



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 4 OF 2016**

**BETWEEN**

FATUMA ANAB MOHAMED HAJI.....1<sup>ST</sup> APPELLANT/APPLICANT

ZAINAB MOHAMED HAJI.....2<sup>ND</sup> APPELLANT/APPLICANT

ALI MOHAMED HAJI.....3<sup>RD</sup> APPELLANT/APPLICANT

ABDIKADIR MOHAMED HAJI.....4<sup>TH</sup> APPELLANT/APPLICANT

ABDIRAZAK HASSAN MOHAMED.....5<sup>TH</sup> APPELLANT/APPLICANT

DEKA ABDULLAHI DABAR.....6<sup>TH</sup> APPELLANT/APPLICANT

**VERSUS**

ASHA ABDULLAHI.....1<sup>ST</sup> RESPONDENT

NUR ABDULLAHI.....2<sup>ND</sup> RESPONDENT

KHADIJA MOHAMED ALI.....3<sup>RD</sup> RESPONDENT

MOHAMED ABDULLAHI.....4<sup>TH</sup> RESPONDENT

**RULING**

**A. INTRODUCTION**

1. By Notice of Motion dated 17<sup>th</sup> December, 2018 filed on 19<sup>th</sup> December, 2018 and brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law and the inherent jurisdiction of the Court, the Applicants seek orders that:

- 1) **THAT the application be certified as urgent and service be dispensed with at the first instance.**
- 2) **THAT the Honourable court be pleased to review and/or set aside its orders issued on 20/11/2018.**
- 3) **THAT a stay of execution of Judgement in Garissa High Court Civil Appeal No. 4 of 2016 be granted pending hearing and determination of this application.**
- 4) **THAT a stay of proceeding in Garissa Kadhi Court Succ Cause No. 28 of 2015 granted pending hearing and determination of this application.**
- 5) **THAT Cost of this application be in the cause.**

2. The applicant application is supported by the affidavit of Abdirazakk Hassan Mohammed the Applicant sworn on 17<sup>th</sup> December, 2018 in which he reiterates the grounds in support of the application. The applicant has attached a notice of appeal dated 8th August, 2018 and an

authority to swear the affidavit on behalf of the other appellants/Respondents, the memorandum of appeal dated 12<sup>th</sup> September, 2018.

3. In response to the application, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondent in response to the applicant's application filed a Preliminary Objection dated 25<sup>th</sup> February, 2019 and filed on 26<sup>th</sup> February, 2019 on the grounds: -

**1) THAT there is already an appeal in the Court of Appeal 340 of 2018 being an appeal from the judgment and decree of the High Court at Garissa No. 4 of 2016 between the same parties and concerning the same subject matter. The matter has a date at the Court of Appeal for the purpose of case management; the High Court therefore has no Jurisdiction. It is *functus officio*.**

**2) THAT this application has been brought to this Court in clear disregard of the above appeal and is an abuse of the due process of Court.**

## **B. BACKGROUND**

4. The genesis of the applicant application is this Court Ruling Delivered by Hon. Justice Dulu on 20<sup>th</sup> November, 2018 dismissing the applicant application for stay of execution dated 4<sup>th</sup> July, 2018 and filed on 11<sup>th</sup> July, 2018. This Court vide the said application allowed the applicant to file their appeal out of time and differed the hearing and determination of the applicant prayer for stay pending appeal.

5. Subsequently and Vide this Court ruling delivered on 20<sup>th</sup> November, 2018 the Court dismissed the applicant application for stay on the grounds that there was no evidence of compliance with its orders directing the applicant to file its appeal within 21 days. The Court held that there was noncompliance with its orders and subsequently dismissed the application for stay.

6. Consequently, the applicant filed the instant application seeking the review of this Court Ruling delivered on 20<sup>th</sup> November, 2018 alleging that there was an error apparent on record, as the court erroneously found that there was no appeal filed, yet the applicant had filed their appeal at the Court of appeal on 17/9/2018, a fact which was confirmed by parties on 27/9/2018 when they appeared before this Court and Respondents Counsel acknowledged having been served with the record of appeal.

7. It is the applicant case that the court finding that the application for stay was unmerited for lack of evidence that the applicants had filed an appeal at the court of appeal as directed was erroneous as they had already filed an appeal in the court of appeal and in fact served the respondent with the record appeal, a fact confirmed by the Respondent's Advocate before this Court on 27/9/2018. Further, they argue that it was in order for the applicants to file their notice of appeal before this Court before the record of appeal is lodged in the Court of Appeal.

8. The applicants in arguing for their request for stay of this Court Judgment allege that they would suffer substantial loss/harm if the same is not granted as they would be forced to participate in the proceedings before the Kadhi Court.

9. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondent in response to the applicant's application filed the above Preliminary Objection challenging this Court Jurisdiction to hear and determine the applicant's application for stay arguing that this Court is *functus officio* having delivered its judgment and the applicants having lodged their appeal at the Court of appeal.

10. When this matter came before this Court on 6/5/2019, Counsel for the Applicants Mr. Kassim indicated to this Court that there is an Appeal over the matter at the Court of Appeal that is scheduled for Hearing on 9/10/2019 and that they are seeking for stay pending the hearing and determination of the Court of Appeal matter to avoid confusion.

11. Counsel Mr. Onono appeared for the 3<sup>rd</sup> Respondent and there was no appearance for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents.

## **C. ISSUES AND ANALYSIS**

12. The following are the issues that arise from the instant application: -

- a) *Whether this Court has the Jurisdiction to determine the instant application in view of the filed appeal at the Court of Appeal.*
- b) *Whether there are sufficient grounds for this Court to review its ruling delivered on 20/11/2018.*
- c) *Whether the applicant application for stay is meritorious.*

**a) Whether this Court has the Jurisdiction to determine the instant application in view of the filed appeal.**

13. It is the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents' contention that this court is *functus officio* pursuant to the applicants lodging of the appeal at the Court of Appeal and that it has no jurisdiction to hear and determine the motion dated 17<sup>th</sup> December, 2019.

14. As was succinctly stated by Nyarangi, JA in the oft cited case of *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1:-*

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.”**

15. From the Court record, it is clear that there exists an appeal lodged at the Court of Appeal by the Applicants, which appeal has a hearing date; the same is scheduled for hearing on 9/10/2019. The Respondents have argued that this Court has become *functus officio* and thus lacks the Jurisdiction to determine the applicant's application for stay.

16. In regard to the principle of *functus officio*, the Supreme Court in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR* rendered itself thus:

**“[18] ... Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept: “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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”**

17. The principle is further summarized in *Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550* as follows:

**“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”**

18. In this instant case, the Applicant has approached this Court under Order 42 rule 6(1) of the Civil Procedure Rules. Which rule provides:

**“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.”**

19. It is therefore clear from the above Order 42 Rule 6(1) that both the court appealed from and the court to which such appeal is preferred have jurisdiction to entertain an application for stay of execution and that if the court appealed from refuses to grant the stay, the appellate court is at liberty to grant the stay of execution.

20. In conclusion, this court based on the foregoing analysis of the principle of *functus officio* and the above section of the law finds that this Court has the Jurisdiction to determine the applicants' application for stay and that it cannot be said to be *functus officio*. Therefore the Respondents objection on jurisdiction fails.

**b) Whether there are sufficient grounds for this Court to review its ruling delivered on 20/11/2018.**

21. The Court of Appeal in *Pancras T. Swai v Kenya Breweries Limited [2014] eKLR* in regard to an application for review affirmed its earlier position in *National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported))* where it held:

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”**

**“... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”**

22. Applying the above legal principle to the instant application, it is apparent to this Court that there was an error apparent on record in respect to the ruling delivered on 20/11/2018 where this Court found that the appellant had not filed the appeal within 21 days as directed by the Court. It is clear from the record than when the parties appeared before this Court on 17/9/2018 the Respondents acknowledged receipt of the Record of appeal.

23. Therefore, this Court is inclined to find there was an error apparent on record in view of this Court ruling delivered on 20/11/2018, and therefore the Court proceeds to consider the applicants application for stay on merit.

**c) Whether the applicant application for stay is meritorious.**

24. The court having found that it has the jurisdiction to determine the instant application and having positively found in favor of the applicant's application for review of this Court ruling delivered on 20/11/2018, the next issue is as to whether the applicant's application for stay is meritorious.

25. It is apparent that Order 42 Rule 6(1) above provides that this court may grant a stay of execution where the Applicant has shown "sufficient cause" for making the application for stay. It is noteworthy that the term sufficient cause has not been defined in the said section of the law and thus the court is at liberty to determine the same based on the applicant's arguments.

26. The applicants have alleged that if the stay sought is not granted, they would suffer substantial loss/harm as they may be forced to participate in the proceedings at the Kadhi Court and that it will render the appeal nugatory.

27. The dispute regards an Islamic law *hiba*, where this court found that only one of the beneficiaries satisfied the set conditions for the passing of a gift by the deceased and referred back the distribution of the rest of the deceased property to the Kadhi Court.

28. Considering the circumstances of the instant case and intended appeal, it is apparent to this Court that the applicants in my view have not demonstrated sufficient cause to warrant this Court to allow the application for stay of its Judgment. In my view the applicants' application for stay lacks merit. Thus the court makes the following orders:-

***(1) The preliminary objection is dismissed.***

***(2) The application is also dismissed.***

***(3) Parties to bear their own costs.***

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 23<sup>RD</sup> DAY OF MAY, 2019.**

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**CHARLES KARIUKI**

**JUDGE**