



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Appeal No. 43 Of 2010

(Being an application for stay of execution of the decree pending hearing of the application inter-partes and hearing and determination of the appeal)

BOAZ ASHIONO SHISANYA APPELLANT/RESPONDENT

VERSUS

ANDREW IKHUNYALO RESPONDENT/DECEASED

A N D

**SAPIENTIA KHASATSILI SHIBACHI (as legal representative
of ANDREW SHIBACHI IKHUNYALO).....APPLICANT**

RULING

On 13th February 2014, this court allowed the appeal filed by Boaz Ashiono Shisanya against Andrew Ikhunyalo. The court concluded as follows -

“Consequently, I allow the appeal and quash the adoption by the subordinate court of the award of the Provincial Appeals Committee. What remains on record therefore is the adoption by the subordinate court of the Land Disputes Tribunal’s Award and the subsequent ruling of the High Court.”

Subsequent to the above orders, Sapientia Khasatsili Shibachi filed the present application as the personal representative of Andrew Shivachi Ikhunyalo (now deceased).

The present application was filed through a Notice of Motion dated 24th February 2014. It was filed under **Order 22 rule 22, Order 24 rule 1, 2, 3 and 5 and Order 40 rule 1, 2 and 3** of the Civil Procedure Rules as well as **Section 3A** of the Civil Procedure Act (Cap.21).

The prayers are as follows -

- 1. That the application be certified as urgent and service of this application be dispensed with**

- in the first instance.**
- 2. That leave be granted to the appellant (applicant) to substitute the respondent/deceased Andrew Shivachi in this suit in the first instance.**
 - 3. That pending the hearing and determination of the application hereto inter-partes an order be issued restraining the appellant/respondent above named or his servants, agents, assignees and/or family members from entering into parcel No. Idakho/Shiseso/955 and/or in any way interfering with the use of the said parcel of land by family members of the deceased/respondent herein.**
 - 4. That there be a stay of execution of the judgment entered herein and all subsequent orders thereto pending the final hearing and determination of the application hereto and the intended appeal.**
 - 5. That pending the filing and hearing and determination of the intended appeal against the judgment entered into herein on 13th February, 2014 against the respondent/deceased, an order be issued restraining the appellant/respondent above named or his servants, agents, assignees and/or family members from entering into parcel No. Idakho/Shiseso/955 and/or in any way interfering with the use of the said suit parcel by the family members of the deceased/respondent herein.**
 - 6. That costs of this application be provide for.”**

From the record, let me state that the parties to the present application herein are Boaz Ashiono Shisanya described as appellant/respondent; and Sapientia Khasatsili Shibachi as personal representatives of the deceased Andrew Shibachi Ikhunyalo described as applicant.

The application has grounds on the face of the Notice of Motion. The grounds are that the applicant had obtained letters of administration *ad-litem* in the estate of Andrew Shivachi Ikunyalo who had died on 28th November, 2013 before the delivery of judgment; that the applicant had already lodged and served the Notice of Appeal to the Court of Appeal; that the family of the deceased had been using the subject land since 1979 when the deceased obtained proprietorship therein; that the appellant, Boaz Ashiono Shisanya had after the delivery of judgment herein, using members of the public threatened to destroy sugarcane planted on the land; that if the orders sought were not granted the deceased's family would suffer irreparable and substantial loss.

The application was filed with a supporting affidavit sworn on 27/12/14 by the applicant. It was deponed therein that the deceased was her husband. That the deceased was the registered owner of land parcel No. Idakho/Shiseso/955 since 1979. That currently there was sugarcane planted on the entire land. That the family members had been occupying the land since 1979. That after judgment was delivered herein, the appellant had incited members of the public to enter the suit parcel and cut sugarcane under the pretext that he had been awarded the land.

A supplementary affidavit was also filed by the applicant. It was sworn on 24/2/14 in opposition the replying affidavit filed. It was deponed inter-alia that the applicant had the right of appeal; that the law granted the court jurisdiction to determine or decide on the orders sought; that Boaz had not filed any document in support of his allegation that he had subdivided the land after the Land Tribunal's award; that the said Boaz had not provided any evidence to prove that only part of the land was planted with sugarcane.

The application is opposed. A replying affidavit sworn on 20th March 2014 by Boaz Ashiono Shisanya was filed. It was deponed that Boaz had won the appeal through a judgment delivered on 13th February, 2014. That the application herein was brought in bad faith and calculated to delay the enforcement by the court judgment. That orders of substitution of a party could not be granted as the court was already *functus officio* having delivered its decision on 13/2/14. That no claim could survive the death of the party against whom an appeal had been decided. That no decree had been extracted and therefore stay orders could not be granted. That it was not true that Boaz had invaded the applicant's portion of the suit land or cut sugarcane plants. That Boaz had infact divided the land in two portions, that is portion A for the deceased and portion B for the respondent, each measuring 1.4 hectares or thereabout. That the sugarcane on portion A had not been cut by Boaz or his family. That this matter was

res-judicata. That no valid appeal had so far been lodged.

