



FERUZ OMAR MAGHRAM

MALKIA OMAR MAHENDAN

FARIDA OMAR MAHENDAN

ANNEUN OMAR MAHENDAN

NURU OMAR MAHENDAN.....
APPELLANTS

VERSUS

AHMED MOHAMED HONEY
.....RESPONDENT

R U L I N G

1. On 1st November, 2011 this court granted the appellants conditional stay of execution pending appeal, requiring them to deposit a sum of shs. 2million as security. Six days later on 7th November, 2011 the appellants came back to court under certificate of urgency seeking a review of the court's order for deposit, primarily on the ground that they are impecunious and cannot afford the sum ordered as deposit. They have raised other grounds which in my view properly belong to the appeal.

2. The respondents have opposed the application by stating that the appellants themselves offered to furnish any security required during the hearing of the initial application for stay of execution, and secondly their alleged poverty does not qualify as a new or substantive matter under Order 45 rule 1 and 2 of the Civil Procedure Rules.

3. These basically are the positions taken by the parties in their respective affidavits and submissions.

4. Order 45 rule 1 of the Civil Procedure Rules under which this application is brought provides as follows;

“(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

5. The financial position of the appellants was a matter within their knowledge at the time they declared their readiness and willingness “to abide by any orders issued by this court ...if we are allowed stay of execution” (affidavit of Malkia Omar Mahendan sworn on 30th May 2011 in support of the application filed on 7th June 2011). Hence the financial position of the appellants cannot qualify as a new matter.

6. The appellants now allege that they may be barred from the seat of justice should the order of deposit be upheld. Apart from not furnishing any evidence in support of their alleged poor financial status, it does appear to me that by this application, the appellants are attempting to have their cake and eat it at the same time. It is also apparent that one of the appellants has yet to account for proceeds of one of the properties of the estate which was liquidated by her while the suit was pending in the kadhi’s court.

7. The foregoing notwithstanding, a court of justice cannot countenance the unhappy prospect of a bona fide party being shut out of the court due to their poverty or status. For that reason alone, I do review my orders of 1st November 2011 to the extent that the appellants will now deposit into court kshs. 1million as security, rather than kshs. 2million within seven days of today’s date. This sum is reasonable in view of the apparent high value of the subject matter at stake.

8. The appellants will pay the costs of this application.

Delivered and signed at Malindi this **28th** day of **February 2012** in the presence of Mr. Otara for appellants and Mrs. Mazrui for respondent. Court clerk – Leah.

C. W. Meoli

JUDGE