



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 45 OF 2013**

**1. HAFSA SWALEH**

**2. SALMA AMUR SALIM SWALEH.....APPELLANTS**

VERSUS

**MWANAMVUA ISAK.....RESPONDENT**

**RULING**

By this Notice of Motion dated 26/7/2012 the Respondent/Applicant seek *inter alia* the following orders

“2. **THAT** the court be pleased to lift the orders given on 5<sup>th</sup> July 2012.

3. **THAT** the court to alternatively be pleased to order the appellants to furnish security equivalent to purchase price paid for the property.

4. **THAT** costs of the Application be provided for”.

The application was disposed of by way of written submissions. Both parties duly filed their submissions.

The genesis of this matter is **Kadhi Succession Cause No. 39 of 2008**, involving the distribution of the estate of the late **FATUMA KAHMIS MAJALIWA**. After a full hearing before the Hon. Kadhi at which parties participated through their Advocates the Hon. Kadhi did on 15<sup>th</sup> February, 2011 deliver a judgment in which made a determination of who the heirs to the estate of the deceased were.

The Hon. Kadhi proceeded to set out the distribution of shares in the estate to each beneficiary. By an order dated 4<sup>th</sup> July, 2011 the Hon. Kadhi adopted a consent of the heirs that the three properties left behind by the deceased namely

- i. **Kimongo/Kimongo/159**
- ii. **Kimongo/Kimongo/121**
- iii. **Kimongo/Kimongo/968**

Be sold either by private treaty or by public auction and each beneficiary to be given their share from the

proceeds of sale in accordance with the distribution as directed. The applicant herein did consent to the mode of distribution and did also consent to the sale of the properties. The properties were accordingly sold to **CONSTANCE AKILIMALI MALAI** and **JOHN MAWEU MBULU**. After the sale the Appellants raised an objection on the grounds that they ought to have been given priority to purchase the property themselves. Their advocate accordingly declined to accept the Appellants share of the proceeds of sale. This issue was again placed before the Hon. Kadhi for determination. The Hon. Kadhi in his Ruling of 27<sup>th</sup> February, 2012 found that the appellants ought to have communicated their intention to purchase the properties during the trial. He found that the sale was properly conducted in accordance with the law. The Appellants then filed the application dated 5<sup>th</sup> July, 2012 seeking:

**“THAT this Honourable Court be pleased to issue an order of stay of execution of the Ruling delivered on 21<sup>st</sup> June 2012 pending the hearing and determination of the appeal herein.”**

On 5<sup>th</sup> July, 2012 **Hon. Justice Richard Mwongo** made orders for temporary stay which have remained in force to date. The respondent now seeks to have this stay lifted.

I have carefully perused and have considered the written submissions filed by both parties. Although the Appellants in their application of 5<sup>th</sup> July, 2012 sought for a stay of the ruling of the Hon. Kadhi delivered on 21<sup>st</sup> June, 2012 the fact is that from the annexed proceedings of the succession cause no ruling was delivered by the Hon. Kadhi on that date. What the Kadhi did was to issue an **Order** on 21<sup>st</sup> May 2012 directing that the certificates of sale be issued to the two buyers. The conditions which an applicant seeking a stay of an order must satisfy were clearly stated by **Hon. Justice Luka Kimaru** in the case of **-PETER ONDANDE t/a SPRE AWETT CHEMIS –VS- JOSEPHINE WANGARI KARANJA** [2006] eKLR as follows:

**“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted.**

**Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”**

Similarly **Hon. Justice Mary Kasango** in the case of **FEISAL AMIN JANMOHAMED T/A DUNIYA FORWARDERS –VS- SHAMI TRADING CO. LTD** [2014] eKLR stated as follows:

**“It is trite law, therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security”**

I will proceed to consider each of these conditions for stay in relation to this case.

1. **Was this application made without unreasonable delay.**

The ruling of the Hon. Kadhi which the appellants seek to challenge was delivered on 21<sup>st</sup> May 2012. The application for stay was filed on 5<sup>th</sup> July 2012, a period of less than two months after the said ruling. Thus the application was filed in a timeous manner. There cannot be said to have been any unreasonable delay.

2. **Has security been offered**

The appellants in this matter have not made any offer to furnish any security and neither have they demonstrated their willingness to do so. They have therefore failed to satisfy this condition.

### **3. Substantial loss**

The appellants have submitted that they stand to suffer substantial loss if the stay orders are not issued.

The appellants' share of the proceeds of sale have already been deposited in court and merely await their collection. The Hon. Kadhi rendered a decision on 27<sup>th</sup> February 2012 by which he found that the appellants had failed to indicate their intention to purchase the property in good time. He found that according to Islamic Law the appellants ought to have clearly communicated to the Hon. Kadhi, their intention to purchase the properties but they failed to do so. The appellants have not appealed that decision to date. The appellants also failed to disclose in their application for stay that the decision to sell the properties was arrived at by consent. Having initially given their consent to the sale no reason has been advanced for the appellants' change of mind after the fact. The position is that the sale has already taken place. The purchase price has been deposited in court. The respondent has collected his share. The appellants shares remains deposited in court. This application has basically been filed too late in the day. I am not persuaded that the prayer for stay is merited. I therefore disallow the appellants Notice of Motion dated 5<sup>th</sup> July, 2012. I further lift the orders of temporary stay in terms of prayer (2) of the Notice of Motion dated 26<sup>th</sup> July, 2012. Each party to meet their own costs.

**Dated and Delivered in Mombasa this 17<sup>th</sup> day of December, 2014.**

**M. ODERO**

**JUDGE**