



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 36 OF 2017**

**HARUN OMAR BAUSI.....APPELLANT**

**VERSUS**

**AHMED OMAR BAUSI.....RESPONDENT**

**(An appeal against the judgement of Sheikh H. Mshaali, Senior Kadhi in Succession Case No. 3 of 2017 at Lamu issued on 16<sup>th</sup> June, 2017)**

**RULING**

**[NOTICE OF MOTION DATED 6<sup>TH</sup> JULY, 2017]**

1. Through the Notice of Motion dated 6<sup>th</sup> July, 2017, the Applicant, Harun Omar Bausi seeks to stay the execution of the judgement delivered on 16<sup>th</sup> June, 2017 in favour of the Respondent, Ahmed Omar Bausi by the Kadhi's Court at Lamu in Succession Cause No. 3 of 2017, Harun Omar Bausi v Ahmed Omar Bausi.
2. From the grounds on the face of the application and an affidavit sworn by the Applicant in support of the application, it emerges that the Applicant and the Respondent are brothers. The Applicant had moved the Kadhi's Court seeking orders for the distribution of the estate of their deceased father Omar Bausi in accordance with Islamic law. According to the Applicant, their father had two houses and his proposal was that the Respondent takes one house and the rest of the siblings take the other house. The Respondent's proposal that he takes one house and the other house be shared by all the children of the deceased including the Respondent was accepted by the Court. It is the Applicant's case that this is against the will of the children of the deceased and Islamic law. He thus seeks a stay of execution of the judgement of the Kadhi's Court pending the hearing of his appeal.
3. The Respondent opposed the application through an affidavit sworn on 15<sup>th</sup> August, 2017. According to him, the Kadhi's Court in Succession Cause No. 1 of 2017 found that the estate of the deceased Omar Bausi comprised of one house without land in Riadha, Lamu. Further, that the other house does not form part of the estate of the deceased as it was bequeathed to him by the deceased prior to his demise. The Respondent urged this court to dismiss the application as it is without merit.
4. Although the Applicant talks of Succession Cause No. 3 of 2017, the Respondent refers to Succession Cause No. 1 of 2017. This is however not a big deal as the parties are talking about a succession cause in respect to the estate of their deceased father Omar Bausi. The case file number will become clear once the appeal is filed.
5. What does the Applicant seek to stay? The judgement of the Kadhi's Court upheld the situation that prevailed before the parties went to court. That situation was that the Respondent was occupying one of the two houses which the Applicant claims belongs to the estate of the deceased. The Respondent's averment that he has been paying ground rent for the two houses to Riadha Mosque in Lamu since the death of their father over thirty years ago has not been disputed. It is therefore clear that the Respondent is the person who has been taking care of the property. Disturbing the *status quo* may not be beneficial to anybody at this stage.
6. There is however merit in the Applicant's request for an order barring the Respondent from disposing the houses in question. Were the Respondent to dispose of the houses during the pendency of the appeal, the appeal will be rendered nugatory. In the circumstances, the Applicant's notice of motion is allowed only to the extent that the Respondent is barred from selling or transferring any of the two houses pending the hearing of the appeal. The management of the houses shall however remain with the Respondent who should be ready to render account should the appeal succeed. This being a dispute over family property, I direct each party to bear own costs of this application.

**Dated, signed and delivered at Malindi this 15<sup>th</sup> day of March, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**