



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL NO. 24 OF 2015

MOHAMED LALI..... APPELLANT/APPLICANT

VERSUS

FATMAATHMANBAKARI..... RESPONDENT

RULING

1. By a Notice of Motion dated 28.8.15 and filed under Certificate of Urgency, the Appellant/Applicant sought the following orders that:
 - a. Spent;
 - b. This Court the execution of the Ksdhi's Court judgement and ororders of 22.8.13, the Rulings made on 18.8.14, 19.3.14 and 25.2.14 pending the hearing and determination of the Appeal herein;
 - c. Prayer 2 above be issued on interim bsaisi pending the hearing and determination of this Application;
 - d. The costs of this the application be met by the Respondent.
2. The Application is founded on the grounds set out on the face of the application and on the facts set out in the affidavit of the Appellant/Applicant sworn on 20.8.15.

The Appellant/Applicant's Case

3. In his Supporting Affidavit sworn on 20.8.15, the Appellant/Applicant takes issue with the decision of the Kadhito decline his application for review of the judgement seeking distribution of the estate in a manner that would be fair to all heirs. That as a result of that dismissal of the application for review, the Respondent sought to have one of the assets of the deceased attached for sale by auction. He argues that that he has an arguable Appeal with a high probability of success; that his brother will suffer irreparable loss and damage if the stay is not granted ad his brother and other heirs will be ejected from their residence.

The Respondent's Case

4. In her Replying Affidavit sworn on 29.9.15, the Respondent avers that the Kadhi in his judgement which was sound and fair determined that she was entitled to 1/8 share of the estate of the

deceased being a widow. That she was granted 47.5% share of the deceased's house at Magongo on Plot No. 1782 or in the alternative the Appellant to buy her share at Kshs. 1,043,750/=. She accuses the Appellant/Applicant of trying to force her to take properties in Faza which are not as prime as the one in Mombasa. She avers that the Appellant/Applicant has been benefitting from the properties belonging to the estate to her exclusion since the death of the deceased in 2010 and has failed to account from the proceeds received from the estate. The Respondent further accuses the Appellant/Applicant of filing the Application and Appeal herein of malice and to further restrain her from enjoying the fruit of her judgement.

Determination

5. The matter was initially placed before this Court on 26.8.15 and a stay of execution was granted for 14 days. When the matter came up again before me on 8.10.15, Mr. Bakari for the Applicant informed the Court that both parties would rely on their filed Affidavits. The Application before me seeks in the main, stay of execution of the decree of the Kadhi's court pending appeal. Stay orders are provided for under Order 42 of the Civil Procedure Rules. The following are the points that the Court must consider in determining whether or not to grant a stay of execution:
 - a. Whether stay has been sought without considerable delay;
 - b. Whether the appellant would suffer substantial loss if stay is not granted; and
 - c. Whether security for due performance is necessary in the circumstances.

Although the parties chose to rely on their Affidavits, neither of them addressed me on the law. They both focused on the merits of their respective positions in their Affidavits.

6. Was the Application for stay sought without considerable delay? The Civil Procedure Act at Section 79G provides that

“every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against...”

The Ruling appealed against was delivered on 18.9.14. The Memorandum of Appeal was filed on 21.8.15 almost a year after the said Ruling was delivered. It is quite evident that this Appeal was not filed without considerable delay. No explanation for the delay has been proffered by the Appellant/Applicant. Further, it is instructive that the Application for review of the judgement of the Honourable Kadhi delivered on 22.8.13 was itself filed on 3.6.14 almost a year after delivery of the same.

7. On the issue of substantial loss, the Appellant/Applicant simply states that “my brother will suffer irreparable loss and damage if the orders sought are not granted as he and my other heirs shall be ejected out of our residence.” This is denied by the Respondent who argues that the Appellant/Applicant has been benefitting from the properties of the estate to her exclusion. That the Appellant/Applicant seeks to keep her from enjoying the fruits of her judgement. Other than that mere statement that his brother and his other heirs shall be ejected from their residence, the Respondent does not say how he shall suffer irreparable loss. He has also not stated which brother would suffer loss nor how that loss will come about. He has also referred to his other heirs being ejected from their residence. Again this is a vague statement not having any details. It is not clear why the Appellant/Applicant chose not to argue his Application which would have shed more light and assisted this Court in making a determination on the alleged irreparable loss to be suffered and by whom if the stay of execution is not granted.
8. Security for due performance is critical where an appeal fails and an appellant is saddled with the costs thereof. The Appellant/Applicant herein has not offered any security for due performance. The Respondent ought to be insured against the Appellant/Applicant's inability to pay or to perform any other obligation under the original decree. The requirement for security under Order 42 is discretionary. The Appellant/Applicant has not given any security for due performance nor

has he offered to do so.

9. I am not convinced that a case has been made out for grant of the prayers sought in the Motion dated 20.8.15. In the circumstances, I find no merit in the application and the same is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of November, 2015.

M. THANDE

JUDGE

In the presence of: -

..... for the Appellant/Applicant

..... for the Respondent

..... Court Assistant