



**Suleiman & 8 others v Kusoma & 4 others (Civil Appeal  
E028 of 2023) [2024] KEHC 9195 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9195 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CIVIL APPEAL E028 OF 2023  
SM GITHINJI, J  
JULY 29, 2024**

**BETWEEN**

AHMED HASSAN SULEIMAN ..... 1<sup>ST</sup> APPELLANT  
GHAZAL ABDU MAKKA ..... 2<sup>ND</sup> APPELLANT  
OMAR MAKKA ADI ..... 3<sup>RD</sup> APPELLANT  
ABDULQADIR ABDU MAKKA ..... 4<sup>TH</sup> APPELLANT  
FAIZ ALI MSUO ..... 5<sup>TH</sup> APPELLANT  
TIMA MBWARAZIDI LALI ..... 6<sup>TH</sup> APPELLANT  
BWANAMA KASSIM KUPI ..... 7<sup>TH</sup> APPELLANT  
OMAR BWANAHERI SHEMAKA ..... 8<sup>TH</sup> APPELLANT  
YUMBE KASSIM KUPI ..... 9<sup>TH</sup> APPELLANT

**AND**

SHEE MOHAMMED KUSOMA ..... 1<sup>ST</sup> RESPONDENT  
KHAIDAR MSUO ..... 2<sup>ND</sup> RESPONDENT  
SALILU USAMA SALILU ..... 3<sup>RD</sup> RESPONDENT  
FUAD BADI USAMA ..... 4<sup>TH</sup> RESPONDENT  
KASSIM BADI USAMA ..... 5<sup>TH</sup> RESPONDENT

*(Being an Appeal from the Directions on Jurisdiction issued by the  
Senior Principal Magistrate's Court at Lamu, Hon T. A. Sitati on 1st  
September, 2023 in Consolidated Civil Suits No.E013 & E014 of 2021)*



## RULING

### Representation:

Abdulmunim Omar & Co. Advocates for the Appellants

A.B. Olaba Advocate for the Respondents

1. For determination is the application dated 26<sup>th</sup> September, 2023 brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act seeking the following orders;
  1. Spent.
  2. Spent.
  3. That this Honourable Court be pleased to issue an order of stay of proceedings in the Kadhi's Court at Lamu and all consequential orders or directions issued by Honourable Mursal Mohamed (PK) in KCPSC Case No. E001 of 2023 (OS) between HYDAR MSUO & 2 Others versus Ahmed Bahsan & 4 Others pending the hearing and determination of this Appeal.
  4. That this Honourable Court be pleased to grant any other order or relief that it may deem fit and just to grant.
  5. That costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the supporting affidavit sworn by Ghazal Abdu Maka the Imam of Jamia Mosque, Faza a.k.a Msikiti wa Ijumaa- Faza on the same day. He deposed that the applicants are the bonafide Trustees and officials of the Mosque which is registered as Jamia Mosque Faza Trust vide the Deed of Trust dated 3<sup>rd</sup> March, 2021. That a suit for trespass was instituted at Lamu being Civil Suit No. E014 of 2021: Abmed Hassan Suleiman & 8 Others Vs. Shee Mohamed Kusoma & 4 Others which was later consolidated with Civil Suit No. E013 of 2021: Hydar Msuo & 2others Vs Ahmed Bahsan & Others.
3. That the consolidated suits were heard by Hon. T. A. Sitati (SPM) and during the hearing of the last Defendant's case, the court on its own motion issued direction on jurisdiction to the effect that the court did not have jurisdiction to entertain civil suits over trust (wakf) properties following the enactment of the Wakf Act No. 8 of 2022. He also deposed that the court directed the parties to seek redress from the Kadhi's court. The applicants aggrieved by the said decision lodged the present appeal and the Respondents on the other hand filed a suit at Lamu Kadhi's Court being, KCPSC No. E001 of 2023 (Os): Hydar Msuo & 2 Others Versus Ahmed Bahsan & 4 Others.
4. He further contended that when the matter came up for inter parties hearing at the Kadhi's Court, the court declined to allow their application for stay of proceedings pending the hearing and determination of the Appeal. It was also his contention that the issues touching on title documents cannot be conclusively dealt by the Kadhi's court.
5. In Response, the Respondent filed Grounds of Opposition dated 21<sup>st</sup> November, 2023. According to the Respondents, the pleadings clearly disclose the existence of a WAQF in the Ijumaa Mosque and the JABIA and as such, only the Kadhi's Court has jurisdiction as conferred by Statute.
6. The application was canvassed by way of written submissions which I have duly considered.



## Determination

7. I have considered all the pleadings, submissions raised by the parties together with cited statutory and case law. In my view the only issue for determination is whether the Applicant has met the conditions for stay of proceedings pending appeal.
8. The applicants assert that they are the bonafide Trustees and/or officials of Jamia Mosque, Faza which is registered vide the Deed of Trust dated 3<sup>rd</sup> March, 2021. That the two properties belonging to the Mosque are in custody and possession of the applicants. The contention between the applicants and the Respondents is the issue of Jurisdiction of the Kadhi's court to determine civil disputes over Wakf properties. The Respondents on the other hand contend that the pleadings disclose the existence of a Waqf in the Ijumaa Mosque and the JABIA and hence only the Kadhi's Court has jurisdiction under the Waqf [Act No. 8 of 2022](#).
9. A decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from Order 42 rule 6 (1) of the Civil Procedure Rules.
10. A stay of proceedings is a radical remedy only granted in very exceptional circumstances. In the words of Ringera J. in Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000): He said, "As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously"
11. In the present case, it is not possible to say that the preferred appeal is not arguable. As numerous decisions have held, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. The Appeal in the instant case relates to the question of whether the Trial Court has jurisdiction to hear the matter. This in my view is an issue that this Court will need to consider and determine at the hearing of the appeal by weighing the reasoning given by the Trial Court vis a vis the Applicant's contestation, and arrive at its own decision. My considered view is that the Appeal passes the arguability test.
12. Further, a perusal of the aforesaid Memorandum of Appeal led this court to the conclusion that the intended appeal is indeed arguable and not frivolous as the question before the appellate court is whether or not the Kadhi's court has jurisdiction to determine the issues of the properties in the Deed of Trust dated 3<sup>rd</sup> March, 2021.
13. For the foregoing reasons, the upshot of this court's decision is that the Appellants' Notice of Motion application dated 26<sup>th</sup> September, 2023 is merited and the same is hereby granted in terms of Prayer No (3) but on condition: -
  - a. That the Appellants shall file and serve their Record of Appeal within thirty (30) days from the date of this Ruling.
  - b. That in the event the Appellants shall default in the order given in Paragraph (1) hereinabove, the order of stay of proceedings will automatically lapse and the Respondents will be at liberty



to move the lower court as provided by the law to proceed with KCPSC No. E001 OF 2023 (OS): Hydar Msuo & 2 Others Versus Ahmed Bahsan & 4 Others.

c. Costs of the application will be in the cause.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29<sup>TH</sup> DAY OF JULY, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

1. Mr Omar for the Applicant
2. Mr Olaba for the Respondent

Mr Omar; - There are some parties interfering with the suit properties. We pray the status quo be maintained pending the appeal.

Court; - Status quo be maintained pending filing and hearing of the appeal.

.....

**S.M. GITHINJI**

**JUDGE**

**29/7/2024**

