



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

**AT MOMBASA**

**(Coram: Ojwang, J.)**

**CIVIL APPEAL NO. 37 OF 2010**

APPELLANT/APPLICANT

ASHA JUMA SHAFI .....

-VERSUS-

RESPONDENTS

1. REHEMA JUMA SHAFI
2. MARIAM JUMA SHAFI
3. RUKIA JUMA .....
4. BAKARI JUMA
5. MARIAM HASSAN

**RULING**

The applicant filed a Notice of Motion (dated **8<sup>th</sup> March, 2010**) under Orders 41 (rules 4 & 5), 50 (rule 1), and S. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The applicant, who has already filed an appeal from an order of the Kadhi’s Court in **Succession Cause No. 45 of 1994**, dated **4<sup>th</sup> March, 2010**, was seeking a stay of execution of that order and all subsequent orders of that Court, pending the hearing and determination of the appeal; and she was asking that the *status quo* be maintained until the appeal is heard and determined.

The applicant’s general grounds were stated as follows:

- (i) the Kadhi’s Court had ordered house-without-land No. BR 514 situate at Barani in Malindi, which is subject to succession, to be sold by public auction;
- (ii) the Kadhi’s Court denied the prayers she made in her application of **22<sup>nd</sup> January, 2010** – to set aside an earlier order of **7<sup>th</sup> December, 2009**;
- (iii) the house thus ordered to be sold by public auction is used as a residence by the applicant and other beneficiaries of the estate;
- (iv) if the house is sold, the applicant will have no accommodation, and she will suffer irreparable loss and damage, apart from her appeal being rendered nugatory.

The applicant swore a supporting affidavit on **8<sup>th</sup> March, 2010** deponing that the house in question is her

sole residential house left for her use by the deceased, and she would be without accommodation if the house were sold as ordered by the Kadhi's Court.

The 1<sup>st</sup> respondent filed a replying affidavit deponing that the appellant's applications had in the past failed because she did not prosecute the same. The deponent averred that the order of **4<sup>th</sup> March, 2010** was for the sale of the house in question, to the intent that the proceeds be distributed among all the beneficiaries (including the appellant). The deponent deposed that the appellant will suffer no irreparable loss, since she will receive her share of the estate once the house is sold, as ordered.

The contending positions of the two sides are clear, from the supporting affidavit and the replying affidavit. The fact that the appellant is a beneficiary, along with other beneficiaries, is not doubted; and there is no evidence that she doubts she would get her fair share, even were the house in question to be sold, as ordered by the Kadhi's Court. But the applicant contends that she will be left without accommodation, if the house in question is sold. A perusal of the entire record and documentation on file shows that the said house is so important to the appellant, she is prepared to raise money and pay into Court, in respect of the interests of the other beneficiaries. So the applicant's position is inherently in conflict with the orders of the Kadhi's Court. If that were all, this Court's inclination would have been to uphold the orders of the Kadhi's Court.

However, the fact that the applicant, on **8<sup>th</sup> March, 2010** lodged an **appeal**, raises a new issue which this Court must take into consideration. An appeal is, in general, a legitimate invocation of the Court's jurisdiction, and thus a duty rests upon the Court to accord it a conscientious hearing, and to resolve it, as a basis for justice as between the parties. That general character of an appeal would be taken for what it is, unless there is glaring indication that it is wanting in seriousness or *bona fides*.

So the Court has to give consideration to the Memorandum of Appeal — not for the purpose of pronouncing on its merits and probability of success, but for ensuring that it shows **good faith**.

The applicant states that the Kadhi's Court had arrived at its decisions without giving her a hearing; she states that the Kadhi's Court had not given her a chance to appoint new Advocates, after the firm of Advocates which had handled her matter, ceased to be available; she states that the Kadhi's Court erred in law, by authorizing the sale of the said house, when a consensus had not been reached among the beneficiaries; she states that the Kadhi's Court erred in fact and in law by "*acting as though it were an administrator of the estate*".

My sense is that the applicant has raised weighty issues for appeal, which ought to be judicially heard and determined. The appeal, therefore, carries *bona fides*, and ought to be pursued to the state of hearing and determination.

The appeal is not to be allowed to be rendered nugatory, firstly, to uphold the principle that the cause in the appeal is the basis of justice as between the parties; and secondly, to uphold the constant principle attendant upon jurisdiction, that Courts are not to make orders in vain.

Accordingly, I will make orders as follows:

- (1) The applicant's application dated 8<sup>th</sup> March, 2010 is allowed.**
- (2) There shall be a stay of execution of the Kadhi's Court's order of 4<sup>th</sup> March, 2010 and all other subsequent orders of that Court made in Succession Cause No. 45 of 1994, pending the hearing and determination of the appeal.**
- (3) The *status quo* shall be maintained until the appeal is heard and determined.**
- (4) The appellant shall move diligently to prosecute the appeal, and time-allocations therefore shall be made on the basis of priority.**

(5) **Costs shall be in the appeal.**

**DATED and DELIVERED at MOMBASA this 25<sup>th</sup> day of February, 2011.**

**J.B. OJWANG**  
**JUDGE**

Coram: **Ojwang, J.**

Court Clerk: **Ibrahim**

For the Appellant/Applicant:

For the Respondents: