



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY APPEAL NO. 11 OF 2020

FATUMA ADALLA.....1st APPELLANT/APPLICANT

BIASAH ABDALL.....2nd APPELLANT/APPLICANT

VERSUS

SULEIMAN MOHMAED ABDALLA.....1st RESPONDENT

RUKIYA HAMISI.....2nd RESPONDENT

(Being an appeal arising from the ruling of Principal Kadhi Abdulhahim Athman in Mombasa Kadhi's Court Succession case no 223 of 2014 delivered on 16th July 2020)

RULING

1. On 27th October, 2016, Principal Kadhi Abdulhahim Athman of Mombasa Kadhi's court delivered his judgment thereby distributing assets in respect of the estate of Mohamed Abdalla Sudi in succession cause No 223/2014.

2. According to the judgment, the deceased died intestate on 29th November, 1987 leaving behind the following heirs;

- (1) Mkasai Swaleh (mother now deceased)
- (2) Rukiya Hamisi (widow)
- (3) Suleiman Mohamed Abdalla (son)
- (4) Abdalla Mohamed Abdalla (son)
- (5) Hadija Mohamed Abdalla (daughter)
- (6) Mwanaisha Mohamed Abdalla (daughter)
- (7) Biasha Mohamed Abdalla (daughter)

3. Pursuant to the evidence adduced during the hearing of the petition before the Kadhi, the trial court found that the applicants/appellants herein being sisters to the deceased were not heirs to the deceased. The court also found that the applicants did not have any beneficial interest in the subject property. That they did not contribute jointly with the deceased in constructing the house now the subject of distribution.

4. According to the decree extracted on 10th June, 2020, the court ordered as follows;

- (1) The deceased herein left a Swahili house without land built on Plot No. 211/MN**
- (2) The deceased is survived by his mother who is now deceased, one widow, two sons and three daughters.**
- (3) That the estate of the deceased should be distributed to the said heirs as shown hereunder;**

- (a) Mkasi Swalleh (deceased mother) 16.66%
- (b)Rukiya Hamisi (widow) Abdalla 12.5%
- (c) Suleiman Mohamed Abdalla (son) 20.23%
- (d)Abdalla Mohamed Abdalla (son) 20.23%
- (e)Hadija Mohamed Abdalla (daughter)10.11%
- (f) Mwanaisha Mohamed Abdalla (daughter) 10.11%
- (g) Biasha Mohamed Abdalla (daughter)10.11%

(4) Mkasi Swalleh who happens to be the deceased's mother also died. Her 16.66% share be distributed to her three heirs as shown hereunder;

- (a) Fatuma Abdalla (daughter) 5.55%
- (b) Biasha Abdalla (daughter) 5.55%
- (c) Ali Suleiman (grandson) 5.55%

(5) That the Swahili house without land built on plot No 211/MN is vested to the heirs according to their respective shares.

(6) That the income of the property including any room occupied by any beneficiary or his relative be collected by estate agent and proceeds to be distributed to the heirs according to their respective shares.

(7) That any heir who wants his/her share in monetary value may be bought off by the other heirs upon valuation of the estate property.

(8) That the petitioner and her children having majority shares have first priority to buy the house.

(9) That the respondents who are in control of the suit house to give records of account from the time Mkasi Swalleh met her death.

5. It is worth noting that the share of the deceased's mother now deceased amounting to 16.66% was inherited by her two daughters now the applicants and a grandson as per order No 4 above.

6. Subsequently, pursuant to a Notice of Motion dated 17th June, 2020, Rukiya Hamisi the widow to the deceased sought to have the property valued by Wyco valuers company and that the petitioners being the primary heirs of the deceased and holding 83.34% shares be allowed to buy the 16.66% share of the respondents (now appellants).

7. After considering the application, the court made the following orders on 16th July,2020;

(1) That the petitioners are hereby allowed to do valuation of the house without land standing on Plot No 211/MN situated at Kongewea

(2) That Wyco valuers company is hereby appointed to do valuation of the house without land standing on Plot No 211/MN situated at Kongewea Mombasa and valuation costs be borne by the estate.

(3) That the petitioners by virtue of being primary heirs of the deceased and holding 83.34% share they are allowed to buy of the 16.66% share of the respondents.

(4) That the respondents are hereby ordered to file in court record of account of the monthly income generated from the house with effect from the date their mother met her death todate.

(5) That the parties, their advocates or agents to avail themselves at the site when the valuer visits the house for valuation.

(6) That parties to appear in court on 30th July,2020 at 9.00am to confirm filing of valuation report, statements of accounts and for further directions.

8. Aggrieved by the above directions and or orders, the appellants /applicants moved to this court on appeal vide a memorandum of appeal dated 28th July, 2020. Among the grounds cited in the memorandum of appeal are; that the Kadhi went against the orders in the judgment

delivered on 27th October, 2015 thereby forcing them to sell their share of the subject house against the principle of willing buyer and willing seller; that Kadhi failed to appreciate that the appellants were residing and have always been in occupation of the subject house.

9. On 4th August, 2020, the appellants/applicants filed a Notice of Motion dated 30th July, 2020 seeking stay of execution of the Khadi's court orders dated 16th July, 2020 pending the hearing and determination of the appeal. It is this application that I am being called upon to determine.

10. The application is premised on grounds stipulated on the face of it and an affidavit sworn on 30th July, 2020 by Fatuma Abdalla in which she averred that; the orders of 16th July, 2020 were against the Kadhi's judgment in succession case No 223/2014; that according to the judgment, the subject house was to be shared and that they (appellants) had the option to sell their share; that the sale was optional but not to be compelled; the order compelling them to sell their share was unfair and unconscionable since they are not willing to sell; they have been staying in that house hence to force them out is not right; if evicted from the house, they will suffer irreparably as they will have nowhere to go.

11. In response, the respondents filed grounds of objection and a replying affidavit sworn on 25th August 2020 by Suleiman Mohamed Abdalla where it was stated that; there are no sufficient grounds to warrant setting aside the judgment of 27th October, 2016 which has not been challenged; application is brought in bad faith and gross malafides.

12. He further averred that the orders of 16th July, 2020 were a follow up of the judgment of 27th October, 2016 which has not been challenged and, that the applicants do not reside in the said premises. That the application has been overtaken by events as further orders were issued on 12th August, 2020 directing the applicants to deposit rent collected amounting to 5 million in court.

13. He further averred that the application is frivolous, misconceived, bad in law and intended to deny the respondents their right of property ownership. To dispose the matter, parties agreed to file submissions in canvassing the application.

Submissions by the applicants

14. The firm of Kenzi appearing for the applicants filed their submissions on 13th October, 2020 reiterating the averments contained in the affidavit in support of the application and grounds of opposition.

15. It was contended that in the judgment of 27th October, 2016 the court did not order the applicants to sell their share to the respondents and that the principle of willing buyer and willing seller should apply.

16. Learned counsel submitted that the applicants will suffer substantial loss if evicted from the premises. That the respondents will not suffer any prejudice as they still retain their shares.

Respondent's submissions.

17. The first respondent Suleiman in person filed his submissions dated 16th October, 2020 submitting on the issues namely;

(a) Whether the applicant's application is merited.

(b) Whether the applicants are in contempt of court orders;

(c) Whether the appellants have an arguable appeal.

18. It was submitted that the applicants had not met the criteria for grant of stay orders under Order 42 (6) (e) of the Civil Procedure Rules which include; proof that the application has been filed within reasonable time; that the applicants will suffer substantial loss if the orders are not granted and, that security be deposited in satisfaction of the decree. In support of this submission, reliance was placed in the case of **Congress Rental South Africa vs Kenyatta International Convention Center Co-operative Bank of Kenya limited and another (Garnishee) (2019) e KLR.**

19. He further submitted that the applicants have not established a prima facie case to prove an arguable appeal. In his view, the applicants are in contempt of court orders by failure to account for the rent collected over time since the deceased died. That the contemptuous acts of the applicants amount to an illegality hence cannot seek the orders sought to continue perpetuating an illegality. To Justify this submission reference was made to the case of **Tabitha Atsinga Musambi V Standard Limited and another (2019) e KLR** where the court held that, a court cannot enforce an illegality.

Determination

20. I have considered the application herein, affidavits and materials in support. I have also considered the respondent's grounds of opposition, replying affidavit and parties' submissions thereof. Issues that arise for determination are;

(1) Whether the applicant has met the requisite conditions before a stay of execution order can issue;

(2) Whether the appeal is arguable and therefore likely to be rendered nugatory should the court decline to grant a stay.

21. Before a court would consider to grant an order for stay pending appeal, the applicant seeking such order must satisfy the conditions set out under order 42 Rule (6) (2) of the Civil Procedure Rules to the effect that; there must be proof that the applicant will or is likely to suffer substantial loss should the orders be denied; whether the application for stay has been filed within reasonable time; whether security in satisfaction of the decree has been furnished.

