COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 227 OF 2002

SAID SWEILEM GHEITHAN SAANUN.....PLAINTIFF

- V E R S U S -

1. THE COMMISSIONER OF LANDS being sued through

THE ATTORNEY GENERAL

2. THE MUNICIPAL COUNCIL OF MOMBASA

3. NORMAN ATAHERALI DAWOODBHAI

4. HASSAN TAHERALI DAWOODBHAI

5. ALI RAMADHANI MWATSAU

6. MOHAMED NAMAN MOHAMED ..... DEFENDANTS

RULING

[1] The applicant in this application applies for a stay of execution of the courts order dated 26th May, 2014 and any consequential orders that may be issued in regard to Mombasa/Block XVII/1517 and or Mombasa/Block XV11/1098 pending the hearing of an appeal from the said ruling.

[2] This application came before Kasango J when this court was not sitting and she ordered that the application be heard inter parties before me after due service. During the hearing on 16th June, 2014 the applicant said that she was seeking stay of execution pending an appeal of this courts ruling dated 26th May, 2014. The applicant relied on the fact that the suit property had been advertised for sale by public auction and that will prejudice the applicant since the applicant intends to appeal. The applicant stated that she has filed an appeal. That this application has been filed timeously and have good chances on the appeal. The applicant argued that this right to appeal is Constitutional under Article 159. The appellant relied on the case of ***Francis Njakwe Githaiari v Daniel Toroitich Arap Moi T/A Moi Educational Centre [2006] eKLR in HCCC. No. 596 of 2004*** which sets the requirement for stay of execution, The

applicant relied on other authorities she cited therein.

[3] The second defendant opposed the application. It argued that first and foremost there is no suit. It said this suit abated on 27th August, 2005.That the application for grant of Letters of administration were taken out and temporary letters issued to one Noor Salim Mohammed of P.O. Box 85144 Mombasa. That the certificate of confirmation was issued to Noor Swellem Keitan on 10th June, 2009. That the applicant herein is not the one who filed the application for Letters of Administration, though they were confirmed to her.It was argued that she therefore has no locus standi to bring this application. The applicant argued that once this court ruled it could not extend the time and revive the suit, the only window left for the applicant was finally closed. That this court became *functus officio*. The 2nd respondent therefore argued that once the suit abated and the court refused to revive the same no fresh suit ought to be brought at all. That under the Civil Procedure Rules Sec. 2 *suit* means; *"All civil proceedings commenced in any manner"* That since this court is *funtus officio*. It does not have the powers to grant the orders sought.

{4} The Attorney General adopted the submissions of the 2nd defendant. It added that for this court to exercise its discretion; the applicants must show sufficient cause. The 3rd,4th and 5th defendant did not oppose this application. The proposed 7th defendant who had filed an application to be allowed to join the suit and whose application was pending when the ruling of 26th May, 2014 was delivered requested to make its contribution. I allowed them to make their remarks because they had an application pending when I made my ruling under reference. It said that its application was overtaken by events when the ruling was delivered. It stated that in their application in the court file, they had annexed a charge document dated 27th January, 2010 in favour of themselves. They argued that they have a right to the suit property under Article 40 of the Constitution. They said that, had they been allowed to came in the suit, they would have opposed the application. They said that they had already advertised the suit property for sale for monies owed to them pursuant to the said charge.

[5] *Having listened to the parties and their submissions in this case, can the orders prayed for be granted?*

The applicants had filed a notice of motion dated 7th June 2013 in which they request the court to

(a) enlarge time and extend time within which that application could be made.

(b) That this suit which has bated be revived.

(c) That the wife of the deceased be made a party to this suit and proceed with the same.

I declined to extend the time and to revive the suit.

In my ruling I stated;

". . . I have found no good reasons advanced to extend time. Consequently I am unable to revive the abated suit."

[6] The question that arises from the above order is, what part of the above order is capable of being executed by the respondents? How can a refusal to extend time be executed by the respondents? Equally; how can a refusal by a court to revive an abated suit be executed by the respondents? I do not know how. In my view, this cannot be done even by any stretch of imagination!

[7] Having refused to revive the suit; the said suit still remained abated. The court is now being asked to grant a stay of execution on an abated suit.

Can a stay be granted in such a situation?

I*n Nairobi High Court Civil Case No. 1661 of 1995, Titus Kiragu v Jackson Mugo Mathai* Onyancha J stated:

"My view as already expressed above, is that the suit, by operation of Order 23 rule 4 (2) automatically and mandatorily abated at the beginning of the 1st day after the expiration of one year after the death of the deceased.Thereafter the suit was dead as a dodo.Any act on the suit thereafter, apart from an act confirming the abatement or on the other hand, reviving it under and as specified by law would be void and a nullity. Even an act or non action by the Deputy Registrar in this case, would come to nought as it would not revive the abated suit."

In Nairobi HCCC. 1671 of 1994 ***Kenya Farmers Co-operative Union v Kaptabei Coffee,*** Waweru J made the same point on abatement.

[8] The court was told that once the court pronounced its ruling refusing to allow extension of time; and to revive the suit; it was *functus officio.* The Supreme Court of Kenya have considered this point in ***Petition No. 5 of 2013 Raila Odinga v The Independent Electrol & Boundaries Commission and 3 others;*** Quoting ***Jersey Evening Post Limited vs A.I Thari [2002] JLR 542 at 550;***

It stated;

"A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when the decision has been communicated to the parties. Proceedings are only fully concluded and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality.Once proceedings are finally concluded,the court cannot review or alter its decision, any challenge to its ruling and adjudication must be taken to a higher court if that is available."

[9] In this case I have finalized my ruling. I have stated that I cannot extend the time within which the application that was filed could be made. I refused to revive th suit. The court is therefore *functus officio.* I allowed the applicants herein, to be supplied with copies of the ruling. I ordered the skeleton file to be placed in this file and I gave the applicants leave to appeal. That is as far as I was allowed by law to go. What I am asked to do now is not sanctioned by law. Indeed, it would be a back door way of reviving an abated suit a fact I have already considered. The relief the applicants seek is not available in this court. I decline to grant it. The application is therefore dismissed with no order as to costs.

Dated and delivered in open court at Mombasa this 20th day of June, 2014

S. MUKUNYA

JUDGE

20.6.2014

In the presence of:

Mutiso advocate holding brief for Taib Advocate

Lumatete for 2nd defendant present

Kiume Kioko for 3rd,4th,5th & 6th defendants

Anyumba Advocate for interested party