th</sup> December 2020 and filed on 11<sup>th</sup> December 2020, the 2<sup>nd</sup> Petitioner's Notice of Motion application dated 15<sup>th</sup> February 2020 and the Caveators' Notice of Motion application dated 15<sup>th</sup> July 2020 which were all pending hearing and determination.

11. In fact in the directions of 22<sup>nd</sup> October 2020, the said Learned Judge had acknowledged that the matter herein was highly contentious and directed that the matter would be heard by way of *viva voce* evidence. She further directed that her orders of 21<sup>st</sup> July 2020 would remain in force until further orders of the court.

12. On 21<sup>st</sup> July 2020, having considered the Caveators' Chamber Summons application dated 15<sup>th</sup> July 2020, the said Learned Judge issued the following order amongst others:-

**“Pending the hearing and determination of the matters raised in the affidavit filed on 17<sup>th</sup> June 2020, the 2<sup>nd</sup> Respondent be and is hereby ordered to deposit his passport with the court on such terms within 7 days from today's date.”**

13. On 11<sup>th</sup> August 2020, the 2<sup>nd</sup> Respondent's advocate asked the court to release the 2<sup>nd</sup> Respondent's passport. He also raised issues of intermeddling by the Applicant. It was on that date that the said Learned Judge directed that the 2<sup>nd</sup> Respondent was at liberty to apply for release of his passport if and when need arose.

14. As can be seen hereinabove, on 22<sup>nd</sup> October 2020, the said Learned Judge had directed that the orders issued on 21<sup>st</sup> July 2020 would remain in force until further orders of the court. There were three (3) substantive orders that were issued on that date. These were :-

**a. An injunction restraining the 2<sup>nd</sup> Respondent whether by himself, his agents, servants and anyone acting on his behalf from moving, using or using as security the funds held at Bank of Baroda, Kisumu that were transferred on 9<sup>th</sup> November 2016 from the deceased's account at Prime Bank Limited.**

**b. An injunction restraining the 2<sup>nd</sup> Respondent whether by himself, his agents, servants and anyone acting on his instructions and on his behalf from moving the funds that were transferred from the deceased's account at Prime Bank Limited to Bank of Baroda, Kisumu.**

**c. The depositing of the 2<sup>nd</sup> Respondent's passport into court.**

15. It was therefore not clear which orders of 21<sup>st</sup> July 2020 would remain in force. However, bearing in mind that there was an order giving the 2<sup>nd</sup> Respondent liberty to apply for the release of his passport if and when the need arose, this court took the view that the orders the Learned Judge may have ordered to remain in force were the injunctive orders. However, that was speculative and this court could not for a fact determine which order remained in force and which one did not remain in force.

16. It is also important to point out that on 29<sup>th</sup> July 2020, the said Learned Judge directed as follows:-

**“DR to ensure that the passport No BK019423 in the name of Sudha Rajnikant Shah is kept in safe custody.”**

17. Notably, Sudha Rajnikant Shah did not appear to be a party in the proceedings of 21<sup>st</sup> July 2020. He was shown to be deceased. In fact the proceedings herein are in respect of the Estate of Sudha Rajnikant Shah. In the said order of 21<sup>st</sup> July 2020, the 2<sup>nd</sup> Respondent was Ashok Khetshi Shah, the 2<sup>nd</sup> Petitioner herein.

18. The circumstances under which the court ordered the deposit of the passport of Sudha Rajnikant Shah who appeared to be the deceased in this matter on 29<sup>th</sup> July 2020 were therefore not clear to this court but it could have been an accidental slip. However, a perusal of the Chamber summons application showed that the 2<sup>nd</sup> Respondent therein was the Respondent herein and there may have been a typographical error in the manner the order was extracted.

19. Having said so, there was also another order extracted on the same day of 21<sup>st</sup> July 2020 and issued on 22<sup>nd</sup> July 2020 clearly showing the Respondent herein as the 2<sup>nd</sup> Respondent.

20. There appeared to be a lot of confusion in the proceedings making it difficult for this court to follow them. Indeed, this court took over the matter from the aforesaid Learned Judge after several court attendances and the descriptive use of Applicant and Respondents caused a lot of confusion. Notably, the Petitioners herein became 1<sup>st</sup> Respondents when the Respondent herein came and took over the description of a 2<sup>nd</sup> Respondent. Ideally the Petitioners ought not to have metamorphosed to be the 1<sup>st</sup> Respondent and ought to have retained their description of 1<sup>st</sup> and 2<sup>nd</sup> Petitioners to avoid confusion.

21. Be that as it may, it was its considered opinion of this court that the orders issued on 21<sup>st</sup> July 2020 were to remain in force until further orders of the court. This implied that the court could grant alternative orders if need be. In this case, the Respondent had sought to have the order of 21<sup>st</sup> July 2020 varied on the ground that he needed to travel out of the country. The Learned Judge had considered all the facts of the case and deemed it prudent to order that he deposit his passport in court.

22. His Summons dated 31<sup>st</sup> July 2020 and filed on 5<sup>th</sup> August 2020 seeking variation of the court orders of the said Learned Judge given on 21<sup>st</sup> July 2020 remained unprosecuted. It was not clear to this court why the same had not been prosecuted and the present application seeking a similar order for variation of the said order, filed. As the Learned Judge had directed that he could apply for the release of the said passport as and when the need arose and he had indicated that he needed to travel out of the country for business, this court found and held that ordinarily there would be no good reason to deny him an opportunity to travel for business. It did not wish to conclude that the emails were not genuine as had been contended by the Caveators as that could not be discerned from affidavit evidence.

23. However, as the Respondent did not deny that his wife had obtained had obtained a UK Settlement Permit and he was expected to travel to the UK for business opportunities, this court felt a lot of uneasiness in ordering the release of his passport without conditions. There was therefore need for the Respondent and sureties to sign personal bonds to ensure that he returned to the country. This was the least this court could do to secure his attendance in the country when required for the hearing of the case herein and at the same time allow him to earning a livelihood.

### **DISPOSITION**

24. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Notice of Motion application dated 16<sup>th</sup> November 2020 and filed on 17<sup>th</sup> November 2020 be and is hereby allowed in the following terms:-

**1. THAT the Respondent's Passport be and is hereby released to him for purposes of travelling for business only and not for settlement in the United Kingdom and/or until further orders of the court.**

**2. THAT the release of the Respondent's passport shall be upon him providing a personal bond of Kshs 2,000,000/= plus two (2) sureties of a similar amount.**

**3. THAT subsequently, the Respondent shall only leave the jurisdiction of this court with leave of the court.**

25. The costs of the application will be in the cause.

26. It is so ordered.

**DATED and DELIVERED at KISUMU this 4<sup>th</sup> day of February 2021.**

**J. KAMAU**

**JUDGE**