



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 11 OF 2017

A M A A.....APPELLANT/APPLICANT

VERSUS

F S S.....RESPONDENT

RULING

1. By a Notice of Motion dated 4.4.17 and filed under Certificate of Urgency, A M A A the Appellant/Applicant seeks stay of execution of the Judgment and Decree order of the Kadhi's Court issued on 27.3.17 pending the hearing and determination of the Appeal herein. The Appellant/Applicant also seeks that the costs of the Application be provided for.

2. The Application is founded on the grounds that the Kadhi's Court entered Judgement for F S S, the Respondent herein in the sum of Kshs. 6,925,000/=. The Appellant/Applicant being aggrieved by the said Judgement has preferred the Appeal herein against the same. The Respondent has threatened to execute the decree against the Appellant/Applicant. The Appellant/Applicant is currently suffering from depression and unless the Application is granted the Appellant/Applicant will suffer irreparable harm and the Appeal will be rendered nugatory. In his Supporting Affidavit sworn on 4.4.17, Mohamed Faki Khatib advocate avers that he has conducted this matter on behalf of the Appellant/Applicant. He avers that the Appeal has overwhelming chances of success but that it will take time to be heard and determined; that in the meantime, the Appellant/Applicant, may move to execute the Decree. The Appellant/Applicant is undergoing treatment for depression in London and any further stress could result in further deterioration of his mental and physical condition.

3. In her Preliminary Objection dated 18.4.17, the Respondent asserts that the Application is bad in law and is an abuse of the Court process; the Appellant/Applicant has no capacity to give instructions to his counsel owing to his mental condition as stated in the suit and in the Affidavit support of the Application; the deponent of the supporting affidavit has no instructions to file the Application or appeal on behalf of the Appellant/Applicant; the Appellant/Applicant's mental condition is such that he is incapable of knowing whether he is affected by the decision made; The Appellant/Applicant has not filed any appeal against has been filed against the decision; the deponent of the supporting affidavit has no instructions to swear the same.

4. In her Replying Affidavit sworn on 11.7.17, the Respondent opposes the Application. According to her, an application was filed in the Kadhi's Court wherein a psychiatric report indicated that the Appellant/Applicant was suffering from paranoia and was incapable of being heard in Court. As a result, the Appellant/Applicant did not testify in Court. The Respondent avers that she has not been served with any document showing that the Appellant/Applicant has recovered fully and is now able to give instructions. She therefore questions the source of instructions to file the Appeal and the Application herein.

5. I have given due consideration to the Application, the rival affidavits and the submissions filed the parties. The Respondent has raised a preliminary objection on the ground that the Appellant/Applicant lacks the mental capacity to give instructions to his advocate to file the Application. This Court has to determine whether the mental capacity of the Appellant/Applicant to instruct his advocate to file this Application is a point of law which if argued will dispose of the matter herein.

6. In Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, Law JA stated:

“ so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

7. It was submitted for the Respondent that the Application is bad in law and an abuse of the Court process for want of the

Appellant/Applicant's mental capacity to give instructions to file the same. It is the Respondent's contention that an application was made in the Kadhi's Court indicating that the Appellant/Applicant was mentally depressed which was confirmed by a doctor's report dated 15.5.14. As such, the Appellant/Applicant is not capable of giving instructions for the filing of the Application and the Appeal and the advocate on record is therefore acting without instructions. The Respondent further contends that the reason the advocate has sworn the supporting affidavit is that he does not have instructions from the Appellant/Applicant. Paragraph 8 of the Affidavit further confirms that the Appellant/Applicant is undergoing treatment for depression. The Respondent urged that the Application be dismissed as it is filed with no instructions from the Appellant/Applicant.

8. For the Appellant/Applicant, it was submitted that though he suffers from depression, he is aware of his surroundings and is capable of giving instructions during his lucid intervals. It was contended that the medical report referred to by the Respondent was struck off the record by the Kadhi's Court and the same cannot be relied upon as indicated in the judgement. It was further submitted that the Appellant/Applicant duly issued instructions for filing both the Appeal and the Application.

9. This Court has had occasion to consider Civil Appeal No. 20 of 2014 involving the parties herein. The Respondent appealed against the ruling of the Hon. Kadhi of 21.5.14 in Mombasa KCC No. 173 of 2011 declining to subject the Appellant/Applicant to a second psychiatric examination. In its ruling of 14.7.16, this Court upheld the decision of the Hon. Kadhi and dismissed the appeal.

