



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL CASE NO. 84 OF 2014**

**MOHAMED AHAMED .....APPELLANT**

**VERSUS**

**ABDULMALIK AHMED BISHAR & ANOTHER.....RESPONDENT**

**RULING**

In petition No. 13/2011 before Kadhi's court at Eldoret, the applicant herein was the respondent. He lost the matter to the petitioner who was granted the letters of administration on 16<sup>th</sup> September, 2011. The applicant dissatisfied with the judgment of 29<sup>th</sup> June 2011, appealed against the same on 26<sup>th</sup> July, 2011, in appeal No. 131 of 2011. However, before the said appeal was heard, another Kadhi purported to revoke the grant issued to the respondent, one *Abdul Malik Ahamed*. On 16<sup>th</sup> January 2014 when the said appeal was to be heard, the appellant on erroneous understanding that the grant he was appealing against had been effectively revoked, withdrew the appeal. Later he learnt that the purported revocation had no legal effect on the findings and judgment in Petition No. 13 of 2011. On 4<sup>th</sup> February, 2014 he applied for leave to appeal out of time and it was granted. On 20<sup>th</sup> June, 2014 he filed an appeal.

On 18<sup>th</sup> July 2014 he brought up a notice of motion where the relevant order sought as of now, is for stay of execution of the decree issued on 24<sup>th</sup> October, 2011 and confirmed on 26<sup>th</sup> January, 2012 pending the hearing and determination of the appeal. The applicant alleges in the application that the respondent is in the process of subdividing the land known as LR 10745 and selling portions to 3<sup>rd</sup> parties. In case the appeal succeeds there will be a great problem dealing with such 3<sup>rd</sup> parties. Unless the orders sought are granted he stand to suffer substantial loss.

The respondent opposes the application on the grounds that it is res judicata. A similar application had been made by the applicant in Civil Appeal No. 131 of 2011. He also contends that the application does not meet the threshold outlined under *Order 42 rule 6(2)* of the *Civil Procedure Rules* that:-

- a. Substantial loss may result to the applicant unless the order is given.
- b. The application has been made without unreasonable delay.
- c. The applicant has furnished security for due performance of the decree being appealed from.

On the issue of Res-Judicata, it is clear that appeal No. 131 of 2011 was withdrawn before it was heard. It is on the basis of the said understanding that the court granted the applicant leave to appeal out of time. The issues raised in the said appeal had not been heard and finally determined on. The current appeal and application cannot therefore be res-judicata.

On whether the applicant has met the threshold outlined under *Order 42 rule 6(2)* of the *Civil Procedure Rules 2010*, I have considered that there is no dispute that he is a valid heir of his late father's estate. That means that irrespective of the way the appeal goes, he is entitled to a portion of the said estate. If he has no other resources, such share would stand in as security for costs. The delay in filing the appeal on 20<sup>th</sup> June 2014 was well explained. There was another filed within time but when a Kadhi revoked the contested grant, it was erroneously withdrawn. The mistake was later realized and leave was sought to file another appeal out of time and was granted. If the grant is executed and illegitimate heirs gets shares and pass them to 3<sup>rd</sup> parties as the applicant alleges is about to happen, definitely he would suffer substantial loss. The threshold for granting the orders sought have been met by the applicant. The application has merit and is granted in terms of prayer 3 in the notice of motion dated 18<sup>th</sup> July, 2014.

Cost will be in the cause.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 28<sup>th</sup> day of March, 2019**

In the absence of;

Respondent

Applicant

And in the presence Mr. Mwelem - Court assistant