



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 4 OF 2015

BISHAR HASSAN AHMED.....APPELLANT/APPLICANT

VERSUS

ATHAR ALI MOHAMED.....RESPONDENT

RULING

Before me is an application by way of Notice of Motion dated 26th February 2015 filed by Bishar Hassan Ahmed. The application was filed under Order 42 Rule 6 of the Civil Procedure Rules 2010 and Section 65 and 3A of the Civil Procedure Act (Cap. 21).

The prayers sought are as follows:-

1. That the honourable court be pleased to certify the application as urgent, service be dispensed with and it be heard exparte in the first instance.
2. That the hounourable court be pleased to order stay of execution of the decree issued by Hon. Ms. Hassan in Kadhi Court case No. 241 of 2014 dated 24/02/2015 pending hearing and determination of the application.
3. That the honourable court be pleased to order stay of execution of the decree issued by Hon. Ms Hassan in Kadhi court case Number 241 of 2014 dated 24th February 2015 pending hearing and determination of appeal.

The application has grounds on the face of the Notice of Motion. The grounds are three. Firstly, that the applicant stood to suffer irreparable loss unless stay of execution of the order of the lower court that he vacates the premises was stayed as the respondent was at liberty to evict the applicant at any time. Secondly, that the present application was filed without unreasonable delay merely 10 days from the date of the decision. Thirdly, that the cause of action related to land and as such though no security was offered, the applicant would abide by any orders on security as directed by the court.

The application was filed with a supporting affidavit sworn by the applicant. It was deponed therein inter alia that the applicant was the defendant in Kadhis Court Case No. 241of 2014 at Garissa wherein he was sued by the respondent for possession of property known as GSAB20299 and judgment was delivered on 16/02/2015 in favour of the respondent. That he was ordered to vacate the premises and the respondent was now at liberty to execute the decree in the Kadhi's Case, though the applicant had filed an appeal. That if execution was carried out before hearing of the appeal, the applicant would suffer irreparable loss.

The application was filed under certificate of urgency. I certified the same urgent and granted interim stay before the hearing of the same. As such prayer 1 and 2 have been spent.

On the hearing date, Mr. Nyaga appeared for the applicant. The respondent appeared in person.

My. Nyaga made oral submissions. Counsel submitted that the Kadhi's court made a ruling which was in effect a judgment. A decree was thus issued. Counsel submitted that the Kadhi determined title and ordered the appellant to vacate. Counsel emphasized that the applicant filed an appeal therefrom and filed the present application without delay. Counsel submitted further that if execution was carried out before the appeal was heard and determined, the applicant would suffer irreparable loss not capable of compensation in damages. Counsel also submitted that the Kadhi's court did not have jurisdiction to order transfer and registration of land. On security counsel submitted that the applicant would abide by the orders of the court.

In her submissions, the respondent opposed the application. She submitted that the applicant was not the owner of the property. She submitted also that the applicant was her brother in law who had wanted to inherit her after her husband died. However, she rejected him and remarried elsewhere. That the applicant was living in the two roomed house built by her husband, while she lived in a rented house. That according to Islamic Law the successor of her late husband was the wife, children and parents of the deceased, not the applicant. That the only living parent was the mother who was in the United States.

In response, Mr Nyaga submitted that the respondent was now remarried and was living with her new husband elsewhere. That the applicant lived in the premises in question and would be prejudiced if evicted. Counsel submitted that the property was registered in the name of the mother of the deceased and other children.

Under Order 42 rule 6 of the Civil Procedure Rules, this court has unfettered discretion to grant stay of execution of decrees or orders issued by a subordinate court. The considerations for the court are whether the applicant will suffer substantial loss if stay is not granted. Secondly, whether the application for stay was made without undue delay. Thirdly, whether the applicant's has offered security.

In my view this application was filed without undue delay. Thus it has satisfied one of the parameters.

Will the applicant suffer substantial loss? In my view he will if evicted. However, from the evidence on record, he is not the owner of the property. The owner or proprietor of the property did not participate in the proceedings. The applicant admitted that the respondent has two children from the person who built the houses (her late husband). The applicant has put it on record that he has rented one of the two rooms to a tenant.

As such, in order to grant stay, I have to protect the interests of the children of the deceased who put up the houses as envisaged in the Constitution of Kenya 2010 and the Children Act.

I will thus grant stay of execution, provided that from this month of April 2015, all the rent received or receivable by the applicant on the rented room is remitted by him to the respondent every month till determination of the appeal. If the applicant will default in payment of the said rent in any month, then the stay hereby granted will automatically lapse.

Dated and delivered at Garissa this 27th day of April, 2015

GEORGE DULU

JUDGE