



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Miscellaneous Civil Case 269 of 2008**

MRS. NAHYER SHARIFF HASSAN ALWI

**(suing as an Administrator Under special limited grant of Probate of the Estate of
SHARIFF HASSAN ALWI (DECEASED)PLAINTIFF**

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....1ST DEFENDANT

HITAN C. MAJEVDA.....2ND DEFENDANT

MAMTA H. MAJEVDA3RD DEFENDANT

RULING

The plaintiff applicant herein, took out the notice of motion dated 3rd March 2009 in which she applied for the status quo obtaining as of 26th February 2009 to be maintained pending appeal. The motion is supported by the affidavit of Nahyer Shariff Hassan Alwi sworn on 4th March 2009.

It is the averment of the plaintiff that the defendants have issued threats to the plaintiff that they would want to evict the plaintiff from Plot No. 1656, Malindi to obtain vacant possession. The plaintiff claimed that the defendants made those threats after the delivery of this court's ruling of 26.2.2009 in which the 1st Defendant successfully obtained an order striking out the entire suit. The plaintiff said that she would suffer substantial loss if the order maintaining the status quo is not granted pending appeal. The ground is that she may lose her matrimonial home if the defendants are not prohibited from evicting her before appeal.

The 1st, 2nd and 3rd Defendants filed written submissions in which they beseeched this court to reject the motion. They are of the view that the applicant has not shown the substantial loss she would suffer if the order is denied.

The defendants urged this court to order the plaintiff to deposit a sum of Ksh.40,000,000/- as security for the due performance of the decree if the court is inclined to allow the order.

I have taken into account the able submissions of the defendants. I have also considered the grounds set out on the face of the motion and the facts deponed in the supporting affidavit. It is not in dispute that what provoked the plaintiff to take out these proceedings is the ruling of 26.2.2009. In short, this court ordered to be struck out the suit filed against the defendants. In the suit which was struck out, the plaintiff had sought in the plaint dated 3rd October 2008 for judgment in the following terms:

(i) A declaration that the suit property is owned by the estate of the deceased and that the charge thereon registered in favour of the 1st Defendant is still in existence.

(ii) A declaration that the registration of the names of the 2nd and 3rd defendants as the current proprietors of the suit property is wrong and illegal and an order be issued vesting the suit property back to the deceased's estate together with the existing charge thereon in favour of the 1st Defendant.

(iii) An injunction to restrain the 2nd and 3rd defendants from entering, dealing or interring with the suit property.

(iv) Costs.

The motion before me is said to be brought under order XLI rule 4 of the Civil Procedure Rules. In deciding applications under the aforesaid rule, this court must take into account the following principles.

First, it must be shown that the application has been timeously filed. It is conceded that the motion was filed without an unreasonable delay.

Secondly, an applicant must show the substantial loss it would suffer if the order is denied. In this case the applicant is saying that the

defendants are likely to have her evicted if the order is not granted. It is said the suit premises houses her matrimonial home. The order prayed for is to maintain the status quo. Under order XLI rule 4, the law only recognizes the order for stay of execution pending appeal. The applicant has however invoked the inherent jurisdiction of the court. I agree with the defendants that the order striking out the suit made on 26.2.2009 is not an executable order. That could be the more reason why the applicant did not seek for an order of stay pending appeal. The applicant is seeking for an order for the maintenance of the status quo. That is to say that the defendants should be ordered not to interfere with the plaintiff's occupation of the suit premises. The applicant in my view is indirectly asking to be given an order of injunction pending appeal. I do not understand why she and her legal advisors did not want to come out openly. It is trite law that courts can only give orders which have been prayed for. There is no order for an injunction pending appeal. In the end the order for maintenance of status does not lie. I appreciate the fact that the applicant is likely to suffer substantial loss if an order of stay is not granted. Unfortunately the applicant did not apply for a stay order. The applicant has not also applied for an order of injunction. I am afraid to state that this court cannot issue orders gratuitously. The fact that a party will suffer substantial loss is not an automatic guarantee that the applicant would be given the orders sought.

The third principle is that where the court is of the opinion that an order for stay of execution should be given, then security must be given. I am afraid that I will not consider this principle because of the view that the motion must be dismissed.

In the final analysis, the motion dated 3rd March 2009 is ordered dismissed with costs.

Dated and delivered at Mombasa this 28th day of May 2009.

J. K. SERGON

J U D G E