



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCC CIVIL APPEAL NO. 11 OF 2018 (OS)

MOHAMED SALEH AWKE..... 1ST APPELLANT

SALAH MOHAMED SALAH..... 2ND APPELLANT

VERSUS

ANAB SALAH AWKE..... 1ST RESPONDENT

ABDULHAMID SALAH AWKE..... 2ND RESPONDENT

RULING

1. This ruling relates to the application dated 31st January 2018 and filed on the same day under certificate of urgency pursuant to Article 165 (6 and 7) of the Constitution, orders 46 rule 6 and 51 of the Civil Procedure Rules seeking orders that:

(1) This application be certified urgent and heard ex parte in the first instance.

(2) The honourable court be pleased to stay execution of the judgment/decree of the Deputy Chief Kadhi at Kadhi's Court in Nairobi, Hon. Rashid Ali Omar, delivered on 18th January 2018 and any consequential orders pending hearing and determination of this application.

(3) The honourable court be pleased to stay execution of the execution of the judgment/decree of the Deputy Chief Kadhi's court in Nairobi Hon. Rashid Ali Omar, delivered on 18th January 2018 and any consequential orders pending hearing and determination of the intended appeal.

(4) The honourable court to order and call for the physical file containing proceedings in Succession Cause No. 32/2016 filed at the Kadhi's court, Nairobi for examination and to enable the court to make appropriate orders.

2. Application contemporaneously filed with a memorandum of appeal is premised on grounds on the face of it and affidavit in support deponed by one Salah Mohammed Salah the second applicant/appellant herein. When the application was presented before the duty judge on 2nd February 2018, the court directed the applicants/appellants to effect service upon the respondents and a hearing date be taken at the registry.

3. Having been served with the said application on 5th May 2018, the respondents filed a replying affidavit sworn by the 2nd respondent on his own behalf and that of the 1st respondent. Both parties

appeared before me on the same day for interpartes hearing. However, parties opted and agreed to dispose the application by way of written submissions instead of oral submissions.

4. Subsequently, the appellants/applicants filed their submissions dated 4th April 2018 on 12th April, 2018 and the respondents filed theirs dated 17th April 2018 on 18th May 2018.

Appellants'/Applicants' Case

5. Based on the grounds on the face of the application and affidavit in support, it is the applicant's case that vide originating summons dated 27th April 2016 filed before the Nairobi Kadhi's Court as Succession Cause No. 32/2016, the respondents herein petitioned the Kadhi's court seeking distribution and or transfer of the estate of the deceased herein Salah Awke who sometime 1965 leaving behind a widow and 12 children among them the respondents and 2nd applicant who is a father to the 1st applicant.

6. That in response to the said originating summons, the applicants/appellants raised a preliminary objection arguing that Succession Cause No. 32/2016 before the Kadhi's Court amounted to resjudicata considering that the same estate had already been dealt with vide Nairobi High Court Succession Cause No. 273/1967 hence challenged the Kadhi's jurisdiction in hearing the matter a fresh. A copy of the Kenya Gazette marked "SMS-1" was attached showing that a petition in respect of the same estate had been filed and gazetted as Succession Cause No. 273/67 before Nairobi High Court.

7. The applicants contended that despite the pendency of the said preliminary objection the learned Hon. Deputy Chief Kadhi went ahead and heard the suit *ex parte* without giving the applicants/appellants an opportunity to be heard hence delivered judgment on 18th January 2018 in their absence. That a mutually agreed hearing date slated for 17th January 2018 having been taken in court in the presence of both parties and the court having failed to sit on the said date, it was not clear how the court ended up delivering a judgment the following day without the applicants being heard or in attendance on the date of delivery.

8. It is the applicants' contention that the intended appeal raises serious points of law, has overwhelming chances of success and that unless stay orders are granted, the appeal will be rendered nugatory.