At the hearing of the application, Mr. Amasakha appeared for the applicant (Sapientia) while Mr. Shifwoka appeared for the respondent (Boaz).

Mr. Amasakha submitted that prayer 1 and 2 had already been dispensed with. That after the decision of the court on appeal delivered 13th February, 2014, the estate of the deceased or respondent was aggrieved. A Notice of Appeal had therefore now been lodged in the Court of Appeal. In the meantime, this application had been filed for stay and restraining orders. Counsel submitted that there were triable issues on appeal. That the applicant had been in occupation of the land for a long time. Counsel emphasized that the respondent had admitted that, after the judgment herein he entered the land and started planting, which was a confirmation that he had not been on the subject land before. Counsel submitted that if the orders sought were not granted, the current status quo would be interfered with to the detriment of his client. Counsel submitted also that a decree had not yet been extracted to allow the respondent execute the court orders. In addition, no consent to sub-divide the land had been obtained from the Land Control Board. The mutation form annexed by the respondent was not signed by a surveyor. Counsel stated that before execution of the decree could commence, taxation of costs should have been done which was not the case. The purported execution of the decree was therefore premature. Counsel relied on a case of **Commercial Bank of Africa -vs- Lalji Karsan Rabadia & 2 others [2012] eKLR**. Counsel also relied on the case of **Swanya Limited Vs Daima Bank Ltd. Nai. Civil application No. 45 of 2001**.

Counsel stated that the principles for considering an application for stay of execution of decree were clearly stated in court decisions, including the case of **Raila Odinga -vs- Uhuru Kenyatta & Others – Election Petition No. 6 & 7 of 2013** which was a decision of the Supreme Court.

Counsel emphasized that the deceased was still the registered owner of the subject land. There was therefore need to preserve the status quo pending the appeal.

In response, Mr. Shifwoka submitted that such an application for stay of execution of decree was considered on three grounds. Firstly whether there was a risk of hardship to the applicant. Secondly, whether the applicant had an arguable appeal. Thirdly, whether he/she had furnished security.

Counsel argued that none of these requirements had been fulfilled by the applicant. The filing of an appeal, *per se*, did not entitle the court to grant stay of execution of decree. Counsel relied on **rule 75** of the Court of Appeal Rules which requires that fees be paid for the filing of a Notice of Appeal. Counsel argued that no fees had been paid herein for the filing of the Notice of Appeal.

Secondly, counsel argued that the appeal was not arguable. He stated that the High Court was the final court in any matter which arose from the Land Disputes Tribunals. There was no provision for further appeal.

On provision of security, counsel argued that the applicant had not demonstrated or shown that she would provide any security. Counsel also submitted that the facts disclose in documents filed showed that the suit land had been clearly sub-divide since 1962. He emphasized that his client was only using a portion of the suit land.

In counsel's view, no substantial loss would be suffered by the applicant if the application was not allowed. Counsel submitted that the mutation form and documents on consent to the Land Control Board were admissible. Counsel argued that Section 94 of the Civil Procedure Act only applied to money decrees. Counsel submitted further that the flashing in court of a purported sale agreement, did not mean that the sale agreement was genuine. Counsel sought to distinguish the case of Daima Bank (*supra*). In the present case, counsel argued, the appeal would not be rendered nugatory if the orders of stay sought were not granted. Counsel also argued that in the Presidential Election petition No. 6 & 7 of 2013, Raila Odinga –vs- Uhuru Kenyatta (*supra*), the Supreme Court was specific. Stay could be granted only where there was an arguable case and where the action was not time barred.

Counsel further argued that the decision in the Judicial Review Case herein, had not been appealed from since 2005. Counsel relied on the High Court appeal decision in this same matter and emphasized that it was reported in the Kenya Law and as such, was an authority to be relied upon. Counsel also relied on the case of **Jane Waturo -vs- Nazil Shah Mohammed – Nkr. Civil Appeal No. 76 of 2012** reported in **2014 eKLR**.

Counsel further argued that prayer 5 of the application could not be granted as injunctive orders were not sought either in the lower court or the High Court. Counsel relied on the case of **Morris & Company Ltd. -vs- Kenya Commercial Bank & 2 others-** Milimani High Court Commercial case No. 729 of 2003.

Counsel further submitted that extraction of a decree is not mandatory before execution commences. Counsel argued that the present application was an afterthought as no appeal had been filed.

