



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY APPEAL NO.E024 OF 2021

IN THE ESTATE OFF OMAR MOHAMED SUYA (DECEASED)

MWANAKOMBO OMAR SUYA....APPELLANT/ APPLICANT

VERSUS

MOHAMED OMAR SUYA.....RESPONDENT

RULING

1. The deceased herein died intestate sometime 2007. He was survived by one widow, ten sons and eleven daughters. Through succession case number 83 of 2007, Mohamed Omar suya(son) and mwanakombo Omar suya(widow) petitioned Mombasa kadhi's court for identification of heirs and distribution of the estate. On 10th March 2009, the court distributed the estate with the widow getting 1/8 each, sons 2/31 each and daughters 1/31 each. It is worth noting that out of the 21 children, 10 are from Mwanakombo's house while the rest were from other wives who had divorced with the deceased.
2. The distributed assets comprising the estate included seven parcels of land, a house without land at Majengo sokoni on plot No. 251/section. XVI MSA and a tractor reg. No.KUZ 811. The court then directed for the house and tractor to be sold and other properties be valued for final distribution to the heirs.
3. On 29th Nov. 2010, parties submitted on the value of the house and the court pegged the value of the house at Kshs 4 million. The court further stated that the 4million value was a reserve price and in case of a prospective buyer paying more than the reserve price, then it was to be for the benefit of heirs. However, priority to purchase was given to any heir willing to buy it at the reserve price in default the property to be subjected to public auction. Mwanakombo (widow) having expressed interest to purchase the house at the reserve price, she was given priority to buy. Unfortunately, the rest of the properties are yet to be valued. From the record, some heirs including Mohamed Omar Suya appealed against the original judgment but the same was dismissed for want of prosecution. For one reason or the other, Mwanakombo was not able to raise the required amount. She however continued staying in the subject house to date.
4. Vide a notice of motion dated 8th October 2020, Mwanakombo Omar Suya moved the Kadhi's court seeking leave of the law firm of Aboubakar Mwanakitina and company Advocates to represent her. Further, that the court to accept her and her ten children to buy the subject house at 4million as per the order of 29th November 2010. She also sought the appointment of Mwinyi Omar Sura and Salma Omar Suya as trustees of the estate of the deceased.
5. Upon canvassing the application, the court delivered its ruling on 15th July 2021 thus stating that the current value of the property as per the current valuation report was 16million. That the applicant having been given priority to purchase the property at 4million way back the year 2010 and having failed to purchase the same, she cannot demand to pay the 4million applicable then. The court further observed that any heir willing to buy the property was at liberty to purchase the house as per the current valuation report. Subsequently, the court issued the applicant 30 days to vacate from the subject premises to facilitate the sale of the house.
6. Aggrieved by the hon.Kadhi's decision, the applicant filed a memorandum of appeal on 3rd August 2021 challenging the ruling. Subsequently, the applicant filed a notice of motion dated 12th August 2021 seeking stay of execution of the impugned orders pending hearing and determination of the appeal.
7. The application is supported by grounds set out on the face of it and averments contained in the affidavit in support sworn on 12th August 2021. It was averred that; the hon, Kadhi considered irrelevant issues that were not the subject of the application at hand; that the court failed to consider that the applicant had made some improvements on the said property hence the need for a refund ; the court relied on one valuation report to arrive at the decision it did; the house in question is her matrimonial property with sentimental value; the rest of the properties have not been valued and, that she will suffer substantial loss if she were to be evicted from the house.

8. In response, the respondent filed a preliminary ground of objection dated 27th August 2021 stating that the application is incompetent as the applicant ought to have filed similar application first before the Kadhi's court hence the application herein is premature. In his replying affidavit sworn on 27th August 2021, the respondent averred that the application is a delaying tactic employed by the applicant considering that she and her children have been occupying the house without paying rent to the detriment of the other beneficiaries. He further averred that parties were given an opportunity to each file a valuation report but the applicant refused to submit hers. He further stated that the applicant is at liberty to buy the house at the current price and if not, she should be made to deposit security equivalent to the current value of the house.

