



REPUBLIC OF KENYA



KENYA LAW
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**Shah v Shah & 2 others (Civil Application E074 of 2022)
[2022] KECA 1144 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1144 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E074 OF 2022
F TUIYOTT, JA
OCTOBER 21, 2022**

BETWEEN

SHAKUNT RAJNIKANT SHAH APPLICANT

AND

PRASHANT RAJNIKANT SHAH 1ST RESPONDENT

SONAL RAJNIKANT SHAH 2ND RESPONDENT

**RONAK RAJ SHAH & ASHOK KHETSHI SHAH (AS EXECUTORS OF THE
ESTATE OF SUDHA RAJNIKANT SHAH - DECEASED) 3RD RESPONDENT**

(Being an application for extension of time to lodge and serve Notice of Appeal and Memorandum of Appeal from the Ruling of the High Court of Kenya at Kisumu (J. Kamau, J) dated 4th February, 2021 in KISUMU HC SUCCESSION CAUSE NO. 15 OF 2017)

RULING

1. The applicant and the respondents are siblings and beneficiaries of their late mother's estate, Sudha Rajnikant Shah (deceased). The 3rd respondents are executors of the deceased's estate duly appointed by her will dated June 15, 2016. A grant of probate of written will was issued to the 3rd respondents on May 9, 2018 and is pending confirmation. The deceased had 8 accounts with Prime Bank Limited, Kisumu Branch holding Kshs. 33,641,854.80 and 5 fixed deposit accounts jointly held with the applicant holding Kshs. 23,273,062.70. These funds were supposedly transferred into the name of the applicant and to the account held in Bank of Baroda, Kisumu branch. A caveat was therein placed by the executors on June 16, 2020 that prevented further intermeddling of the deceased's estate. The 1st and 2nd respondents sought, via chamber summons dated July 15, 2020 before the High Court in Kisumu Succession Cause No. 15 of 2017, orders of injunction against the applicant from moving or using funds held at the Bank of Baroda account, Kisumu Branch belonging to the deceased. Cherere J on July 21, 2020 allowed the application ex-parte and directed that the applicant deposit his passport into



court as security. Further directions were made on October 22, 2020 for the parties to be heard through *viva voce* evidence.

2. The applicant filed chamber summons dated November 16, 2020 seeking variation of the *ex-parte* order. J. Kamau J, by a ruling dated February 4, 2022, allowed the application and permitted the release of the applicant's passport for purposes of travelling for business only and upon him providing a personal bond of Kshs. 2,000,000 plus 2 sureties of a similar amount and that he would only be allowed to leave the Country with leave of the Court.
3. Notwithstanding dissatisfaction with that decision, the applicant did not prefer an appeal against it and now moves this Court through a Notice of Motion dated May 16, 2022 for grant of extension of time to file and serve a notice of appeal and to file a memorandum and record of appeal from the said ruling.
4. In the affidavit sworn on May 16, 2022 by the applicant, he explains that his belated decision to appeal the ruling of February 4, 2021 was because he had hoped that the issues he sought to appeal would be resolved through the inter partes hearing and determination of the 1st and 2nd respondents' application of July 15, 2020. He deposes that the hearing inter partes has delayed the determination of the issues which in turn has continued to keep in place the *ex-parte* orders which infringe upon his constitutional freedom of movement. He further deposes that the continued retention of his passport seeks to oppress him by preventing him from engaging in business travels to sustain his business from which he earns a living and that the order for deposit of his passport was made on account of false and spurious reasons.
5. The 1st and 2nd respondents responded to the application vide a replying affidavit of Prashant Rajnikant Shah, the 1st respondent (and on behalf of the 2nd respondent) sworn on June 30, 2022. He deposes that all parties were heard on the application of July 15, 2020 and the *ex-parte* orders were substituted with the conservatory order and directions made on October 22, 2020 which were in every sense inter partes orders. He notes that the applicant's application of November 16, 2021 was allowed on terms and did not bar him from getting his passport and further, nothing stopped him from at the very least filing a notice of appeal and requesting for proceedings as every prudent litigant would ordinarily do when aggrieved by a decision that is appealable. He asserts that the applicant really had no intention of appealing against the ruling of February 4, 2021. He further deposes that the reasons proffered by the applicant for delay in bringing this application are shocking as it is the applicant who has been responsible for the delay in the determination of the case in the superior court by making unnecessary applications. The superior court had already given directions as to the trial of the case and when parties showed up for hearing with all their witnesses, the applicant raised objections that stalled the process. In addition, what is holding up the proceedings at trial is the applicant's preliminary objection regarding certain witness statements that were prepared. He avers that the applicant clearly does not wish to proceed with the trial at the superior court.
6. Both parties have filed their submissions which are a regurgitation of their affidavits save for the respondents' submissions which add that the applicant's preliminary objection before the trial court was scheduled for determination on September 26, 2022 (a date now past). The respondents submit that whichever way the trial goes, the applicant will get back his passport which is only held as security pending the hearing and determination of the case.
7. What is before me is an application for extension of time pursuant to rule 4 of rules of this Court which grants a single judge unfettered discretion on whether or not to extend time. But so that the exercise of the discretion is judicious it is guided by well settled principles which have been stated times



without number by this Court. See for example *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997 where the Court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

8. The provisions of rule 75 (now rule 77) of this *Court's rules* succinctly provide on the procedure for lodging a notice of appeal:-

75. Notice of appeal

- (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
- (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

9. Similarly, rule 82 (now rule 84) makes provision for institution of appeals and reads: -

82. Institution of appeals

1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
 - (a) a memorandum of appeal, in quadruplicate;
 - (b) the record of appeal, in quadruplicate;
 - (c) the prescribed fee; and
 - (d) security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.
- (3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.

10. The applicant has not adhered to either of these provisions. The notice of appeal ought to have been lodged on or before February 18, 2021 being 14 days from the date of the ruling of February 4, 2021. This application brought on May 16, 2022, is brought more than 1 year 3 months after the date the ruling was delivered. This period is certainly inordinate.



11. The reasons proffered for delay are equally unsatisfactory. The applicant decided to stake his bet in resolving the difficulties which he contends the ruling of February 4, 2021 placed on him in the proceedings before the trial court. He now laments that the proceedings have taken longer than he had anticipated but that is the nature of litigation. Sometimes caught up in unexpected twists and turns. In working out which path to pursue, the applicant would have been imprudent to assume that the proceedings before the trial court would be clockwork in his favour. He cannot use his dissatisfaction of the pace of the proceedings there to seek to inconvenience the respondents with an appeal over 1 year and 3 months after the date of the ruling. He must with fortitude soldier on at the High Court.
12. Ultimately, the application dated May 16, 2022 fails and is disallowed with costs.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR

