



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO. 9 OF 2020**

**BETWEEN**

**SAID NOOR, IMAM MASJID NOOR.....APPELLANT/APPLICANT**

**AND**

**MOHAMUD MOHAMED AHMED.....RESPONDENT**

**RULING**

1. Said Noor, Imam Masjid Noor, the appellant herein, brought an application by way of Notice of Motion under Order 40 Rules 1, 2& 3, Order 42 Rules 5 &6 of the Civil Procedure rules, Sections 3 & 3A of the Civil Procedure Act and Article 159 (2) of the Constitution of Kenya. He is seeking the following orders:

- a) That this matter be certified urgent. (Spent)
- b) That pending hearing and determination of this application inter-partes there be issued temporary orders of stay of execution of decree of the Honourable Kadhi's Court in Busia Kadhi's Court Civil Case No.12 of 2020.
- c) That further pending hearing and determination of this appeal there be issued and it is hereby issued stay of execution of decree and judgement in Busia Kadhi's Court Civil Case No.12 of 2020.
- d) That an order of injunction be issued restraining the respondents, his servants, agents and or those claiming through him from evicting, interfering with the employment and management of Noor Mosque and or the Committee of Noor Mosque.
- e) That pending hearing and determination of this appeal orders in (3) and (4) above be confirmed.
- f) That in any event the Honourable Court be pleased to issue any conservatory orders pending hearing and determination of this appeal.

2. The application is premised on the following grounds:

- a) That the respondent have threatened to execute appellant/applicant by evicting and taking over the appellant's work at Noor Mosque.
- b) That the appellant is the in charge of conducting prayers/services at the Mosque.
- c) That there is tension likely to cause breach of peace.
- d) That the applicant appealed against the judgement and has an arguable appeal.
- e) That the applicant will suffer irreparably if execution is allowed and stay not granted.
- f) That the applicant/appellant applied for copies of proceedings which are yet to be supplied.

3. The application was opposed on the following grounds:

- a) That the application has not met the legal threshold of Order 42 Rule 6 of the Civil Procedure Rules.
- b) That the impugned judgment never gave any positive orders to the respondent for purposes of execution pending appeal.
- c) That both the applicant and the respondent were dismissed from their respective positions hence there is no apprehension of execution and/or interference with the applicant's activities by the respondent as a result of the judgment.
- d) That the balance of convenience favours maintaining the status quo of the mosque obtaining from the judgment pending hearing and determination of the appeal and without interference by the applicant or the respondent.
- e) That it is in the interest of justice the mosque be run by a neutral party as held by the trial court as opposed to reinstating the applicant to his former position which action will lead to a breach of peace and interference with the activities of the mosque.
- f) That the application herein is therefore scandalous, vexatious and otherwise an abuse of the court process and the same ought to be dismissed with costs.

4. Both counsel addressed me orally and I have had the benefit of perusing the record of appeal.

5. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

**(1) 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 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 an 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.**

**(2) 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 that the application has been made without unreasonable delay; and**

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

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

**(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.**

6. The dispute between the parties herein touches on religion and the loss if any cannot be quantifiable in monetary terms. In the interest of justice, I will allow the application to preserve the status quo prevailing prior to the impugned judgment.

7. Costs shall abide with the outcome of the appeal.

**DELIVERED AND SIGNED AT BUSIA THIS 22ND DAY OF SEPTEMBER, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**