



WAKF COMMISSIONERS OF KENYA PLAINTIFF

V E R S U S

1. MAALIM OMAR

2. ADAM JUMA

3. KHALIL KHALIL

4. FARID ALI

5. ABUBAKAR ALI

6. MOHAMED ISLAM DEFENDANT

R U L I N G

This application is made by a Notice of motion dated 22nd September, 2006, and brought under O. XLI rule 4 of the Civil Procedure Rules. It seeks two main orders-

1. *THAT there be a stay of execution of prohibitory injunction, mandatory injunction, and injunction given on 15th September, 2006 pending the hearing and determination of the appeal filed by the defendants herein and/or other orders of the court.*
2. *THAT the costs of this application be provided for.*

The application is supported by the annexed affidavit of Khalil A. Khalil, and is based on the following grounds-

- a) *The Honourable Court on 15th September 2006 granted orders of injunction which were inter alia prohibitory and mandatory in nature.*
- b) *The orders granted by the Honourable Court were final in nature pre-empting the hearing of the suit. The court has made a final determination conclusively determining the rights of the parties at an interlocutory stage relying on affidavits only without tendering viva voce evidence by the parties herein.*
- c) *The freedom to worship is a fundamental (right) enshrined in the Constitution. The orders made on the 15th September 2006 jeopardize this right and freedom.*
- d) *The defendants were not informed of the date of the ruling on 15th September, 2006.*
- e) *The defendants shall suffer substantial loss unless the order of stay is granted as they will be unable to discharge their duties as worshippers of the Mosque which they have discharging for over 40 years and will be prevented from attending prayers in the Mosque. Their right to worship and participate in the day to day activities in the said Mosque has been curtailed and abridged by reasons of the orders*

granted herein.

f) The application herein has been made without unreasonable delay.

g) The defendants are willing to abide by any conditions as to security the court may order for the performance of the order that may ultimately be binding upon the defendants.

h) The defendants' appeal has high chances of success and unless the order of stay is granted the defendants appeal shall be rendered nugatory.

i) The defendants and their predecessors have been running the day to day activities of the Mosque for over 40 years now and the plaintiff shall suffer no prejudice by the grant of the order of stay.

In response to the application, the plaintiffs filed their own grounds of opposition as well as a replying affidavit. At the hearing of the application, Mr. Asige for the applicants argued that orders 1 and 2 of the application in which the mandatory injunctions were granted extended to parties other than the applicants, and this militated for a stay of execution pending appeal. The applicants were not given notice of the date when the ruling which is the subject matter of this application was due to be delivered, but they filed the application immediately upon receipt of a copy of the orders. Therefore, they came to court without unreasonable delay. The orders given deprived the applicants of their right to a trial, as the same were premised on affidavit evidence which was lacking in cross examination. This constituted sufficient cause for the grant of a stay of execution, and also substantial loss to the applicants to entitle them to an order of stay. In any event, to give a final order at an interlocutory stage usurps the function of a trial court, and it is substantial loss to deny the trial court the opportunity to hear the matter on merit. If the stay is not granted, and the appeal succeeds, the fact of the applicants having been sent away cannot be recalled or reversed. This would constitute substantial loss as they cannot recover or recoup what they had lost. It is irredeemable and therefore amounts to substantial loss.

Mr. Asige also referred the court to KENYA SHELL LTD v. KIBIRU & ANOR [1986] KLR 410, and AGIP KENYA LTD v. MAHESHCHANDRA HIMATLAL VORA & ANOR. Civil Appeal (Mombasa) NO. 213 of 1999 and submitted that there was no danger of damaging or alienating anything and therefore any injunction was beyond the scope of Order XXXIX and this constitutes an adequate ground for grant of stay. He further submitted that the order granted to the plaintiffs dealt with substantive matter which should be dealt with at a hearing and that this constitutes substantial loss. He finally submitted that there were no special circumstances to warrant the grant of the mandatory injunction at that stage and the court ought to preserve the applicant's rights to urge that point. He reiterated the contents of the supporting affidavit that the applicants would abide by any order for security which the court may make.

