



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 8 OF 2019

OMAR ABDI ISSACK.....APPELLANT

VERSUS

MALEBO HARED.....1ST RESPONDENT

FATUMA HASSAN.....2ND RESPONDENT

RULING

1. The applicant Osman Abdi Issack has lodged notice of motion dated 29/7/2019 essentially seeking stay of Kadhi court decree in Succession No. 16 of 2017 dated 18/6/2019.
2. The application is anchored on the provisions of Order 42 rule 6 inter alia and supported by the grounds on the face of the motion essentially that the impugned decision ordered among the properties for distribution Plot No. 1/79 property of the applicant vide attached title documents dated 31/12/2018.
3. That the said property Plot No. 1/79 at no time was it owned by the deceased person thus not available for distribution.
4. If same is distributed, the appeal will be rendered nugatory and the applicant will suffer substantial loss.
5. The application is supported by the affidavit of the applicant sworn and filed on 31/7/2019 and his further affidavit sworn on 15/2/2020.
6. The application is opposed by the respondents via replying affidavit of Fatuma Hassan sworn on 19/7/2019.
7. The parties were directed to canvass appeal via submissions which they did and exchanged.

APPLICANT'S SUBMISSIONS

8. On substantial loss, the applicant submitted that for an application for stay of execution to succeed, the first condition to be satisfied is for the applicant to show that there is a likelihood of substantial loss to be suffered by the applicant if stay is not granted. The applicant has contended and demonstrated that he stands at the verge of losing his private property if the orders of Kadhi's Court are to be executed.
9. He submitted that this court in the case of **Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR** held that:

“The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.”

10. In the present case, he submits that, on substantial loss he stands to suffer irreparably is that if the suit property is sold to third parties; he may never recover it if the appeal were to succeed. This loss is what has to be prevented by preserving the status quo because such loss would render the entire appeal nugatory.
11. He also cited the cases of **Butt vs Rent Restriction Tribunal Supra**, **Wilson vs Church (No.2) 12 CH D [1879] 454 at p 459**, **Magnate Ventures vs Simon Mutua Muatha & Another [2018] eKLR**, **Chris Muga N. Bichage vs Richard Nyagaka Tongi & 2 Others [2013] eKLR**, **Hassan Guyo Wakalo vs Straman EA Ltd** cited in the **Masisi vs Wanjiku** case (Supra).

12. The applicant further submitted that this court ought to preserve the status quo pending the hearing and determination of the appeal herein as failure to do so would cause the applicant to suffer irreparable damage.

13. The underlining merit of granting the stay as sought by the applicant is that in addition to the above, should the applicant's appeal succeed, the suit property will have been preserved for his benefit and should the appeal fail, the respondents would have their fair chance at utilizing in the manner prescribed by the court.

14. The purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised. They therefore beseech this court to exercise its discretionary powers to maintain the status quo to ensure that the respondent does not suffer substantial loss.

15. The applicant in this matter has not instituted this appeal in bad faith or with frivolity as he is the rightful proprietary owner of Garissa Town Block 1/79 and the Kadhi's Court wrongfully distributed the aid property to the respondents without considering the proprietary rights attaching to the suit property.

16. The applicant believes that he has a strong case to present before this court and ought to be afforded adequate opportunity to present his case and in the interim have the suit property preserved.

17. On unreasonable delay, the applicant submitted that the second condition to be satisfied under Order 42 rule 6(1) is that the application is made without unreasonable delay.

18. The applicant averred that it has made the application without any delays as the judgment of the Honourable Kadhi was delivered on 18th June 2018, and immediately thereafter the applicant's application dated 29th July 2019, was filed on 31st July 2019.

19. It is therefore clear that there was no unreasonable delay on the part of the applicant in making this application and the same will therefore not occasion any prejudice to the respondent.

20. On security for costs, the applicant submitted that under Order 42 rule 6 sub-rule 2(b) of the Civil Procedure Rules 2010, it is provided that the applicant is obligated to furnish such security as the court may order for the due performance of such decree or order as may ultimately be binding on him. He relied on the case of **Kenya Commercial Bank Ltd vs Sun City Properties Ltd & 5 Others [2012] eKLR**.

21. The applicant understands that in a bid to balance the two competing interests, the court may make an order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal.

RESPONDENTS' SUBMISSIONS

22. The respondents submitted that on unreasonable delay, the respondents submitted that the Kadhi delivered his judgment on 18th June 2019, and the present application was lodged on 31st July 2019. The application was filed over one (1) month from the date of judgment and thirty (30) days after the herein memorandum of appeal was lodged. No plausible explanation has been given for the delay which they submit was inordinate.

