

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Appeal 42 of 2008

ZAINABU TEMBUKO

ASMAN ALI

MOHAMMED ALI

SAIB ALI

IDRIS ALI APPLICANTS

VRS

RUKIA ALI RESPONDENT

RULING

This is a ruling from an application brought under certificate of urgency under Order XLI r.4 of the Civil Procedure Rules section 3A of the Civil Procedure Act seeking for one main prayer:

2. *That this hon. court do order a stay of execution of the judgment and order made by the Kadhi's court on the 23rd June, 2008 pending the hearing and final determination of the applicant's appeal.*

Briefly the facts leading to this application, are that the parties appeared before Kadhi Court at Bungoma in Succession No. of 2 of 2008 where the Respondent, Rukia Ali was bequeathed a two bed room house and ½ acre of land with title deed. The applicant being aggrieved by the said decision, appealed to High Court, Bungoma in a memorandum of appeal filed in court on the 21st July, 2008. The applicant therefore prays for stay of execution of the lower court order in this application.

The grounds supporting the application are that, if the decretal property is delivered to the Respondent, the appeal will be rendered nugatory and the applicants will suffer irreparable loss and damage. The Kadhi's Court allowed the Respondent to occupy the said house and a notice to show cause has been issued against the applicant. The Applicant contends that, this appeal has high chances of success. The Respondent opposed the application relying on her replying affidavit sworn on 19th December 2008. She depones in paragraph 6 that, she has resided in the said house as her matrimonial home for the last 10 years. Ordering that she should not stay there will cause her injustice and reduce her to a destitute. She further states that the rental property herein fetches only Ksh.1,000/= totaling to Ksh.12,000/= annually. It is therefore not true that she will not be able to refund that amount in the event that the appeal succeeds.

Mrs. Mumalasi represented the Respondent while Mr. Situma represented the Applicant. The court has perused the affidavits of the parties plus the annexures thereon including the judgment of the Kadhi's Court. It is not disputed that the Respondent Rukia Ali is a widow of the deceased.

The annexed Memorandum of Appeal challenges the lower court judgment in that, it failed to recognize one Zainabu Tembuko and Safina Mohammed as widows of the deceased. And also contends the issue of bequeathing ½ acre to the respondent without ascertaining the value of the estate. It has not been disputed that the respondent is currently occupying the said house and that she only collects a meagre

income of only Ksh.1000/= per month. The amount collected from the rent by the respondent is negligible and it is not true as alleged that she is not capable of refunding the said amount in the event of a successful appeal. It is upon the Applicants to prove that she is not capable. The applicants are collecting rent from the commercial building which was bequeathed to them and are therefore not likely to suffer irreparable loss. The Applicants have the onus of proving that they will suffer irreparable loss if the orders sought are not granted. In my considered opinion, there has been no attempt to satisfy this condition. In any event, if any loss results, it is within the financial capability of the respondent to refund since she is collecting some rent from the premises.

I find that, it will not be in the interest of justice to remove the widow from her matrimonial home which will be the result of granting the prayers sought in this application. I therefore find the application not merited and dismiss it with costs.

Dated, Delivered and Signed this 9th day of June 2009.

F. N. MUCHEMI

JUDGE