



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY AND SUCCESSION DIVISION

CIVIL APPEAL NO. 48 OF 2018

ABUBAKAR MOHAMED AL AMIN.....APPELLANT

VERSUS

FIRDAUS SIWA SOMO.....RESPONDENT

(Being an appeal from the judgment delivered on 27th March, 2017 and ensuing decree

by Hon. Khamis Ramadhan, Senior Resident Kadhi, in Mombasa Kadhi's Court

Civil Case No. 173 of 2011).

RULING

1. The appellant/applicant through a Notice of Motion application dated 24th January, 2020 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21; Order 45 rules 1, 2 and 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law and inherent jurisdiction of the court, seeks the following orders:-

(i) Spent

(ii) That pending the hearing and determination of the application there be a stay of execution of the Judgment delivered on 27th March, 2017 in Mombasa Kadhi's Court Civil Case No. 173 of 2011;

(iii) That the court be pleased to review its ruling delivered on 22nd July, 2019 so that the appellant is granted an order for stay of execution of the Judgment delivered on 27th March, 2017 in Mombasa Kadhi's Court Civil Case No. 173 of 2011 pending the hearing and determination of the appeal filed herein; and

(iv) That the costs of this application be in the cause.

2. For the sake of clarity, prayer No. (iii) above is as per an amendment made through an oral application by Ms. Murage, Learned Counsel for the applicant. This court was directed by the Presiding Judge, Mombasa to hear the present application after Judge Chepkwony recused herself from hearing it. The application is supported by the affidavit of Mohidin-Abubakar Al-Amin sworn on 24th January, 2020. On 3rd February, 2020 the respondent Firdaus Siwa Somo filed a replying affidavit sworn on the same day, to oppose the application. A further affidavit was filed on 14th February, 2020 by the applicant.

3. On the same date the applicant's counsel filed written submissions. In highlighting the same, Ms. Murage, stated that their primary prayer was for an order of review of the ruling delivered on 22nd July, 2019. She indicated that they did not go before the same Judge for review because in a previous ruling, the said Judge had touched on the issue of the mental capacity of the applicant, which is an issue they intend to ventilate in the appeal in the High Court. She submitted that the said issue was a live one in an appeal filed before the Court of Appeal, whose Judgment was attached to the applicant's affidavit. She stated that the Court of Appeal allowed the applicant's interlocutory application for leave to appeal out of time.

4. Ms. Murage further submitted that the issue of the applicant's mental capacity was raised in the Kadhi's court and before Judge Thande as well. She stressed that it was a cross-cutting issue in the appeal which was heard before the Court of Appeal and the appeal which is pending before the High Court.

5. It was submitted that the applicant felt that Judge Chepkwony had in the interim application which was heard by her, dealt with a matter which was to be substantially dealt with on appeal.
6. In seeking review of the ruling delivered on 22nd July, 2019 the applicant's Counsel contended that the said Judge declined to grant the orders because of the applicant's mental capacity. It was stated that there was an error on the part of the court because the applicant had preferred an appeal against the ruling of Judge Thande in the Court of Appeal at Mombasa. It was submitted that a reading of paragraph 9 of the Judgment of the Court of Appeal, reveals that the respondent had raised the issue of the applicant's mental capacity before the said court. Ms. Murage contended that the ruling by Judge Thande had not been appealed on a piecemeal basis but transcended to the substantive appeal. She stated that the applicant would at the hearing of the appeal arising from the Judgment by the Hon. Kadhi ventilate the issue of the applicant's mental capacity and that the respondent would have the opportunity to respond to the same.
7. The applicant's Counsel submitted that the applicant had met the prerequisites for being granted an order for stay of execution and that if the suit property was sold, the substratum of the appeal would be lost. It was also stated that the respondent wanted to attach the suit property and sell it. It was argued that in the event that the respondent succeeded in the appeal, the applicant would be left with no property.
8. It was submitted by the applicant's counsel that the respondent had registered a prohibitory order against the suit property and a copy thereof was attached to the applicant's affidavit. Ms. Murage prayed for the application to be allowed.
9. Mr. Mkan, Learned Counsel for the respondent filed his submissions on 20th February, 2020. In opposing the application dated 24th January, 2020 he stated that the said application was bad in law for the reason that the applicant herein had made several applications for stay of execution. He stated that 2 of the said applications were made before the Hon. Kadhi and 2 before Judge Thande and that they were all dismissed.
10. The respondent's counsel submitted that the applicant went before the Court of Appeal and under the provisions of Section 79G of the Civil Procedure Act, the said court granted him an order to file an appeal out of time. He further stated that the Court of Appeal was silent on the other orders which had been sought.
11. Mr. Mkan submitted that the issue of *locus standi* was not addressed by the Court of Appeal and therefore the orders of Judge Thande still stood unchallenged. He stated that the donee of a Power of Attorney can only act on the instructions of a person who has mental capacity and that the donor or any other person was supposed to file an application as a legal representative of the applicant. The respondent's counsel maintained that the applicant had no mental capacity to instruct an Advocate or a donee to file an appeal on his behalf.
12. The respondent's Counsel pointed out that Judge Chepkwony in her ruling of 22nd July, 2019 repeated what was on record and it was not proper for the issue of stay of execution to be litigated again as this court was being requested to review the ruling of the said Judge and to issue an order for stay of execution. He indicated that the applicant had not offered any security and he had therefore not met the minimum requirement, for grant of orders for stay of execution. Mr. Mkan prayed for the application to be dismissed with costs.
13. In her response to the submissions made by the respondent's Counsel, Ms. Murage submitted that the applicant had not offered security because the Judgment in issue is a money decree and the respondent intends to execute the suit property. She further submitted that the prohibitory order registered against the said property serves as security as the property cannot be alienated.
14. Ms. Murage indicated that the 1st application for stay of execution was struck out for incompetence and the 2nd one seeking the same order plus leave to appeal out of time, was dismissed. It was stated that the applicant appealed to the Court of Appeal vide Mombasa Civil Appeal No. 59 of 2018 and at paragraph 31 of the Judgment, the Court of Appeal held that the application for stay of execution could only be filed after the filing of an appeal, pursuant to leave to appeal out of time being granted.
15. Counsel for the applicant submitted that Judge Chepkwony dismissed an application for stay of execution pending the hearing and determination of the review of the ruling of 22nd July, 2019. Ms Murage restated that the issue of *locus standi* transcends the appeal which is pending. She further submitted that it would be unlawful for the respondent to execute a Judgment against a person who has no mental capacity.

ANALYSIS AND DETERMINATION

The issue for determination is if this court should review the ruling delivered on 22nd of July, 2019 and grant orders for stay of execution.

16. This court has delayed in writing the ruling herein because there was no signed copy of the ruling delivered on 22nd July, 2019 in the court file. The copy which was attached to the applicant's further affidavit was not signed. A signed copy was availed by the Judge who delivered the said ruling.
17. In his affidavit sworn on 24th January, 2020 in support of the application of even date, the deponent averred that by a ruling dated 22nd July, 2019 the court dismissed the appellant's application for stay of execution of the Judgment delivered on 27th March, 2017 in Mombasa Kadhi's Court Civil Case No. 173 of 2011 pending the hearing and determination of the appeal filed.
18. The applicant's deponent averred that from the said ruling it was clear that the court dismissed the application based on the mistaken belief that the applicant did not prefer an appeal against the ruling delivered by Hon. Justice Thande on 11th May, 2018 yet the aforesaid ruling was set aside by the Court of Appeal in Mombasa Court of Appeal Civil Appeal No. 59 of 2018; Abubakar Mohamed Al-Amin vs Firdaus Siwa Somo.

19. The deponent therefore stated that there were sufficient reasons which warrant a review of the ruling delivered on 22nd July 2019 as there were clear errors committed by the court which delivered the said ruling, that needed to be rectified.

20. The deponent averred that the respondent had already served him with the 45 days' redemption notice in respect of the property known as Mombasa/Block/XLVII/41 which they intend to sell in settlement of the money decree issued in Mombasa Kadhi's Civil Case No. 173 of 2011.