9. In support of the applicants' averments, Mr. Ashitiva Advocate counsel for the applicants reiterated the averments contained in the applicants' supporting affidavit urging the court to find that the applicants have complied with the conditions set out under Order 42 rule 6 (2) of the Civil Procedure rules in that the application for stay was filed without undue delay the same having been filed 13 days after delivery of judgment and that the applicants have established that substantial loss may result unless the order for stay is made.

10. To buttress his submissions, counsel quoted various authorities among them: **Antonie Ndiaye vs African Virtual university (2015) eKLR** where the court held that:

“.....substantial loss does not represent any particular mathematical formula. Rather it is a qualitative concept; it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.....”.

Counsel further referred the Court to the case of **Bungoma High Court Misc Application case no.42 of 2011between James Wangalwa and another vs Agnes Naliaka Cheseto (2012) eklr** wherein the court had this to say;

“The applicant must establish other factors which will show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail.

11. Mr. Ashitiva opined that the applicants will suffer irreparable damage should execution take place as assets were distributed contrary to Islamic law and that if they change hands to 3rd parties it will be hard

and expensive to recover the same for fair distribution to beneficiaries that were not provided for. Counsel was however quick to add that, stay orders are discretionary in nature and therefore urged the court to apply the same judiciously and in the interest of justice. Reference was made to the cases of **Absalom Dova vs Tarbo Transporters (2013) eKRL** and **Selestica Limited and Gold Rock Development Ltd (2015)**.

Respondents' Case

12. In reply to the applicants' case, the 2nd respondent swore an affidavit on his own behalf and that of the 1st respondent denying the claim by the applicants terming the application as an abuse of the court process with the intention of delaying the estate distribution process.

13. The respondents asserted that the applicants had not discharged the conditions set out under Order 42 rule 6 in that they had not furnished any security or proved any substantial loss in case the orders are not granted. It was further argued that the appellants had not attached a copy of the memorandum of appeal for the court to weigh the probability of success of the appeal and that the applicants having submitted to the jurisdiction of the Kadhi's court, they cannot then question the same.

14 The respondents denied that the applicants/appellants were denied the right to be heard as they fully participated in the proceedings. A copy of part of the proceedings up to 16th May 2017 was attached and marked as annexure AS-1. At paragraph 9 of their replying affidavit, the respondents stated that, the appellants' assertion that the case was slated for hearing on 17th January 2018 was a lie as the Kadhi had indicated that the suit was fixed for distribution of the estate the same day. That since the Kadhi did not sit on 17th January 2018 after duly notifying all parties, the matter was again rescheduled for 18th January, 2018 which day distribution was done in accordance with Islamic Law.

11. It was the respondents' argument that the proceedings before the Kadhi's court involved distribution of the estate as per Islamic Law since the High Court succession cause had already been concluded with the appointment of an administrator hence substitution of an administrator was totally different with the Kadhi's court case. To bolster their case, counsel relied on the case of **Fauzi Said Ali & 3 others vs Said Ahmed Ali (deceased) (2014) e KLR**. They contended that no security had been furnished and that stay orders will cause unnecessary inconvenience to the parties and then subject the estate into waste.

Analysis and determination

12. I have carefully considered the application herein, supporting and replying affidavits together with the materials attached thereto. I have also considered rival submissions of both counsels. Issues for determination are:

- (1) Has the application for stay been filed without undue delay;**
- (2) Are the applicants likely to suffer substantial loss if the orders of stay are not granted;**
- (3) Will the appeal be rendered nugatory if the orders sought are not granted;**
- (4) Is it necessary for the applicants to furnish security in the circumstances;**

13. A grant of orders of stay in the Kenyan legal system is clearly articulated under order 42 rule 6 (2) of the Civil Procedure rules cap 21 which provides that:

“no order for stay of execution shall be made under sub-rule 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.

14. Before me is an application seeking stay of execution orders made by the Kadhi's court on 18th November, 2018 pending hearing and determination of the appeal. Prayers one and two are spent. Prayer four seeking production of the original Kadhi's court is not necessary as a record of appeal will automatically entail submission of the original file from the court against whose orders the appeal relates. I will therefore endeavour to determine only prayer no three with regard to stay of execution pending appeal.

