



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Famau Madi Shosi (Deceased) (Family Appeal
5 of 2020) [2021] KEHC 9797 (KLR) (12 March 2021) (Ruling)**

Neutral citation: [2021] KEHC 9797 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 5 OF 2020
JN ONYIEGO, J
MARCH 12, 2021
IN THE ESTATE OF FAMAU MADI SHOSI (DECEASED)
UMMI FAMAU MADI..... APPELLANT
VERSUS
KASSIM FAMAU MADIRESPONDENT**

RULING

1. The application pending determination is the one dated October 9, 2020 and filed on the same day seeking;
 - a. That on the grounds set forth in the certificate of urgency, this application be certified urgent.
 - b. That pending hearing and determination of this application inter parties, this court be pleased to direct that the rental proceeds collected from the deceased's estate by the appellant or any other beneficiaries of the deceased whether jointly or severally by themselves, their representatives and or agents to be deposited to this Honourable court.
 - c. That pending hearing and determination of the appeal as well as the petition, this court be pleased to direct that the rental proceeds collected from the deceased's estate by the appellant or any other beneficiaries of the deceased whether jointly or severally by themselves, their representatives and or agents to be deposited to this Honourable court.
 - d. That this court be pleased to issue an order directing the appellant or any other beneficiaries of the deceased whether jointly or severally by themselves, their representatives and or agent to give a full, accurate and comprehensive account of the deceased's property from the time of his death to date.
 - e. That this Honourable court be pleased to issue an order restraining the appellant or any other beneficiaries of the deceased whether jointly or severally by themselves, their representatives and/or anyone claiming under them howsoever from collecting rent, utilizing rent, and/or



selling off property forming the estate of the deceased pending hearing and determination of the petition.

- f. That this Honourable court be pleased to issue an order restraining the appellant or any other beneficiaries of the deceased from engaging in any acts that amount to intermeddling with the estate of the deceased pending hearing and determination of this petition.
 - g. That costs of this application be provided for.
2. The application is premised upon grounds cited on the face of it and averments contained in the affidavit sworn on October 9, 2020 by Kassim Famau Maddi. In response, the respondent filed a replying affidavit sworn on October 26, 2020 challenging the application.
 3. During the hearing, the respondent's counsel raised a very important aspect touching on this court's jurisdiction in entertaining the application. Without delving into the merits of the application, a brief summary of the suit herein will suffice.
 4. The deceased whose estate these proceedings relates to was a Muslim who died intestate on July 12, 2018 while domiciled within Mombasa. He left landed property some of which generate rental income.
 5. On December 13, 2018, the respondent herein Kassim Famau Madi filed a petition at the Kadhi's court Lamu being Succession Cause No 9/2018. Specifically, the respondent prayed for preservation of the estate which the court allowed and directed that rental income collected from the houses comprising the estate be deposited in court. In response, the appellant herein entered appearance. He subsequently filed an application before the High court being Misc Application No 6/2019 seeking transfer of the case from Lamu Kadhi's court to Mombasa Kadhi's court.
 6. The suit was subsequently transferred as prayed. Meanwhile, the appellant filed a preliminary objection on February 8, 2020 against the whole proceedings pending the order of the court directing all beneficiaries (parties) to undergo DNA test to confirm and verify on the rightful heirs of the estate.
 7. The said application was heard on January 31, 2020 and ruling delivered on February 14, 2020 dismissing the preliminary objection. Aggrieved by the said ruling, the appellant herein Umami Famau lodged the instant appeal before the high court challenging the same ruling.
 8. Via a memorandum of appeal dated February 17, 2020, the appellant sought orders setting aside the impugned ruling and an order directing parties to undergo DNA test be made.
 9. Before the appeal could be heard, the instant application was filed. During the hearing, M/s Nafula appearing for the respondent/appellant urged the court to grant the prayers sought. She entirely relied on the averments contained in the affidavit in support.
 10. Mr Mokaya for the appellant/respondent opposed the same stating that the prayers sought can only be issued before the trial court.
 11. I have considered the application herein and the response thereto. Pending before this court is an appeal which is yet to be determined. This court's jurisdiction was invoked vide an appeal and not a substantive suit in its jurisdiction as a court of first instance.
 12. I do agree with Mr Gichana that this court is not properly seized of the application dated October 9, 2020. The prayers seeking that rent be deposited in court is not for this court to direct. Since there is a court order to that effect, it's for the trial court to enforce its orders.
 13. The respondent/appellant is seeking orders which are supposed to issue by the court of first instance where the main suit is lying. I cannot open parallel proceedings before the High court yet the only issue



which led to this file come before the High court on appeal is a ruling arising from an interlocutory application cum preliminary objection. Accordingly, the application dated October 9, 2020 is hereby dismissed for want of jurisdiction.

14. Parties are advised to first track the appeal. Deputy Registrar to call for the original file from the Kadhi's court. Mention on April 22, 2021 for further directions.

Dated, signed and delivered virtually at Mombasa this 12th day of March, 2021.

J.N. ONYIEGO

JUDGE

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