



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO. 141 OF 2016

IN THE MATTER OF: ESTATE OF SEIF ABDALLA MOHAMED (DECEASED)

IN THE MATTER OF: SAID KHAMISI MBILU

ESHA AHAMAD HAMISI.....PETITIONERS/APPLICANTS

IN THE MATTER OF: SULTANA FADHILI.....1ST INTERESTED PARTY

FRANCIS M.O.KADIMA.....2ND INTERESTED PARTY

Coram: Hon. Justice R. Nyakundi

Kilonzo & Aziz Advocates for the 1st interested party

Ondabu & Co. Advocates for the Petitioner

Kadima & Co. Advocates for the 2nd interested party

R U L I N G

This is the intended appellant's application for an order staying execution of the judgement delivered by this Court on 14.4.2021 in favor of the respondents. The application for stay is supported by an affidavit sworn by the Said Khamisi and the relevant part thereof provides as follows:-

1) That being aggrieved by the judgement of Hon Mr. Justice R.Nyakundi and I have appealed against the whole judgement delivered on 14th April, 2021 to the Court of Appeal and I have filed and served a Notice of Appeal (Annexed & marked "SKM - 2" is a copy of the Notice of Appeal duly filed and served).

2) That have been informed by Advocates on record, which information I verily believe to be true, that whereas is not the business of this Court to sit on appeal of its own judgement, it is important to point out that my intended appeal to the Court of Appeal ha high chances of success as per the grounds of appeal enumerated here-below:

a) That the learned trial Judge erred both in law and in fact in holding that the only asset of the estate of the late Seif Abdalla Mohamed being Mnarani Farm Plot No. 7 Group V Kilifi Title No. Lt.45 Folio 475 was a wakf when there is evidence on record to the contrary.

b) That the learned trial Judge erred both in law and in fact by failing to appreciate the law that governs the consecration of wakfs and their administration and thus arrived at a wrong and injudicious judgement that is of no jurisprudential value.

c) That the learned trial Judge erred both in law and in fact by intentionally failing to consider properly the testimonies of all the witnesses and thus arrived at a wrong and clearly pre-determined conclusions.

d) The learned trial Judge erred both n law and fact by holding that a wife to a deceased person has no legal capacity and right to petition the High Court for Letters of Administration intestate in respect of an estate of her late husband.

e) The learned trial Judge failed to appreciate the law governing the grant and revocation of Grants of Letters of Administration particularly section 76 of the Law of Succession Act Chapter 160 Laws of Kenya and arrived at a wrong conclusion.

f) The learned trial Judge was indecisive and biased and thus rendered a judgement that is manifestly not based on the law, the facts and the evidence on record.

g) The learned trial Judge usurped powers he does not have and went out of his way to make declaratory which clearly is a preserve of the Environment and Land Court established under Article 162(2)(b) of the Constitution of Kenya, 2010.

The Respondents are opposed to the application for stay and they filed affidavits in opposition sworn by Sultana Fadhili and the grounds of opposition buttressing the averments in the affidavit.

The application was also followed with written submissions filed by each respondent counsels on the various aspects of the application for stay of execution within the necessity of reproducing them in this determination. I appreciate that each of the legal propositions is of immense value to the discussion that follow herein thereafter. The crux of the matter in all those submissions is on whether or not to grant a stay of execution in favour of the applicant.

Determination

The operative rule on stay of execution is as expressly stated under order 42 Rule 6 of the Civil Procedure Rules. The conditions hence render the granting of stay of execution include:-

a) The application being brought without unreasonable delay.

b) That the applicant intended appeal is likely to suffer substantial loss in the event the relief is not allowed.

c) That the applicant believes that there are reasonable prospects of the appeal succeeding.

d) Furthermore, enjoining the above provision, the court ought to order for security for the one performance of the decree. (See Deposit Protection Fund Board Suing as The Liquidator of Reliance Bank Limited (In liquidation) V Panachand Jivraj Shah and others Nairobi(Milimani) High Court Civil Case Number 1529 of 2001).

The Principles

On awarding/denying stay of execution have been orchestrated in various case law. The general rule is that the court does not make a practice of depriving a successful litigant the fruits of his or her judgement. Therefore, the fact that an aggrieved party has taken the liberty to exercise his constitutional and statutory right of appeal does not mean that the judgment appealed against must be stayed as of right (See Order 42 Rule 6 (1) of the Civil Procedure Rules.

The Court in *Southern Credit Banking Corporation Ltd V Grand ways Ventures Ltd and another civil application number Nairobi 321 of 2001; LLR 7042(CAK)* stated *inter alia*; -

“That whether or not the appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved and if damages will reasonably compensate the applicant if the aggrieved and if damages will adequately compensate the applicant or if the act to be stayed can reasonably be reversed, then it cannot be said that an appeal or intended appeal will be rendered nugatory unless a stay or injunction is granted.”

However, the court has unfettered discretion to grant or decline stay of the judgement pending an appeal so as not to render it nugatory. In the circumstances the burden of proof rests with the applicant to demonstrate that if an order of stay is denied, there are compelling reasons that he or she will suffer substantial loss(See *Antonine Ndiaye V African Butt V Rent Restriction Tribunal[1979](KLR)*). The court in *James Wangalwa & another V Agnes Naliaka Cheseto[2012]eKLR* succinctly stated as follows on the condition as it relates to substantial loss;-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rule. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.....the issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

I meticulously perused the entire record of proceedings in this matter including the impugned ruling which dismissed the objection by the intended appellant. First on the face of the circumstances of this case the consideration for granting a stay of execution include the weighing of the interest of the parties to establish whether the appeal has chances of success or whether irreparable damage may be suffered by the applicant unless stay is ordered in his favor. Furthermore I have taken the liberty to scrutinize afresh the impugned judgement delivered by this court without sitting as an appeals court the merits of the intended appeal has slim chances of success. The motion is intended to cause a further delay in the execution of the order made for the benefit of the wakfs property in this particular case. Thus I fail to understand how a case which is of more public importance namely the challenge to the validity of the wakf should be stayed until the final determination of the intended appeal. More so the applicant has not shown any special circumstances necessitating that this court’s judgement on appeal should not be executed by the respondent. In the present case they are no good reasons canvassed by the applicant why he is entitled to stay of execution.

In exercising this court's discretion and balancing the convenience and competing rights of both parties the scale of injustice and prejudice seems to tilt more on the side of the Respondent. All that the applicant has done is to state that he is optimistic that his appeal has high chances of success and therefore the judgement should be stayed. This can be easily seen from the lengthy grounds of appeal and the reliefs he expects to secure from the Court of Appeal. I take cognizance of the fact that it is not within my jurisdiction to make any attempts to defend the impugned decision but the prospect of the appeal succeeding is one of the condition precedent for grant of stay of execution. It is common cause that the instituted proceedings the contested property had already been registered in the name of the wakf in terms of the deed of the transfer dated 3rd January, 1942 by Khadija Binti Suleiman Bin Hemed El-Busaidy(Proprietor). It is clear to me that real and substantial injustice demands that execution should not be stayed pending the determination of the intended appeal. In the circumstances, the application for a stay order is dismissed with no orders to cost.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF JUNE, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr Ondabu for the Applicant
2. Mulwa for Kilonzo for the 1st Interested party

(maurice.kilonzo@yahoo.com, advocatesondabu@gmail.com, kadimawakili@yahoo.com)