9. In her rejoinder, the applicant filed a supplementary affidavit sworn on 8th September 2021 stating that she is entitled to purchase the house at 4million and that she is opposed to the current valuation. She further claimed that her share and that of her children in the rest of the properties is sufficient to offset the sale price of the house even if she were to pay 16million. When the matter came up for hearing, counsel agreed to file written submissions to dispose the application.

Applicant's submissions

10. Through the firm of Aboubakar and co. Advocates, the applicant filed her submissions on 9th September 2021 reiterating the averments contained in the affidavit and supplementary affidavit in support to the application. Counsel submitted that the learned Kadhi did consider irrelevant issues and made directions on the purchase of the house at kshs 16million when there was no application for valuation. Learned counsel submitted that she will suffer substantial loss if the order sought is not granted. Counsel quoted a number of authorities governing circumstances when stay can issue interalia **HCCA NO.20 OF 2020 Kakamega between HE Vs SM** where the court underscored proof of substantial loss, timely filing of the application and deposit of security.

11. As to whether the appeal is arguable, counsel submitted that the appeal has high chances of success. To support this proposition, counsel referred to **Civil Appeal No. 218 of 2014 between Kenya Ports Authority vs Mitu-Bell welfare society and others**.

Respondent's submissions

12. Through the firm of Oddiaga and company Advocates, the respondent filed his submissions on 28th September 2021. Counsel submitted that the application herein ought to have been filed before the Kadhi's court first before moving to this court. It was further submitted that the judgment of the Kadhi's court has never been challenged since 10th March 2010 hence no substantial loss will be suffered by the applicant. That the respondent should be allowed to enjoy the fruits of his judgment. Learned counsel opined that the application of the oxygen principles is in favour of the respondent's case that litigation must come to an end. In support of this position, counsel referred to the case of **Victory Construction vs BM(suing as a minor through next friend one PMM)(2019)e KLR**.

Analysis and determination

13. I have considered the application herein, response thereto and rival submissions by both counsel. Issues that emanate for determination are; whether the application is incompetent for being filed in the high court before filing the same before the trial court; whether the applicant has met the threshold for grant of stay of execution orders.

14. Before I address the main issue on grant of stay of execution, I would like to address the preliminary objection regarding incompetence of the suit. According to the applicant, order 42 rule 6 (1) demands that before an application for stay is filed before the appellate court, the same must first be filed before the court whose order or decree is being challenged. For avoidance of doubt, I wish to reproduce O42 rule 6(1) of the civil procedure rules as follows;

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay of execution shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by the order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”

15. From the wording of the above quoted provision, it is optional in my view, for a party aggrieved with an order of the trial court to either seek stay in the trial court or straight away seek stay orders from the appellate court. I find this to be the correct position of the law and general practice. I do not agree with Mr. Aboubakar that the suit is incompetent on grounds that stay was not first applied for before the trial court. In my opinion, that submission is improper and order 42 rule 6(1) does not contemplate A boubakar's line of submission.

16. Having addressed the preliminary objection, the court is left with the critical question whether the applicant has met the requisite conditions for grant of stay of execution orders pursuant to order 42 rule 6(2) of the civil procedure rules. Therefore, it is incumbent upon the applicant to establish that; she is likely to suffer substantial loss should the order for stay be denied; that the application for stay has been filed within reasonable time and; that security for due performance of the decree has been furnished. This position was succinctly captured in the case of **Antoine Ndiaye Vs African Virtual university (2015)e KLR**.

17. However, it is worth noting that the power to grant or not to grant an order for stay is purely a matter of discretion by the adjudicating court. Such discretion is obviously guided by the principles geared towards the attainment of substantive justice not forgetting that the objective for stay is to preserve the purpose of the appeal. See **Butt vs Rent restriction Tribunal (1979)** where the court of appeal held that the power to grant stay of execution is discretionary and that such discretion should not be exercised in such a way as to prevent an appeal.

18. In the instant case, the applicant is alleging that the hon. Kadhi did not address the issues in controversy. That the court considered issues on valuation of the house and directed the applicant to pay 16million instead of 4million. That the court failed to address the issue of refund based on the improvements done on the property. Whereas these issues are the subject of the main appeal Mr. Aboubakar has extensively relied on this grounds to argue this application.