22. I am alive to the fact that to issue or not to issue an order of stay is purely a discretionary power bestowed upon the court. Such discretion must however, be exercised judiciously while balancing the interests of justice of both parties. See **Butt Vs Rent Restriction Tribunal (1982) KLR 417** where the court stated that the power to grant or refuse an application for stay of execution is a discretionary power which should be exercised in such a way as not to prevent an appeal. Similar position was also espoused in **Halai and another Vs Thorn Turpin (1963) Ltd 1990) KLR 365.**

23. However, for effective exercise of discretion, the court must also go further and interrogate the conduct of the party seeking such orders. This will include among others; issues of delay in moving the court for the orders sought, ill motive in filing the suit or application and, non-compliance with previously given court directions. In this regard, I am guided by the decision in the case of **Ferruz Omar Mahendan and 4 others V Ahmed Mohamed Honey (2016) e KLR** where the court stated that;

“Of course, in the exercise of discretion, the court looks at the conduct of the parties in the proceedings. If the conduct of parties is appalling as in this case, the court will rightly refuse to exercise its discretion in his favour”.

24. The respondent argued that the applicants have not met any of the conditions under Order 42 rule 6 of Civil Procedure Rules. Before I consider the issue whether the applicants are likely to suffer substantial loss which is the key consideration before issuing a stay order, I will like to address the issue whether the application was filed timeously. The impugned ruling was delivered on 16th July, 2020 while the appeal was lodged on 28th July, 2020. This is a difference of 12 days. By all standards, the application was filed within the stipulated time contrary to the respondent’s counsel’s submission.

25. What substantial loss will the applicants suffer if the order is not granted. As to what constitutes substantial loss, the same is relative depending on the circumstances of each case. In the case of **Antoine Ndiaye V African virtual University (2015) e KLR**, Justice Gikonyo cited with approval the case of **Sewankambo Dickson Vs Ziwa Abby HCT HCC MA 0178 of 2005** where it was held that ;

“...substantial loss is a qualitative concept. It refers to any loss, great or small that is real worth or value, as distinguished from loss without value or loss that is merely nominal ...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals -especially in a commercial court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”

26. In the instant case, the applicants are claiming they are occupying the subject premises and any eviction order likely to arise out of the impugned ruling will have a devastating effect as they will have nowhere to go. Their argument is that the judgment did not direct that they sell their shares to the primary heirs hence to force them to sell will be unfair.

27. According to the judgment, the applicants/appellants (sisters to the deceased) were not heirs to the deceased. However, their mother was and after her death they stepped into her shoes by taking her 16.66% thus giving them a share in the premises. Order No 7 of the extracted decree out of the judgment delivered on 27th October, 2016 states;

“That any heir who wants his/her share in monetary value may be bought off by the others upon valuation of the estate property.”

28. Order No.8 went further to provide;

“That the petitioner and her children having majority shares have first priority to buy the property”

29. From the wording of the two orders quoted above, the applicants are arguing that there is nowhere the court declared that the applicants do sell their shares to the primary heirs. Indeed, the orders are subject to further scrutiny as to whether the judgment required them to sell their shares even if they do not want. There is an arguable question thus making the appeal arguable which does not mean that it will necessarily succeed and if not taken care of, the appeal will be rendered nugatory.

30. In the case of Kenya **Shell limited Vs Kibiru (1986) KLR 410** Plat AG J.A expressed himself on the question of substantial loss in execution orders as follows;

“it is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

31. It is apparent from the impugned orders that, if the orders of sale are not stayed, there is a likely hood of eviction or sale of property hence the possibility of the applicants suffering substantial loss by losing their residence and unnecessary inconvenience suffered both by them and the could be purchasers should the appeal succeed and the sale of the premises reversed. To that extent, there is sufficient cause to warrant stay.

32. Having held that the applicants have proved the element of substantial loss, I will now turn to the issue of security. In the impugned ruling, the court had directed the applicants to furnish accounts in respect of what has been collected over a period of time by the applicants. Subsequently, the court made orders on 12th August, 2020 directing them to deposit 5000,000 in court. I think this order if implemented will sufficiently address the issue of security. The Kadhi's court is at liberty to execute its order's regarding submission of accounts. I do not find it necessary at this stage to order for a deposit of security to be executed.

33. I do not see any prejudice likely to be suffered by the respondents if orders staying valuation and sale of the subject premises is allowed. Having allowed the application for stay, it is hereby ordered that;

(a) An order of stay of execution be and is hereby issued restraining execution of the Kadhi's court order dated 16th July,2016 in so far as it relates to the sale of premises comprising the estate pending hearing and determination of the appeal.

(b) The order of stay herein above granted does not affect the order requiring the applicants to submit a statement of accounts and depositing of rent collected from the premises for the relevant period as directed by the Kadhi's court.

(c) This being a family dispute each party to bear own costs.

(d) Applicants to serve record of appeal urgently to facilitate hearing of the appeal.

(e) Deputy Registrar to call for the Kadhi's court file in Mombasa Kadhi's Succession File No 223/2014.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MARCH, 2021

J. N. ONYIEGO

JUDGE