



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**CIVIL APPEAL NO. 15 OF 2011**

**FERRUZ OMAR MAGHRAM**

**MALKIA OMAR MAHENDAN**

**FARIDA OMAR MAHENDAN**

**ANZUN OMAR MAHENDAN**

**NURU OMAR MAHENDAN .....APPELLANTS**

**VERSUS**

**AHMED MOHAMED HONEY .....RESPONDENT**

**RULING**

1. The Notice of Motion filed on 28th June, 2012 is expressed to be brought under Order 26 and 42 of the Civil Procedure Rules as well as Sections 1A, 1B, 3A and 63E of the Civil Procedure Act. There are three key prayers;

1. **This matter be certified as urgent and be heard exparte in the first instance.**
2. **The appellants be restrained from disposing and/or transacting in any asset wherein their late sister Estate of the late Batuli Omar Mahendan (deceased) has a share and/or interest including any of the asserts of the Estate of the Appellants' late parents Omar Mahendan (deceased) and Esha Omar Mahendan (deceased) pending the hearing and determination of this application.**
3. **This appeal be dismissed for failure to comply with the procedure related to appeals from subordinate courts and/or failure to comply with this hon. Court's orders issued on 1st November, 2011 and 28th February, 2012.**
4. **In the alternative, and without prejudice to the foregoing, the respondent and Farida Omar Mahendan (wrongly listed as the third appellant) be allowed to execute the judgment of the Hon. Kadhi dated 27th May, 2011 and all the appellants be compelled to assist with the said execution including providing all necessary documents and title deeds”**

2. It is based on seven grounds:

**“1. The appellants have not complied with express conditions of stay of execution to date.**

2. **The appellants are and/or have been maliciously and willfully disposing of estate assets in**

**defiance of the directions to the honourable Kadhi during the course of this succession cause in Malindi Kadhi's court succession Cause no. 87 of 2008 and/or the ongoing appeal thereby negating the Respondent's judgment and causing him irreparable harm.**

- 3. Appellants have promised never to distribute to respondents and are maliciously and willfully delaying the expeditious listing and/or hearing of the appeal herein.**
- 4. The appellants have maliciously expelled Farida Omar Mahendan from residing in one of the houses owned by the estate despite her being an heir as punishment for her refusing to support their appeal and/or for her seeking her rightful share therein.**
- 5. The appellants are enjoying the sole benefit of the proceeds and/or occupation of the estate assets to the ongoing and grave prejudice of both the respondent and the estate assets to the ongoing and grave prejudice of both the respondent and Farida Omar Mahendan.**
- 6. The just and expeditious disposal of this matter requires that the entire appeal be dismissed particularly where the appellants are not keen on any settlement except in using such pretense as a means to delaying the finalization of the pending case.**
- 7. The respondent and Farida Omar Mahendan are entitled to the fruits of their success in the Kadhi's Court as granted by the Hon. Kadhi in his judgment there in which fruits appellants are deliberately.”**

3. The application is supported by the affidavit of the Respondent Ahmed Mohamed Honey, the successful party in the Lower Court. It is also supported by the affidavit of Farida Omar Mahendan formerly the third Appellant herein who withdrew her appeal on 1st November, 2012. The affidavits consist of an elaboration of the grounds on the face of the application.

4. Through the 2nd appellant the Appellants filed an affidavit in reply on 4th July, 2012. Therein, it is asserted, inter alia, that the Respondent is already holding property acquired by their late sister and also the Respondent's wife which generate “good revenue”. That they fear the Respondent will dispose of that property to defeat this appeal. The 2nd appellant depones that the Appellants have no intention of disposing of the suit property which ought to be preserved in its entirety so that justice is done. That the record of appeal has not been prepared due to delay by the Lower Court to furnish typed proceedings. The application was argued by way of written submissions, which, basically took one from the respective affidavits of the parties.

5. The Respondent asserts that the Appellants have failed to furnish security as ordered by the court as a condition for stay of execution and further, they have not set down the appeal for hearing as further directed. The Respondent accuses the appellants of abusing the court process by disposing of assets of the estate (Manoz Hotel) and purported vesting order in favor of the 4th Appellant. Allegedly the appellants evicted the former 3rd Appellant from one of the estate properties. In particular, is alleged that the 2nd Appellant has sworn to frustrate the settlement of the estate in order to punish the respondent.

6. The appellants argue that there is no evidence they have disposed of any of the assets of the estate, including Manoz estate, the latter which was allegedly sold on the express orders of the Kadhi. The appellants contend that prerequisites such as admission of the appeal and preparation of the record of appeal have not taken place hence it is premature to set the appeal down for hearing.

7. With regard to compliance with the deposit order, the appellants contended that they have demonstrated good faith by offering an alternative to hard cash. Besides, it is pointed out that a larger part of the estate of the deceased is in the control of the Respondent.

8. I have considered the grounds of the Notice of Motion, the rivaling affidavits and submissions by the parties. The subject matter of this appeal is the judgment of the Hon. Kadhi, Malindi regarding the estate of the late Batuli Omar Mahendan who was the daughter of the late Esha Omar Mahendan and Omar Mahendan (both deceased). The said Batuli died in 2005 allegedly before she could obtain her rightful share in the estate of her parents. The appellants are sisters of the late Batuli. Other beneficiaries are long dead. The Respondent is the widower of the late Batuli.

9. The appellants were aggrieved by the decision of the Hon. Kadhi and have appealed to this court. In November, 2011 this court granted them stay of execution pending appeal, subject to furnishing

security of shs. 2Million, later reduced to shs. 1Million. It is not disputed that the appellants have not complied with the order.

10. The question that now falls to be determined is whether the court should dismiss the appeal as sought by counsel for the Respondent, citing order 26 of the Civil Procedure Rules. With due respect, Order 26 of the Civil Procedure Rules relates to security for costs and not the security envisaged in Order 42 of the Civil Procedure Rules. In the case before us, stay of execution was conditional upon deposit of security. The consequence of failure to deposit such security is that the order for stay of execution lapses automatically once the period has expired. In this case, the period provided for deposit expired ten days after the order of 28th February, 2012 with regard to reviewing the amount ordered on 1st November, 2011. Any intentions that the Appellants had entertained to persuade the court to admit a substitute for hard cash cannot stop the effluxion of time and subsequent lapsing of the stay order.

11. In the circumstances, the Respondent is at liberty to execute the judgment of the Kadhi's court. Thus his prayer for an injunction against the appellants is superfluous. The judgment of the Kadhi's court has not been set aside.

12. Finally, I have to state that the appellants have not explained their failure to take the necessary steps to prosecute this appeal. Mere unsupported allegations that the court has not supplied proceedings are only excuses. It is now over two years since the appellants filed their memorandum of appeal. It is true that the appeal cannot be listed for hearing until Order 42 rule 11, 12, 13 of the Civil Procedure Rules have been complied with. The duty of setting this process in motion lies with the appellant by virtue of Order 42 rule 11 of the Civil Procedure Rules which requires the appellant to "cause the matter to be listed before a judge for directions".

13. The respondent is at liberty to move the court as appropriate as regards the dismissal of the appeal if there is no compliance by the appellants within thirty days of today's date.

I order that the appellants pay the costs of this application.

Delivered and signed at Malindi this **25th October, 2013** in the presence of Mr. Otara for Appellants, Mr. Mazrui for Respondent.

Court clerk – Samwel.

**C. W. Meoli**

**JUDGE**

MR. OTARA – I pray for certified copies of appeal.

**C. W. Meoli**

**JUDGE**

COURT – Proceedings be supplied.

**C. W. Meoli**

**JUDGE**