



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HCA NO.28 OF 2012

TIMA HASSAN UREMA & OTHERS.....APPELLANTS

-VERSUS-

1.MWANAAMINA HASSAN UREMA

2.FATUMA MOHAMED KOMBO

3.MWANAPAMBO HASSAN UREMA.....RESPONDENTS

RULING

1. The Notice of motion filed by the appellant on 3/10/12 seeks four key orders:

(b) That there be stay of execution of the judgement, decree and all other consequential orders pending hearing and determination of the Application or Appeal.

(c) That Rental incomes be deposited in court or in a joint interest earning account in the names of respective counsels.

(d) That the Honourable Court do make orders as may be necessary as per the contingencies and exigencies of the case to meet the ends of justice.

(e) The Respondents by themselves, servants, Agents and or Employees be restrained from alienating, disposing of properties in the occupation and or control pending hearing and determination of the Application or Appeal.

2. It is expressed to be brought under sections 1A & B, 3A, 63(e) and 65(1) of the Civil Procedure Act and is premised on four grounds, namely, that the estate property which is the subject matter of the appeal is at risk of being wasted or alienated to the detriment of the legitimate heirs, that rental incomes and other profits accruing to the property may go untraced, that the appeal has a high chance of success and finally that it is just and equitable to grant the orders sought. The application is supported by the affidavit of the appellant, Tima Hassan. In the affidavit she raises several complaints regarding the succession proceedings, before the Kadhi in Succession Cause No. 6 of 2011, from which his appeal emanates

3. The main complaints relate to the substance of the appeal. These are ground in paragraph 7 and 10 of the affidavit. In the former she states, and I have confirmed this from the record, that an order to exclude certain properties from the estate was made after the judgement upon an application by one Mohamed Buishe who was on the face of it not party to the original proceedings.
4. The contents of paragraph 10 are quizzical because therein the appellant states;-

“THAT, the judgement and or consequential order as explained to me by Gichana Esq is incapable of execution as there are no values attached to any property of residential property or at all, and the same is a farce as heirs kurieth not, proceeds which of which property is to receive a share of his inheritance from “(sic)”.

This deposition flies in the face of prayer b of the Notice of motion which is for stay of execution pending appeal. Even so, there is no material in the affidavit of the appellant to support the grant for stay of execution as provided under Order 42r(6)(2) Civil Procedure Rules.

5. Regarding prayer(c) it was correctly argued by counsel for the 1st and 2nd Respondents that there is no basis for the presumption of rental income accruing to the estate properties. The affidavit of the appellant does not suggest so.
6. Although Order 42 rule 6(6) of the Civil Procedure Rules is not expressly cited in the body of the notice of motion, it is evident that prayer (e) is brought under that provision. The grant of a temporary injunction is governed by the principles established by the Courts since **Giella Vs Cassman Brown & Co. Ltd 1973 EA 332.** The applicant must demonstrate that he has a prima facie case with a probability of success, whose equivalent in this case would be a prima facie arguable appeal. Secondly, he must show that he will suffer irreparable damages if orders sought are denied. If in doubt, the court will weigh the balance of convenience.
7. The fact that a non party Mohamed Buishe approached the court after judgment and obtained ex parte orders which effectively altered the substance of the judgment may be remarkable but he Appellant`s affidavit does not disclose the damage she stands to suffer if an injunction is denied. Besides, an interim injunction is an equitable remedy. The proceedings in the Lower Court contain disturbing admissions by this appellant that she has unlawfully disposed of two of the properties of the estate- Naharadhani House and Shamba Kwaiyu. Surely such a party cannot invoke the principles of equity to her aid against other heirs who have been adversely affected by her unlawful actions.
8. Be that as it may, upon reviewing the proceedings before the lower court and the matters I am able to discern at this stage, it does appear that due to the long delay in filing the succession proceedings, the properties of the two deceased persons have been diverted and may eventually be lost without trace if no appropriate steps are taken. As a court of law, I cannot shut my eyes to the likelihood that further adverse developments may take place thus rendering the entire estate wasted or otherwise dissipated. Perhaps more so because the judgement of the lower court, on the face of it, did not order distribution of the estate with any exactitude.
9. I am therefore persuaded that this is an appropriate case for the invocation of the court's powers under section 63(e) of the Civil Procedure Act which states:-

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.”

I will therefore order that pending the outcome of this appeal, the status quo with respect to the estate of the deceased as outlined in the Lower Court proceedings be maintained by all the parties who participated in the proceedings before the Kadhi, and that all of them be served with this order, and be at liberty to apply to be enjoined in this appeal. I further direct that steps be taken to

prosecute the appeal with despatch.

Costs will be in the cause.

Delivered and signed at Malindi this **17th** day of **April, 2013** in the presence of Mr. Olwande holding brief for Mr. Gichana for the applicant, Mr. Olaba for 1st and 2nd respondent, 3rd respondent – no appearance.

Court clerk – Evans.

C. W. Meoli

JUDGE