21. In her replying affidavit filed on 3rd February, 2020 the respondent averred that Mohidin Al-Amin (deponent) was not a party to these proceedings hence not competent to swear the affidavit in support of the present application pursuant to the General Power of Attorney. The respondent further averred that at the time the said Power of Attorney was donated, the donor had no capacity to donate the same (3/4/2018) as the applicant herein was declared to be of no mental capacity (sic) to swear an affidavit in support of the motion and the position remained the same to date. The respondent stated that the applicant had made an application for stay (sic) and the same was dismissed on 22nd July 2019. She further stated that the applicant appealed to the Court of Appeal, which declined to give him stay (sic).

22. The respondent further averred that the applicant once again made an application for stay (sic) on 11th June, 2019 and a ruling was delivered on 8th October, 2019 denying him the order. She also averred that the applicant had no capacity to sue and the application herein was a breach of the legal process.

23. In his further affidavit filed on 14th February, 2020 the applicant's deponent stated that his father had the mental capacity to donate the Power of Attorney dated 3rd April, 2018. The said deponent made reference to a ruling delivered on 11th May, 2018 in which the High Court declined to grant the applicant leave to appeal out of time because according to the court, the applicant lacked the mental capacity to institute the appeal.

24. The deponent further stated that the said decision was challenged through Mombasa Court of Appeal Civil Appeal No. 59 of 2018 and the applicant was granted leave to appeal out of time through a ruling (sic) delivered on 8th November, 2018.

25. The applicant's deponent stated that by virtue of leave being granted by the Court of Appeal, the applicant had the authority to file Mombasa High Court Civil Appeal No. 48 of 2018 and any necessary applications therein. The said deponent averred that in the ruling delivered on 22nd July, 2019 the court was of the mistaken view that no appeal was referred (sic) against the ruling delivered on 11th May, 2018 and it was therefore necessary for the said ruling to be reviewed.

26. This court notes that it is not in doubt that the decision delivered on 11th May, 2018 was appealed against. On 8th November, 2018 the Court of Appeal in Mombasa Civil Appeal No. 59 of 2018 rendered its Judgment. Paragraphs 1 and 2 of the said Judgment disclose that the issues before the Court of Appeal were based on the application and interpretation of the provisions of Section 79G of the Civil Procedure Act and more specifically, the proviso thereto.

27. The Court of Appeal considered if Judge Thande had properly exercised her discretion when she declined to grant the appellant leave to lodge an appeal out of time against the Judgment of the Kadhi's Court dated 23rd March, 2017 arising from civil cause No. 173 of 2011 and to stay the execution of the said Judgment.

28. Paragraph 14 of the said Court of Appeal decision states as follows-

"It is that decision that sparked the appeal herein which is predicated on nine grounds which can be aptly summarized as the learned Judge erred in fact and law by-

(i) Misinterpreting the proviso to Section 79G of the Civil Procedure Code.

(ii) Failing to find that the appellant had given a reasonable explanation for the delay in filing the appeal.

(iii) Failing to find that the respondent would not be prejudiced in any way if the extension of time to file the appeal was granted.

(iv) Failing to uphold the appellant's right of appeal.

(v) Failing to realize that the intended appeal raised a jurisdictional question which warrants the High Court's consideration".

29. Paragraph 21 of the Court of Appeal decision contains the submissions made by Mr. Mkan, Counsel for the respondent, who raised the issue of the competency of the application dated 2nd March, 2018. His contention before the said court was that the affidavit in support of the said application was sworn by the applicant, whose mental capacity was found wanting. He also submitted in the Court of Appeal that there was no medical report confirming that the applicant was mentally fit to institute the application in question.

30. Having gone through the decision of the Court of Appeal, it is evident that the issues before it were based on the applicant not being granted leave to appeal out of time and stay of execution pending the hearing of the appeal filed in the High Court. The issue of the applicant's capacity to file the appeal due to his mental condition was not a substantive issue before the Court of Appeal. The said court steered clear from addressing the issue.

