



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 23 OF 2019

ASHA HAMISI NIMUTENDEAPPLICANT

VERSUS

MWARONGA NASSORO NASSORO.....1ST RESPONDENT

MWINYI HAMISI SHEE MBETO.....2ND RESPONDENT

RULING

1. Asha Hamisi Nimutende, the Applicant herein has filed an application dated 2.7.19 against Mwaronga Nassoro Nassoro and Mwinyi Hamisi Shee Mbeto seeking leave to file appeal out of time, against the orders of Hon. Said Hamisi Bedzenga in Kwale Succession Cause No. 186 of 2015 and that the draft memorandum of appeal be deemed as duly filed. The Applicant also seeks stay of execution of the said orders.

2. The grounds are that the Applicant's advocate was not aware that the Hon. Kadhi has delivered his ruling on 30.10.18 as the same had been adjourned severally. Upon perusal of the ruling and proceedings, the Applicant formed the opinion that there was "a lot of irregularity in the conduct of the matter." The Applicant claims that she and her siblings are the sole beneficiaries to the estate of their grandfather Abdalla Kisinyo which includes a property known as Kwale/Waa/114 (the property). The Applicant claims that the 1st Respondent without their knowledge, filed Succession Cause No. 186 of 2015 and obtained title in respect of the property in their favour. Following an application, the Applicant was enjoined in the proceedings and the matter was heard and concluded. She further claims that without an application for review, the Hon. Kadhi sat on appeal of his own judgment of 15.6.15 and issued orders to the effect that the Applicant's family and that of the 2nd Respondent should inherit the property in equal shares. The Applicant stated that she did not prefer an appeal as the records are not proper as observed in the ruling. She then invoked the supervisory opinion of this Court *vide* Miscellaneous Application No. 4 of 2019 which was dismissed. Being still aggrieved by the decision of the Hon. Kadhi, the Applicant intends to appeal the same.

3. The Respondents did not file any response to the Application. At the hearing however, the Respondent's counsel stated that they do not oppose the prayer for leave to file appeal out of time. They do however oppose the prayer for stay of execution which they say has been dealt with. The Applicant's counsel on his part submitted that if stay is not granted, the intended appeal will be rendered nugatory.

4. The Application and indeed the intended Appeal herein arise from the decision of the Kadhi's Court in Succession Cause No. 186 of 2015. The Applicant has invoked Sections 1A, 1B, 3, 3A 79G and 95 of the Civil Procedure Act as well as Order Rule 6(1) of the Civil Procedure Rules.

5. The appellate jurisdiction of this Court in respect of decisions of Kadhis Courts is stipulated in Section 50 of the Law of Succession Act which provides:

50. Appeals to High Court

(1) ...

(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.

6. The Law of Succession Act is a complete code containing its own rules of procedure. The provisions of the Civil Procedure Act and Rules are not applicable in succession matters, whether at the original or appellate stage. The only provisions imported into the Law of Succession Act are stipulated in Rule 63 of the Probate and Administration Rules which provides:

Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

7. The provisions cited by the Applicant are not applicable herein. Section 47 of the Law of Succession Act however confers jurisdiction upon this Court to entertain any application and determine any dispute under the Act and make such orders therein as may be expedient. Likewise, under Rule 73 of the Probate and Administration Rules, the inherent power of the Court to make such orders as may be necessary for the ends of justice, may not in any way be limited. This Court therefore has the jurisdiction to entertain this Application and has unfettered discretion to issue any orders for the ends of justice.

8. The Respondent's' opposition to the prayer for stay is their claim that the same has been dealt with. The Respondents did not, however place any material before the Court to support this claim.

9. It is trite law that the purpose of stay of execution pending appeal or intended appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing an appellant. The Applicant claims that she and her siblings are the sole beneficiaries of the property yet the Hon. Kadhi made a determination that the property be equally divided between the Applicant and her siblings on the one hand and the 2nd Respondent. Execution will result in the property being divided between the parties as ordered by the Hon. Kadhi. I am therefore satisfied that if stay is not granted, the Appeal will be rendered nugatory.

10. In view of the foregoing, I allow the Application and make the following orders:

- i) The draft Memorandum of Appeal filed herein is hereby deemed as duly filed subject to payment of the requisite fees.
- ii) Conditional stay of execution is hereby granted to the Applicant on terms that the Applicant shall file and serve the record of appeal within 21 days.
- iii) In default, the stay granted herein shall automatically lapse.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of January 2020

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicant**

.....**for the Respondents**

.....**Court Assistant**