



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 18 OF 2013

BIHIJA ALI SEMPA

HASSAN ALI SEMPA.....APPELLANTS

VERSUS

BAKARI MOHAMED MOTTE.....RESPONDENT

RULING

By a Notice of Motion dated 25th June, 2013 the Applicants/Appellants sought the following order:

“That there be a temporary stay of execution of the decree/or judgment delivered by the Kadhi’s Court IN THE MATTER OF THE ESTATE OF FATUMA JUMA HEMED on 15th May, 2013, pending hearing and determination of the Appeal filed herein.”

The application was supported by the affidavit of **BIHIJA ALI SEMPA** dated 21st June, 2014. The court did grant a temporary stay and parties were directed to file written submissions. This was duly done and the matter is now for ruling.

The background of the appeal is the Kadhi Succession Case No. 151 of 2012 involving the estate of the late **Fatuma Juma Hemedi**. The deceased died intestate in 1995 leaving no child, husband, brother, sister or parents. The parties are third generation descendants of the deceased. By a decision dated 15th May, 2013 the Hon. Chief Kadhi distributed the estate of the deceased as follows:

“(a) Riziki Bakari Motte (niece to deceased) – 50%.

(b) Children of Bakari Mohamed Motte (grandnephews and nieces of deceased) –33.3%.

(c) Children of Asina Mohamed Motte (also grandnephews and nieces of deceased) – 16.6%.”

The estate of the deceased comprised of a Swahili House without land situated at Mwembe Tayari in Mombasa on **Plot No. 19R-279/XVI**. The said house had already been sold by the appellants to a buyer for Kshs. 11 million. That being the case the judgment of the Hon. Chief Kadhi would require that the appellants refund to the respondent the sum of Kshs. 5,500,000/= being his share of the estate (as per the Hon. Kadhi’s judgment). The appellants being aggrieved with the decision of the Hon. Kadhi filed an appeal before the High Court. They further seek a stay of execution of the Hon. Kadhi’s decision arguing

that any execution would render their intended appeal nugatory and would subject them to substantial loss. As stated earlier the application was opposed. The respondent through his advocate submits that no evidence of substantial loss has been shown.

I have carefully considered the submissions filed by counsel as well as the authorities annexed thereto. The applicants are seeking a stay of execution of the judgment of the Hon. Chief Kadhi. Order 42 rule 6(1) of the Civil Procedure Rules provides:

“No order for stay of execution shall be made under sub-rule (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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

I am satisfied that this application has been brought in good time and without unreasonable delay. The Hon. Chief Kadhi delivered his judgment on 20th May, 2013. Notice of appeal was filed a few weeks later on 3rd June, 2013. This present application was filed about 35 days after the date of delivery of the judgment on 25th June, 2013. There has been no delay in approaching the court on the part of the applicants.

The applicants submit that if execution is commenced against them for this amount of Kshs. 5.5 million, they stand to suffer substantial loss should their appeal eventually succeed. The respondents on the other hand submit that the term ‘*substantial loss*’ is relative. The respondent further submits that the appellants had no right to sell off the deceased house in the first instance. The merits or otherwise of the appeal are not the mandate of this court. The question of who the genuine beneficiaries of the deceased were and what each one is entitled to are all questions of facts and are matters that can only be decided upon evidence being tendered at the appeal. At this point the duty of the court is merely to preserve the current status quo so as to ensure that the appeal is not rendered nugatory. The sum of Kshs. 5.5 million is not an amount to be sneezed at. If execution proceeds and the appellants pay out this sum, they will obviously have suffered substantial loss if eventually their appeal succeeds. To ensure fairness to both parties this court in my considered opinion that execution must be stayed until the appeal is heard and determined.

I therefore allow this application for stay of execution pending the hearing and determination of this appeal. I further direct that the applicant provide a bank guarantee in the sum of Kshs. 5.0 million within 20 days of today’s date as a condition for such stay. Costs in the cause.

Dated and delivered in Mombasa this 27th day of October, 2014.

M. ODERO

JUDGE

In the presence of:

Ms. Kariuki holding brief Mr. Gikandi for the Respondent

Court Clerk Mutisya