31. This court notes that this is the 4th time the applicant is seeking prayers for stay of execution of the decision from the Kadhi's Court. On

the 19th January, 2018 Judge Thande delivered a ruling on a preliminary objection that was raised by the respondent's counsel in an application for stay of execution. The said Judge partly held as follows –

“This court draws the conclusion that the Appellant/Applicant was neither in a position to instruct his advocate to file this application nor to swear the supporting affidavit on his behalf. The purported instructions to file this application have no legal effect. The application and indeed the appeal herein ought to have been filed in the name of the Appellant/Applicant through his next friend. In the circumstances I find the application incompetent, bad in law and an abuse of the court process and the same is struck out. I hereby uphold the preliminary objection...”

32. Despite the said ruling, the applicant made no efforts to take appropriate measures to comply with the ruling delivered by Judge Thande on 19th January, 2018. The applicant did not appeal against the ruling upholding the preliminary objection. The said decision therefore stands unchallenged. If the applicant appealed against the said decision, a copy of the Court of Appeal decision arising therefrom was not attached to the affidavits filed by his deponent in support of the present application.

33. When the applicant filed the 3rd application for stay of execution, it was heard by Judge Chepkwony, who dismissed the said application. Contrary to Ms. Murage's assertion and that of the applicant, the excerpt which was captured by Judge Chepkwony from Judge Thande's decision was derived from the ruling delivered on 19th January, 2018 which upheld the preliminary objection raised by the respondent. Had the applicant's counsel read Judge Chepkwony's ruling more keenly, she would have noted that the said Judge made reference to the application dated **4th April, 2017** and not the one dated 2nd March, 2018 which formed the subject of the Court of Appeal decision.

34. Judge Chepkwony in the ruling dated 22nd July, 2019 stated as follows in paragraphs 4 and 5–

“4. I note that the ruling on stay of execution delivered by my sister Thande J, it was held (sic) as follows-

That the Appellant/Applicant was neither in a position to instruct his advocate to file that application nor to swear the supporting affidavit on his behalf. The purported instructions to file the application have no legal effect. The application was found to be incompetent, bad in law and an abuse of the court process and the same was struck out.”

5. The Appellant has not sought for (sic) review and/or appealed against the said ruling. In the present application, the appellant seeks for (sic) similar orders as the ones he had sought for (sic) in the application dated 4th April, 2017. I therefore find that this court is functus officio on the issue of the capacity of the appellant/applicant as he is still incapable of executing a power of attorney authorizing the deponent to act on his behalf unless proven otherwise through a medical report”.

35. An order for review of a Judgment, ruling or order is practicable under the provisions of Section 99 of the Civil Procedure Act which establishes the slip rule. It provides as follows-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties”.

36. In this court's view, a review of the ruling by Judge Chepkwony would alter the merits upon which it was made. This court finds no clerical error in the said ruling that would call for review by this court. The position stated by the said Judge in paragraphs 4 and 5 of her ruling was drawn from the ruling of Judge Thande and arose from the application dated 4th April, 2017.

37. I too hold a similar position as Judge Chepkwony that this court is *functus officio*. In **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others** [2013] eKLR, the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled **“The origins of the *functus officio* Doctrine, with specific Reference to its Application in Administrative Law”** (2005) 122 SALJ 832 which states thus –

“...the functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter..... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive, such a decision cannot be reviewed or varied by the decision maker”.

38. In the case of **Telkom Kenya Limited vs John Ochanda (suing on his own behalf and or behalf of 966 former employees of Telkom Kenya Limited** [2014] eKLR, the Court of Appeal followed the decision in **Raila Odinga & 2 Others vs Independent Electoral and Boundaries Commission** (supra). The Court of Appeal held thus:-

“Functus officio is an enduring principle of the law that prevents the re-opening of a matter before a court that rendered the final decision thereon”.

39. Having found that a decision for stay of execution had been heard and a decision rendered thereon on 19th January, 2018 I hold that this court is *functus officio* and decline to grant the orders sought by the applicant. This court also finds that the application for stay of execution is an abuse of the court process as it has been raised in the High Court 4 times. I dismiss the application dated 24th January, 2020. Costs are awarded to the respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of September, 2020. The Judgment was delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Murage holding brief for Mr. Gikandi for the applicant/appellant

Mr. Mkan for the respondent

Mr. Oliver Musundi - Court Assistant