15. According to the applicants, the hon. Deputy Chief Kadhi proceeded to determine a succession matter while fully aware that the same was a subject before court in High Court succession cause No. 273/67 which was dealt with before the high court Nairobi hence the court lacked jurisdiction to entertain a petition for a grant of representation in respect of the same estate. Secondly, that the applicants were never accorded a fair hearing in that the court sat on a date other than the one agreed by consent and went ahead to determine the dispute without their knowledge and attendance.

16. It has been held time and given that jurisdiction is everything in litigation and without it, a court is not seized of the competency and legal authority to make any determination on any dispute in controversy. A court without jurisdiction is automatically expected to reasonably down its tools and make no further step. This position is authoritatively captured in the celebrated case of **Owners of Motor Vessel "Lilians" vs Caltex Oil (Kenya) Ltd (1989) KLRI.**

17. According to the applicants, they had filed a preliminary objection dated 13th May 2016 challenging the jurisdiction of the court in determining a succession case whose estate had already been dealt with by the high court under file No. 273/67 vide gazette notice No. 3337 of 15th September 1967. Both parties are in agreement that there was a high court succession cause No. 273/67 in respect of the same estate. The respondents however justify assumption of jurisdiction on grounds that it was only for purposes of distributing the estate and in any event, parties had fully participated in the proceedings despite the pendency of the preliminary objection and therefore cannot be heard to complain over jurisdiction.

18. It is trite law under the provisions of Section 7 of the Civil Procedure Act that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

19. It therefore follows that should the court find on appeal that indeed the Kadhi's court had no jurisdiction to entertain the matter the same having been the subject of litigation before the high court, the same may be declared resjudicata and an abuse of the court process hence set aside the said judgment. It is incumbent upon the applicant to prove that he is likely to suffer substantial loss in the event stay orders are not granted and the respondents proceeds to execute the grant thereby transferring the assets in question to 3rd parties. The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by any monetary award (**See Selestica Ltd. vs Gold Rock Development Ltd) (Supra).**

20. It is however not lost in my mind that a court has unfettered discretion to issue or not to issue orders for stay depending on the merits and circumstances of each case. (**See M/S Portreitz maternity vs James Karanja Kibia Civil Appeal No. 63/1997).**

In the instant case, the applicants have substantially demonstrated that this file having been a subject of high court succession No. 273/67 would not be litigated against before the Kadhi's court. With these facts, the applicants' appeal has chances of success if proved on appeal and unless the stay orders sought

are granted, there is a high possibility that the impugned judgment and distribution or transfer of the estate may be executed leading to transfer of the assets in question to 3rd parties recovery of which in case the appeal succeeds will be costly and very complex hence a likelihood of substantial loss. In the same vein, the appeal may be rendered nugatory if the orders sought are not granted.

21. As regards furnishing of security, this is neither a monetary claim nor have the respondents demonstrated that the appellants are paupers who cannot afford payment of costs should they lose the appeal. There will be no prejudice to be suffered by the respondents if the orders sought are granted. The right to be heard is a fundamental right which is a constitutional imperative not subject to compromise whatsoever. Each party will have an opportunity to ventilate his or her case during the appeal stage. For purposes of preserving the estate, this court is persuaded to grant the orders for stay of execution as the same will serve the interest of both parties. As regards failure to file a memorandum of appeal as claimed by the respondents, the same is not true as there is a copy on record filed simultaneously with the application herein.

Accordingly, application dated 31st January 2018 is allowed in terms of prayer three pending hearing and determination of the intended appeal.

Secondly, the appellants to file their record of appeal within 30 days from the date of delivery of this ruling and thereafter file be placed before a judge within the division for further directions.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MAY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

Mr. Barasa holding brief for Pere.....Counsel for the appellants/ applicants

No appearance for.....Counsel for the respondents

Edwin.....Court Administrator