Counsel also argued that in terms of Order 9 rule 9 of the Civil Procedure Rules, Mukua & Company advocates were required to obtain leave to come on record, since they purported to come on record after the decision was made. Counsel urged that the application be dismissed with costs.

In response, Mr. Amasakha for the applicant stated that Mr. Mukua advocate was not improperly on record as they were not replacing Amasakha & Co. advocates. Counsel argued that the Notice of Appeal was properly paid for and filed on time. That Order 22 of the Civil Procedure Rules clearly stated that a decree had to be extracted before execution could commence. Counsel emphasized that the appellate court from the decision of the High Court was the Court of Appeal. Therefore in his view, the appeal herein was a valid appeal.

I have considered the application, documents filed and the submissions of counsel of both parties.

The main application herein is for stay of execution of decree pending appeal to the Court of Appeal. Such applications are governed by the provisions of **Order 42 rule 6 (2)** of the Civil Procedure Rules 2010, which provides as follows -

“6 (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.”***

As a preliminary point, I wish to observe that, though it has been argued herein that the appeal has to have good chances of success, that is not a specific requirement under the rules for applications to the High Court. It is however, a requirement for grant of stay of execution for appeals intended to be filed in the Court of Appeal. Though the applicant has filed this application in the High Court, in my view, since the appeal is intended to be filed in the Court of Appeal, the considerations under the rules applicable to the Court of Appeal for stay of execution will apply herein.

Let me first deal with technical issues raised. It has been argued that there is no avenue for appeals to the Court of Appeal from the decisions of Land Disputes Tribunals. That there is therefore no arguable appeal to the Court of Appeals, after the decision on appeal by the High Court herein. **Section 8** of the **Land Disputes Tribunal's Act (Cap.303A)** provides for appeals to the High Court. The relevant parts are as follows –

8. (8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of;

Provided that no appeal shall be admitted to hearing by the High Court unless a judge of that court has certified that an issue of law (other than customary law) is involved.

The decision in contest was made following the decision of the subordinate court adopting an award from the Provincial Appeals Committee, after another decision of the Land Disputes Tribunal had already been adopted. It was not an appeal strictly speaking from a decision of the Appeals Committee. The High Court found that the Appeals Committee did not have jurisdiction to entertain the purported appeal to it. In my view, the provisions of **Section 8 (8)** and **(9)** of the Land Disputes Tribunal's Act do not apply herein. Even if the said decision was a decision on appeal to the High Court from the Appeals Committee, the law does not state that the decision of the High Court on appeal is final. The Court of Appeal will determine the merits and legality of the appeal, when it is filed. As for me, at this moment, I find no bar to the applicant proceeding to the Court of Appeal to ventilate her intended appeal.

It has also been submitted by Mr. Shifwoka, learned counsel for the respondent that the applicant cannot replace her deceased husband after judgment on appeal was delivered. This court on 11/3/2014 granted prayer 2 of the application. I do not have jurisdiction to interfere with that decision by my brother. In effect the applicant is properly before this court as the administrator of Andrew's estate.

From the record, I have not seen the replacement of the firm of Amasakha & Company advocates by MS Mokuu & Co. advocates. Therefore in my view, the provisions of Order 9 of the Civil Procedure Rules do not apply herein. That objection is also disallowed.

Coming to the substantive consideration of the request for stay of execution of decree, the applicant in my view has filed this application within reasonable time. There was no inordinate delay in filing the application.

In my view, the applicant will suffer substantial loss if the stay is not granted. This is because the position taken by the contesting parties and their actions on the subject land, demonstrate that their neighbourly relationship is intricate. Though I have not seen any draft Petition of Appeal, with the arguments put across to me by the parties counsel, I am of the view that the appeal is an arguable appeal.

As for provision of security, all parties have agreed that the applicant and respondent have occupied and used the land or part of it for a long time. Therefore, in my view, there is no point or real necessity of ordering the provision of security herein. Therefore, I shall grant stay of execution of decree, which I hereby do, provided the substantive appeal to the Court of Appeal is filed within 60 days from today otherwise the stay granted herein will automatically lapse on expiry of the 60 days.

Though the applicant has sought injunctive orders under prayer 5, that prayer was not argued by her counsel. She did not in any case, fulfil the requirements for the grant of injunctive orders enunciated in the case of **Giella -vs- Casman Brown & Co. Ltd. [1973] EA 358**. I treat that prayer as abandoned.

As for costs, in my view, the costs of this application will follow the results of the appeal to be filed in the Court of Appeal. If the stay herein lapses after 60 days as stated above however, then costs of this application will be borne by the applicant.

In conclusion, I allow the application and grant stay of execution of the judgment/decreed, on the conditions stated above.

Dated and delivered at Kakamega this 22nd day of May, 2014

George Dulu

JUDGE