



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL No. 20 of 2017

B E T W E E N:

AL-AMIN ALI.....1ST APPELLANT

HUSSEIN ALI.....2ND APPELLANT

VERSUS

ALI MOHAMED.....1ST RESPONDENT

ALWI HAMID.....2ND RESPONDENT

ALI AHMED.....3RD RESPONDENT

MOHAMED AHMED.....4TH RESPONDENT

R U L I N G

1. The Court has before it an Application for Stay of Execution pending hearing and determination of a pending appeal. the Appeal in question is against the Decision of the Hon Senior Principal Kadhi sitting in Voi. The Decision being appealed against was delivered on 27th July 2017. The Appeal was filed on 25th August 2017 and this Application was filed under a Certificate of Urgency on 1st March 2018.

2. The Application is brought under Order 42 rules 6(1) and (2) and Order 51 rules 1 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the Law.

3. The Matter first came before Hon J. Kamau, J. who did not certify it as urgent. However she did make an ex parte order giving directions etc. She made the following order:

From the terminology used, it is not entirely clear what the Learned Judge meant by that Order because she wished to preserve the status quo. The status quo was that there was no actual execution but there subsisted a legal right to execution because an appeal does not operate as a stay.

4. The Grounds Relied upon are:

(i) That the Kadhi ordered that the "deceased's two properties L.R. 1956/IV/27 and 1956/IV/367 be valued to ascertain their current market values and the respondents be paid their shares

(ii) That the Kadhi acted ultravires as he had no jurisdiction to hear and determine an issue which has been decided by the High Court

(iii) The Appellant (the identity is not disclosed) has appealed to this court in Appeal No 20 of 2017 which was then listed for a mention for directions on 23rd April 2018.

(iv) The Appeal has a high chance of success

(v) The appellant is likely to suffer greatly if stay is not granted

(vi) The Appeal herein is likely to be rendered nugatory if orders of stay are not issued

(vii) The Respondent has already threatened to execute and hence this application is very urgent.

The Application is supported by the Affidavit of the First Appellant Al-Amin Ali. It simply repeats that the Kadhi made an order for valuation and payment of shares, the Kadhi acted ultra vires as the matter has been determined in the High Court and he exhibits a certificate of confirmed grant relating the Estate of Shariff Ali Bin Mohammed in Cause 322 of 1994 as well as Letters of Administration for a deceased with the same name in Cause No 312 of 1994. Made in 2005. He repeats he has a mention date and that the Appeal has a good chance of success. He states at paragraph 8 "THAT unless an order of stay is issued I am likely to suffer greatly and same will render my appeal nugatory". There is no explanation of that statement nor is there any supporting evidence.

5. At no point in that Affidavit does the deponent state that the Respondents have commenced or threatened to commence execution. That statement comes from the Advocate with conduct in his Certificate of Urgency. Equally it is not supported by any evidence.

6. The Respondents oppose the Application. They have filed Grounds of Opposition on 16th March 2018 of the same day. The Grounds relied on are:

- (1) That the Application is an abuse of the process of court
- (2) That the Appellants are not deserving of the orders they are seeking
- (3) There is no evidence that there is any damage if execution is to take place or at all
- (4) The application should be dismissed with costs.

7. The Parties filed Written Submissions, not as directed by Hon J. Kamau J but according to an new timetable instituted when there was a new Judge in the High Court station. The Appellants Written Submissions were filed on 15th May 2018. The Respondent's Submissions were filed on 20th June 2018

8. The Appellant's Submissions begin by setting out certain facts which are not contained in the Supporting Affidavit. It is said that the Respondents filed an application for execution of the Ruling, there is no evidence of that Application before the Court. It is said that the Respondent's extracted the decree for execution on 2nd March 2018 which triggered the Application to be made a day earlier. That filing such application was done without delay. It is said the Application was filed on 18th February 2018 but there was no decree until 2nd March 2018. There is no evidence of any of those matters before the Court. Secondly it is said that the Appeal raises very serious triable issues with high chances of success. The Submissions then move onto arguing the merits of the appeal.