23. On substantial loss, the respondents submitted that substantial loss is a relative term and, more often than not, can be assessed by the totality of the consequences which an applicant is likely to suffer. They relied on the case of **Daniel Cheptulu Rotich & 2 Others vs Emirates Airline Civil Case No. 368/2001 as cited with approval in Bake 'N' Bite (Nrb) Limited vs Daniel Mutisya Mwalonzi [2015] eKLR**.

24. The decision of the court on whether substantial loss will occur will depend on the balancing act between the rights of the parties; the applicant's right to his appeal and the right of the respondent to the fruits of his judgment.

25. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered; the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given. They relied on the case of *Re Estate of Joyce Kanjiru Njiru (Deceased) [2018] eKLR*.

26. They further submitted that the appellant has not demonstrated what loss he will suffer if the order sought is not granted. To begin with, the documents relied on by the appellant, in support of his claim as the registered proprietor of Plot No. 1/79, were never produced in the trial court. They are new evidence. Given that no leave has been sought or given to produce these documents at the appeal stage.

27. They urge the court to disregard them. Indeed, Order 42 rule 27 of the Civil Procedure Rules, 2010 provides that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred. They relied on the case of **Geoffrey Muriungi & Another vs John Rukungam' Imony [2017] eKLR**, also relied on the cases of **Tarmohamed & Another vs Lakhani & Marshall [1954] 1 WLR, 1489, the Court of Appeal for Eastern Africa, Wanjie & Others vs Sakwa & Others [1984] KLR 275**.

28. The respondents submit that; appellant has not demonstrated what loss he will suffer. It is not enough for a party to state that they will suffer loss; such loss must be demonstrated.

ISSUES, ANALYSIS AND DETERMINATION

29. After through the application, affidavits and submissions on record, I find that the singular issue herein is; whether **the applicant has established the threshold for the grant of stay of execution of the Kadhi Court impugned decision pending appeal to the required standard?**

30. The law on whether to grant an order of stay of execution pending appeal is found in **Order 42 Rule 6(2) of the Civil Procedure Rules 2010** as follows;

“No order for stay of execution shall be made under subrule (1) unless-

a) the court is satisfied that substantial loss may result to the applicant unless the order is made and hat the application has been made without unreasonable delay; and

b) such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

31. These principles were further set out in **Butt vs Rent Restriction Tribunal (1982) KLR 419**, as follows: -

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule out to exercise its best discretion in a way not to prevent the appeal if, successful from being nugatory...The court will grant a stay where special circumstances of the case so require...”

32. Essentially the impugned decision ordered among the properties for distribution Plot No. 1/79 which per the attached title documents is the property of the applicant vide attached title documents dated 31/12/2018.

33. That the said property Plot No. 1/79 on prima facie basis is not and was not at any time demonstrated to have been owned by the deceased person thus contended that it is not available for distribution.

34. Therefore, the applicant apprehension is that if same is distributed, the appeal will be rendered nugatory and the applicant will suffer substantial loss.

35. In the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto** it was held interalia that:

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs Chesoni [7].....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

36. The court finds that the distribution of the plot 1/79 which is in applicant’s name may cause him substantial loss as it may not be recovered in event he wins the appeal.

37. On whether the application was made without unreasonable delay, the court notes that, it was made without any delays as the judgment of the Honourable Kadhi was delivered on 18th June 2018, and immediately thereafter the applicant’s application dated 29th July 2019, was filed on 31st July 2019.

38. It is therefore clear that there was no unreasonable delay on the part of the applicant in making this application and the same will therefore not occasion any prejudice to the respondent.

39. The final requirement is that the court is required to consider whether to order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal.

40. It is the applicant’s submission that it is not mandatory that security for costs be provided and it was at the discretion of the court as provided in Order 42 rule 14 of the Civil Procedure Rules to make such order if it is necessary.

41. The applicant implores upon this Honourable Court not to make any order on security for costs since the decree sought to be stay is not a money decree hence the provision of security is not necessary since the suit property is intact.

42. However, the applicant submitted that, if this Honourable Court is persuaded to make any order for costs, the applicant is ready and willing to furnish such reasonable security to be deposited in court as guided by this Honourable Court.

43. The court finds no need for the security as the subject is not a money decree which is sought to be preserved pending appeal and thus it will be available to the victor party after appeal is determined.

44. Thus the court finds that the appeal has merit and allows the application with orders that;

i. The plot no 1/79 shall not be distributed pending hearing and determination of the instant appeal.

ii. The costs to be in the main appeal.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 9TH DAY OF MARCH, 2020.

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C. KARIUKI

JUDGE