



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK SUB-REGISTRY**

**CIVIL CASE NO. 1 OF 2016**

**(Formerly Naivasha HCCC No. 10 of 2015**

**and**

**Nakuru HCCC No. 204 of 2009)**

**TOYO MOYO CO. LTD.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**ABDUL AZIM KASSAM (Sued as the legal Representative of the Estate of Hussein**

**Haji Issa.....DEFENDANT/RESPONDENT**

**BADRUDIN HUSSEIN HAJI ISSA.....APPLICANT**

**CONSOLIDATED WITH CIVIL CASE NO. 2 OF 2016**

**(Formerly Naivasha HCCC No. 11 of 2015**

**and**

**Nakuru HCCC No. 168 of 2009)**

**MUMTAZ ANWARALI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ABDULGANI KASSAM.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**(Suing as legal representatives of the estate of Kassam Ismail Anwarali)**

**-VERSUS-**

**ABDUL AZIM KASSAM (Sued as the legal Representative of the Estate of Hussein**

**Haji Issa.....DEFENDANT/RESPONDENT**

**BADRUDIN HUSSEIN HAJI ISSA.....APPLICANT**

## RULING

1. Two separate suits were filed against the present Applicant in his capacity as the legal representative of the estate of the late Hussein Haji Issa (the deceased). These are **Nakuru HCC No. 168 of 2009 Anwarali Kassam Ismail –Vs- Badrudin Hussein Haji** (Now HCC 02 of 2016 Narok Sub-registry) and **Nakuru HCC 204 of 2009 Toyo Moyo Company Limited Badrudin Hussein Haji** (now HCCC 1 of 2016 – Narok Sub-registry).
2. Following the revocation of the grant made to the Applicant in the Succession Cause in respect of the estate of the deceased, the current Defendant herein was substituted in both causes above as a Defendant, in place of the Applicant.
3. The said substitution order was made by **Mulwa J**, sitting in Nakuru, simultaneously in the two causes on 10<sup>th</sup> December, 2014. Aggrieved by the substitution, the former Defendant now Applicant, filed an application in each of the causes on 6<sup>th</sup> October 2015 under Order 1 Rule 10 (2) of the Civil Procedure Rules seeking to be enjoined herein as an interested or necessary party.
4. The two applications are similar, and the parties agreed to dispose of the same by way of written submissions. The affidavits in support and in opposition of the applications were basically similar as are the respective parties' submissions. The applications being identical, as well as representation of parties this ruling will apply to both causes.
5. The gist of the Applicant's affidavit is that the cause of action in the two suits arose during his tenure as an administrator of the estate of his late father **Hussein Haji Issa**; that he (Applicant) gave instructions to levy distress upon the Plaintiffs; that as a beneficiary to the estate, he stands to be prejudiced or affected by the outcome of the suits, particularly through consents, which may be detrimental to the estate whose interests he will take care of if admitted as an interested or necessary party.
6. The application in HCC 1 of 2016 (Narok Sub-registry) is opposed by the current Defendant **Abdul Azim Kassam**, a beneficiary of the estate of **Hussein Haji Issa, Naseem H. Issa** and the widow of the deceased, **Khatija Hussein Haji Issa**. In HCC 2 of 2016 (Narok Sub-registry), affidavits were sworn by the present Defendant and the 1<sup>st</sup> Plaintiff Mumtaz Anwarali. The gist of these affidavits is that the Applicant's real intention is to delay the resolution of the cases, contrary to the deponents' intention and that the Applicant is a felon on the run.
7. It is further deponed that the Applicant has previously abused the process of the court; that during his tenure as administrator of the deceased estate the Applicant failed to account for monies collected in respect of the estate; that the estate is well represented by the present defendant and that no other beneficiary is objecting to the settlement by consent of the suits, especially for the benefit of the elderly widow of the deceased; and finally, that the Applicant has not shown what prejudice he stands to suffer if he is not included as a party to the two suits.
8. The Applicant's submissions rest upon the provisions of Order 31 Rule 1 and Order 1 Rule 10 (2) of the Civil Procedure Rules. Reiterating the role of the Applicant at the time the two disputes arose, the Applicants' Counsel submits that the Applicant is a necessary party to the suits and that it is fit to enjoin him therein so that issues raised in the suits can be adjudicated upon.
9. For the Plaintiffs, submissions by Mr. Kiptoo reiterated the affidavit evidence in opposition to the application. The Defendant's submissions also repeat depositions made in opposition to the application, and emphasise, as the Plaintiff does, that the present Applicant's intention is to delay the conclusion of the two suits even as the estate of the deceased continues to be wasted.
10. I have carefully considered all the material canvassed before me with regard to the present application. It is an inescapable fact that the parties have brought into these matters issues relating to the raging succession cause now pending the court's decision in **Naivasha HC Succession Cause 129 of 2015 in the estate of Hussein Haji Issa (deceased)**. There is no dispute that the present Applicant was

at some point in the said succession proceedings granted letters of administration to the estate of his deceased father and that the present suits arose from his actions against the Plaintiffs in that period. The damages claimed in both suits are substantial.