Opposing the application, Mr. Akanga for the plaintiffs argued that the applicants had not shown that they had any authority to do anything except to worship and that this could not be passed on as was the case in AGIP (KENYA) LTD (supra). He then submitted that the applicants' rights had not been taken away as they have already filed an appeal and the main case is still to be heard, and therefore their right to be heard is still there. The defendants right of worship was not infringed in any way, and that what was affected by the order were the works which the defendants were doing and which was the preserve of the Wakf Commissioners. Counsel further argued that the defendants had no locus to do anything, and if a stay is granted it will only perpetuate the position on the ground. He thereupon asked the court to dismiss the application for stay.

In reply, Mr. Asige argued that the defendants were not served with summons in the suit, and that O.XLI rule 4 does not require

an applicant to file an appeal as a pre-condition to obtaining an order of stay. He then submitted that if a court finds that there is no locus at a preliminary stage, then the court will have determined the rights of the parties without hearing them and that this was substantial loss. He finally submitted that the applicants deserved a stay and urged the court to grant it with costs.

Upon considering the pleadings and arguments and submissions of counsel, I am constrained to observe that some of the grounds upon which the application is premised as well as arguments of counsel would be better reserved for the appeal. This applies particularly to grounds (b), (c), and (e). Coming to the procedure for granting stay pending appeal, it is instructive that this is provided for in O. XLI rule 4(1) of the Civil Procedure Rules. Under that subrule, the court appealed from may, for sufficient cause, order stay of execution of the order or decree to be appealed against. O. XLI rule 4(2) then provides as follows-

“No order for stay of execution shall be made under subrule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Regarding the making of the application without unreasonable delay, I note that although the ruling which precipitated this application was delivered on 15th September, 2006, this application was not filed until 22nd September, 2006. I don't think that a span of 7 days would be construed to constitute an unreasonable delay. And if it was to be so construed, in this instance there was a reasonable explanation for it. The ruling was initially scheduled to be delivered on 1st September, 2006. Unfortunately the court was not sitting during that week. It was then listed for delivery on 15th September, 2006 but the applicants were not served with the relevant notice and therefore got to know about the court orders on 18th September, 2006. In those circumstances, I don't think that anyone can hold it against them, and I therefore find that the application was made without unreasonable delay in part satisfaction of rule 4(2) (a) above.

The other limb of that subrule requires the court to be satisfied that substantial loss may result to the applicant unless the order of stay is made. In this case, learned counsel for the applicants went to great pains to demonstrate that if the stay is not made, the applicants will suffer loss because the injunction should not have been granted; the three orders granted should not have been granted at law; giving such orders at a preliminary stage denies the applicants their right of being heard before a final order is made; the decision rested entirely on affidavit evidence lacking in cross examination; the applicants lost the right to be heard before a final order was made; and it was a substantial loss to deny the trial court the opportunity to hear the matter on merit. Counsel further submitted that there were no special circumstances to warrant the grant of those orders at that stage. In my respectful view, all these arguments are weighty when raised on appeal, but they do not demonstrate any substantial loss that would be suffered by the applicants if an order for stay was not made.

The only viable points raised were that if the stay were not granted, the applicants would cease to be the managers of the Mosque in dispute, and that their rights of worship would be compromised. With respect, the right of the applicants to worship would not be compromised in any way if a stay is not granted. I would think that anyone has a right to worship either in that or any other Mosque.

Secondly, if this court were wrong in granting the orders which it granted at an interlocutory stage, the Court of Appeal will readily order the reinstatement of the applicants after the appeal. This is the essence of their appeal.

In sum, and by reason of the foregoing, this court is not satisfied that substantial loss may result to the applicants unless the order of stay is made. In the circumstances, the application for stay is hereby dismissed with costs.

Dated and delivered at Mombasa this 27th day of March, 2009.

L. NJAGI

JUDGE