



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 17 OF 2013

1. MOHAMED HISHAM
2. MANSURR MOHAMED
3. AHMED MOHAMED ABDULKARRIMAPPELLANTS

VERSUS

1. MOHAMED H. ABDULAZIZ
2. SAADA HASSAN ABDULAZIZ
3. AMINA HASSAN ABDULAZIZ
4. ABDULKADIR HASSAN ABDULAZIZRESPONDENTS

RULING

By way of a Notice of Motion Application dated 22nd February, 2013 brought under order 42 rule 6 of the Civil Procedure Rules 2010. Section 1A, 1B and 3A of the Civil Procedure Act, the applicant seeks orders for a stay of execution of the ruling and order of Hon. Abdulhalim H. Athuman Principal Kadhi delivered on 21st February, 2013 in Kadhis Succession case No. 219 of 2011 Mohamed Abdulaziz & Others – Vs- Mohamed Hisham & Others pending the hearing and determination of the appeal herein.

The grounds are that the Appellants are the owners of the property known as Mombasa/Block XLV/44.

That on 21st February, 2013 the Kadhi Court issued an order condemning the appellants to one month imprisonment in contempt.

That the Appellants were not personally served with the order.

Further that they had not disobeyed the alleged or any order and that they have appealed against that order which appeal has high chances of success.

The application is opposed on the grounds that its an attempt to frustrate the Respondents from enjoying security and peace of the suit premises.

That the appellants will not suffer any substantial loss. Further that the appellants ought to deposit security for the performance of the orders appealed against.

On 3rd May, 2012 the Principal Kadhi made orders as follows,

“The Respondents be and are hereby restrained from selling, mortgaging, charging or disposing the property known alas 799 Section 11(BLOCK XLV/44) Birikau pending the

hearing and determination of the main petition”.

The Respondents contend that on various occasions the Appellants proceeded to demolish and disposing part of the suit premises and this prompted the Respondents to file a Notice of Motion application dated 26th September, 2012 and content orders were issued by the Kadhi on 21st February, 2013.

The Appellants submit that the Kadhis order was without jurisdiction. The issue of jurisdiction is neither here or there.

In the case of National Industrial Credit Bank Ltd. (2005) eKLR Njagi Judge held that,

“Unless and until a Court order is discharged, it ought to be obeyed. The only way in which a litigant can obtain a reprieve from obeying a Court order before it is discharged is by applying for and obtaining a temporary stay”.

The issue before the Kadhi was that the appellants had demolished the suit premises and disposed off part of it.

- Is demolishing tantamount to disposing?
- Does plot No. 799 Section 11 (BLOCK XLV/44) exist and if it does is it the same as MSA/Block/XLV/44?
- Was there personal service?

I find these to be serious issues for consideration.

If the stay orders are not granted the appellants stand to be committed to jail for one month and the appeal would be rendered nugatory.

I am satisfied that the appeal and application were filed without delay.

I am satisfied that the application has merit. I accordingly grant the orders of stay of the ruling and order of the Kadhi Court delivered on 21st February, 2012 pending the hearing and determination of the appeal.

Ruling delivered dated and signed this **25th** day of **September, 2013**.

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M. MUYA

JUDGE

25TH SEPTEMBER, 2013

In the presence of:-

Learned Counsel for the appellant Miss Kahiti holding brief Mutubia

Learned Counsel for the Respondents Mr. Egunza

Court clerk Mr. Musundi