11. As the current appointed administrator the present Defendant is a proper party in both suits, and that is not disputed. The application by the former administrator is brought under Order 1 Rule (2) of the Civil Procedure Rules and in retrospect, the Applicant invoked in his submissions of the provisions of Order 31 Rule 1 of the Civil Procedure Rules. The provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules generally relate to parties to suits. Order 31, as the title states, expressly provides for suits by or against trustees, executors and administrators.

12. In the context of this matter, Order 31 is specifically applicable as the property in respect of which the cause of action arose was and is vested in an administrator. Order 31 Rule 1 of the Civil Procedure Rules provides:-

**“In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties.”**

13. Apart from the Applicant, there are other persons, including his mother, who are beneficially interested in the subject property. Technically therefore the two suits are against all persons beneficially interested in the estate of the late Hussein Haji Issa. The above rule provides that in such a case the persons beneficially interested shall be represented by the executor or the administrator, in this case the present Defendant. Such parties need not be made parties to suits involving the vested property of the estate **“but the court may, if it thinks it fit, order them or any of them to be made parties.”** Thus the court has discretion in allowing persons beneficially entitled to become parties in a suit involving the property vested in an administrator.

14. In considering this application, it is relevant that the present Applicant was the past administrator and in particular, during the time that the cause of action arose in respect of the two suits. He has made unsupported claims that the parties in the suits intend to settle them in a manner adverse to the estate. But the main reason he has given for his prayer to be enjoined is that he will **“shed light”** on the matters that resulted in the two suits, as he gave instructions to levy distress against the Plaintiffs therein.

15. The present Defendant as an administrator is duty bound under the Law of Succession Act to administer the deceased's estate diligently and to give an account thereof to the appointing court. He does not need to be supervised by the Applicant in that regard. Secondly, if the Applicant has in his possession crucial evidence to lead, he can do so effectively without becoming a party. He has already filed a defence in the suits and there is no evidence that he, more than any other persons beneficially entitled will be prejudiced by being represented by the present Defendant.

16. While it is also true that the claims in the two suits are substantial, I cannot see what advantage the inclusion of the Applicant as a party will add to the defence. It is plain that the Applicant has fallen out with the majority of the other beneficiaries including his elderly mother, leading to prolonged litigation in the succession proceedings. Allowing the acrimony flowing out of the succession cause into the instant suits can only serve to delay the matters or the obfuscation of the real issues.

17. In my considered view, what the Applicant by the present application is seeking, is another bite at the cherry; the variation of the order of **Mulwa J** dated 10/12/2014. Equally, if granted, the orders sought will qualify if not nullify the effect of appointment of the present administrator in the succession cause at least regarding the property herein. The court would be loathe to allow contestation in a succession cause to be introduced via proxy in separate and unrelated suits.

18. The Plaintiffs in the said suits have not been shown to have any interest or role in the succession

battles in the family of the deceased Hussein Haji Issa, and their suits should not be hobbled by such disputes. Both suits are well over five years old but have never come up for hearing. It is instructive that the same were being mentioned with a possibility of settlement at the time when the present application was filed.

19. In my considered view, enjoining the Applicant as an interested or necessary party will defeat the overriding objective “**to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.**” I therefore decline to grant the application which I dismiss accordingly. Each party will bear own costs.

20. For the efficient disposal of the two suits which are based on similar facts and raise the same issues and are against the same Defendant, I will direct that the same be consolidated for purposes of hearing. To that end, the parties are directed to file their witness statements and to exchange documents within 30 days of today’s date. The court will also fix a hearing date. The ruling will apply to HCC 01 of 2016 and HCC 02 of 2016 (Narok Sub-registry).

Delivered and signed at Narok this **1<sup>st</sup>** day of **July, 2016.**

In the presence of:-

Mr. Leteipa for the Applicant

Mr. Kiptoo for both Plaintiffs

Mr. Ombati for Defendant – N/A

Court Assistant : Barasa

**C. W. MEOLI**

**JUDGE**

**COURT**

Hearing to proceed on 27<sup>th</sup> October 2016. Plaintiffs to serve the Defendants.

**C. W. MEOLI**

**JUDGE**