10. The background of this case is that the Respondent filed suit against the Appellant/Applicant in the Kadhi's Court in Mombasa. In the suit, the Respondent stated that the parties were married to each other on 17.11.05 in accordance with Muslim law and that on 29.6.11 the Appellant/Applicant divorced her. Thereafter the Appellant/Applicant and his adult children kicked her out of her matrimonial home and refused her to collect her personal effects, furniture and kitchenware. The Respondent therefore sought a declaration that the alleged divorce is a nullity and that the marriage between the parties was still subsisting. She also prayed for provision of edda, restitution of conjugal rights, release of personal effects and costs.

11. As far back as September 2013, the Appellant/Applicant was said to be away in the United Kingdom undergoing treatment. When he was finally presented before the Hon. Kadhi on 23.3.14 it was evident that he was mentally disturbed. Following an order by the Hon. Kadhi the Appellant/Applicant examined by Dr. Omar J. Aly a psychiatrist who in his report dated 12.5.14 made the following conclusion:

“On account of Mr. A's mental status, I find that he cannot be subjected to Court proceedings on account of the diagnosis of depression and/or early dementia... I therefore conclude that A is NOT fit to appear before Court till his current problem is sorted out”.

12. It is not disputed that the Appellant/Applicant has been suffering from a mental condition for a long time. The Court notes that the Affidavit in support of the Application was indeed sworn not by the Appellant/Applicant but by Mohamed Faki Khatib advocate. In paragraph 8 of the said affidavit, Mr. Khatib avers:

“That the Appellant/Applicant is currently in London United Kingdom where he is undergoing treatment for Depression and any further stress on his condition could result in further deterioration of his mental and physical condition.”

13. The above and the fact that the supporting affidavit is sworn by the advocate and not the Appellant/Applicant lends credence to the claim by the Respondent that the Appellant/Applicant has no mental capacity to give instructions to his advocate.

14. Order 32 of the Civil Procedure Rules makes provisions for suits by or against minors and persons of unsound mind. Rule 1 thereof provides:

“Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

Rule 15 of the same Order extends the provisions of the Order to persons of unsound mind as follows:

“The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.”

15. In the case of Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri & 5 others [2011] eKLR, the Court of Appeal had this to say:

“The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions.”

In the instant case the fact that the Appellant/Applicant was undergoing treatment for depression at the time the Application was filed is not in dispute. And as stated above, the supporting affidavit was sworn by the advocate. In Yussuf Abdulgani vs. Fazal Garage (1953) 28 LRK 17 it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own. It would appear from the averments of the advocate in his affidavit that the Appellant/Applicant was not available to swear the Supporting Affidavit as he was ***“currently in London United Kingdom where he is undergoing treatment for Depression and any further stress on his condition could result in further deterioration of his mental and physical condition.”***

16. In the Hon. Kadhi's judgement exhibited by Mr. Khatib, the said medical report was expunged from the record and the reason given was that the doctor did not appear before Court nor were any submissions made on the medical report. The Hon. Kadhi however observed that the

Appellant/Applicant who appeared in Court ***“was not in a proper mental capacity to testify as stated by his counsel”***. It is not clear to me why the Hon. Kadhi chose to expunge from the record a said medical report he had himself ordered. The proper action would have been for him to summon the doctor to Court. Be that as it may, the medical report is part of the record of this Court in Civil Appeal No. 20 of 2014 and the Court cannot disregard the same.

17. It has been submitted for the Appellant/Applicant that though he suffers from depression, he is aware of his surroundings and has his lucid moments during which he capable of giving instructions. If this were true, then the Appellant/Applicant and not his advocate ought to have sworn the Affidavit in support of the Application. No explanation was proffered as to why the Appellant/Applicant did not swear the Supporting Affidavit. Further, there is the averment in the said Affidavit that the Appellant/Applicant is undergoing treatment for depression in London which is an indication that the Appellant/Applicant’s problem is yet to be “sorted out” as stated in the medical report of 12.5.14.

18. In view of the above and in absence of any evidence to the contrary, I am not persuaded that the Appellant/Applicant who was unable to testify in the lower Court in 2014, who at the time the Application was filed was receiving treatment for depression, and was unable to swear the supporting affidavit herein, is in any mental state to competently instruct counsel to file the Application. Legal instructions presuppose that the instructing client has the mental capacity to do so. In the instant case it is not disputed that the Appellant/Applicant suffers from depression that has rendered him mentally incapacitated. 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. The Respondent shall have costs which in accordance with Order 32 Rule 2 of the Civil Procedure Rules shall be paid by the advocate for the Appellant/Applicant.

DATED, SIGNED and DELIVERED in MOMBASA this 19th day of January 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Appellant/Applicant**

.....**for the Respondent**

.....**Court Assistant**