9. The Submissions then go onto the argument that the Appellants will suffer irreparable harm. Again the arguments put forward are arguments which are the subject of the appeal. In summary it is said that the Appellants own the properties in which the Respondents are claiming a share. The Appellants Submissions then attach 3 Authorities without explaining what principles from those authorities are being relied upon. The first authority HCC No 427/2015(Nairobi) Stanley Karanja Wainanina & Another vs ridon Anyangy Mutubwa, a stay was granted because the Court formed the view that the Respondent would not have the means to refund any monies paid had the Appeal succeeded. That is not a ground relied upon in the current application. In the Second Authority; *Selestica Ltd vs Gold Rock Developments Ltd* High Court Civil Appeal No 46 of 2015 the Court granted a conditional stay conditional on security being provided. That is not what is being sought here. In the Third Authority Succession Cause No 1559 of 1995, In the Matter of the Estate of the late Zakayo Kipkoech Kirui the Application was filed within 18 days of the Ruling and Hon W. Musyoka, J granted a stay. He considered that on the facts of that case a stay was justified because that case related to the physical division and distribution of property. In this case the Kadhi ordered for a valuation in the first instance.

10. The Respondents Submissions raise several issues. Firstly it is argued that there is no evidence that execution is imminent. it is said that the order is such that no execution can take place without further orders of the court. The Court notes that the Ruling of the Kadhi's Court provides for payment of monies only, after valuation and ascertaining of shares. The Respondents further argue that if a stay is granted it will be to the prejudice of the Respondents because the Appellants are the ones benefiting from the property in dispute. Further it is argued that Order **42 Rule 6** provides for conditional stay on the Applicant providing security. In this case the Applicants have not offered Security. Further, it is argued that the Appellants are causing delay by not filing their record of Appeal and any stay will work to their benefit rewarding them for their failing. The Appeal is not ready for hearing. The Respondent relies on the Applicant's third authority Namely; ***Selestical Limited -V- Gold Development ltd (2015) HCA No 48 of 2015*** Nairobi which deals with the third condition in Order 42 rule 6(2) (b). The Learned Judge said "In my view the Rule gives the court unfettered discretion to issue any orders as to preserve the subject matter pending the hearing of the appeal. I have no doubt therefore that I have the power to order such security for the due performance of decree or order, and that the appellant did not have to furnish such security up front before arguing the application for stay pending appeal. In any event, where the court orders for security deposit and there is default, then the order for stay are rendered useless for a defaulting party."

11. The Respondents remind the Court that its discretion must be exercised in accordance with the law. They state that they are willing to accept a stay provided there is security in the terms that all the rent collected from the estate be deposited in an interest earning account in joint names. That suggestion is extremely vague. It does not identify which parts of the estate and it does not say in whose names the account will be held. By serving its Submissions the Respondents have suggested that to the Appellants. It seems the DPP have not agreed to the suggestion and therefore are still not offering any security.

12. Order 46 Rule 6 provides;

6. Stay in case of appeal [Order 42, rule 6.]

(1) 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.

(2) No order for stay of execution shall be made under subrule (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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

13. The Application is premised on three main grounds (1) that the Respondents will execute immediately; (2) that such execution will render the appeal nugatory and (3) that the Appeal has good chances of success. The Applicants have not produced any evidence to support those grounds. Further they have not explained how a valuation of the Estate will cause them any prejudice at all much less render the Appeal nugatory.

14. The Appellant argue that the Kadhi lacked jurisdiction. However, they must first demonstrate that they raised the question of jurisdiction before the Kadhi at the earliest opportunity. As the record of Appeal has not been filed, that is not demonstrated. This Court also notes that the Kadhi was not asked for a stay being the Court that made the Order that the Appellants wish to stay.

15. In the circumstances, the Application must fail. However, having read the Parties' respective submissions it is apparent to the Court that their expectations of what comprises the Ruling of the SP Kadhi differ greatly. Whether that is because the terms are lost in translation or for some other reason is unclear.

16. Notwithstanding the dismissal of the Application, this Court takes the view that the age of this matter and the concerns of the Parties require that the Appeal be heard without any further delay.

17. In the circumstances, it is therefore ordered that:

- (1) The Application is dismissed with costs
- (2) The Appellants to file and Serve their Record of Appeal within 14 days
- (3) The Respondents to file any Response within 14 days of service
- (4) Appeal to be listed for Directions on 18th October 2018

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 27th day of July 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Appellants: Mr Muthami

Respondents: Mr Nyamae