19. Judgment in this case was entered way back on 10th march 2009. The applicant did not challenge the decision. Subsequently, the house in question was valued at 4million and priority to purchase given to the applicant on 29th Nov.2010. Unfortunately, none of the heirs including the applicant ever took up the offer. It was until 8th October 2020 that the applicant filed a notice of motion seeking two of her children appointed as trustees and the court to accept her and her children to purchase the house as per the order of 29th November 2010.

20. It is this application that generated reaction from the other party opposing the purchase of the house at 4million given the rate of inflation since 2010. Subsequently, parties were ordered to file their respective valuation reports. Despite the applicant being given an opportunity to file her valuation report, she did not bother to do so. She also argued that she had improved the property hence needed a refund. The hon. Kadhi did address all the issues thus stating that in all fairness, the house cannot be sold at a price of 4million which was applicable 11years ago hence the applicable current price.

21. Without delving in detail on the grounds of appeal which arguments are similar in this application, one would ask, what substantial loss the applicant will suffer if the orders sought are not granted. The judgment in this case delivered on 10th March 2009 has never been challenged and the sale of the house has never been an issue. The only issue in contestation is what price should the house be sold and the convenience of the applicant in buying it. For all purposes and intent, the value of the house cannot remain constant given the rate of inflation since 2010. Further, the applicant has since 2010 been given priority to purchase the house.

22. The applicant's financial inability cannot be used to hold every other beneficiary at ransom. Had she been denied the opportunity to purchase, she would be justified to claim the possibility to suffer substantial loss. She has an opportunity to buy the house or move out to an alternative house. She will benefit from the sale if the house is sold at 16million or more. It will also be prejudicial for other beneficiaries to continue waiting for their share for over 11yrs. In my view, the applicant has not proved that she is likely to suffer substantial loss.

23. Regarding the issue whether the appeal has high chances of success and therefore likely to be rendered nugatory, the court has to balance the interest of both parties. I am alive to the fact that an arguable appeal need not necessarily be the one which must succeed. See Halai and another Vs Thornton & Turpin (1963) Ltd (1990) KLR365.

24. It is trite that proof of substantial loss is the cornerstone in granting stay of execution orders. In the case of Kenya shell Limited Vs Benjamin Karuga Kibiru & Ruth Wairimu Karuga(182-1988) KAR 1618 the court held that;

“it is usually a good rule to see if order 41 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 an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay”

25. Whereas the applicant has a right to be heard, the respondent has an equal right to enjoy the fruits of his judgment which have remained elusive for the last 11yrs. In this regard, I do agree with the holding in the case of ANM Vs VN(2021) e KLR where the court held that;

“The general principle of the law is that the successful litigant in possession of a valid court judgment is entitled to the fruits of his judgment unless there exist exceptional circumstances to deny him or her that right”.

26. In the circumstances of this case, the issue at hand only revolves around the purchase of the house which is open to all heirs at the prevailing market price. I do not find any good ground to hold that the appeal will be rendered nugatory if the orders sought are not granted. Further, I do not find the appeal arguable. All parties will benefit if the house is sold at the prevailing market price and the court has inherent powers to so direct even suo moto.

27. Regarding the issue whether the application was filed within reasonable time, the same was timeously filed hence no contestation on the issue.

28. As to deposit of security, the same is meant to measure the seriousness of an applicant and avoid subjecting a respondent to unnecessary costs against frivolous and vexatious litigant. It is however not intended to hinder a litigant from pursuing his or her appeal. Since execution of the judgment herein has been pending for too long, we cannot peg the sale of the house on beneficiaries' shares in other properties. To do so will further complicate execution of the Judgment. If the applicant is serious in pursuing the appeal with the intention of buying the house without land, she should deposit Kshs 16million being the current market price in court as security within 45 days pending hearing and determination of the appeal in default, the kadhi's court to proceed with the process of execution of its judgment. As to costs, each party to bear own costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF DECEMBER 2021

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J.N. ONYIEGO

JUDGE.