

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Misc Civ Appli 86 of 2008

DAUDIAPPLICANT

VERSUS

ABDULRAHMAN HUSSEINRESPONDENT

R U L I N G

Daudi, the appellant herein, took out a motion pursuant to the provisions of order XLI rule 4 of the Civil Procedure Rules in which he sought for an order for stay of execution of the orders issued by the Kadhi on 20th February 2008 pending Appeal. The motion is supported by the affidavit of David Muguro Maina sworn on 26th February 2008.

When served with the application, Abdulrahman Hussein, the Respondent herein filed a replying affidavit to oppose the motion.

The history behind this motion appear to be short and straightforward. Rukia Wangari Wairimu also known as Monica Wangare Wairimu (deceased) was involved in a road traffic accident on 13th February 2008 along Nairobi-Mombasa road. She died as a result of the accident and her body was taken for preservation at the Coast General Hospital, Mortuary. The Respondent herein, who claims to be the husband to the deceased visited Mariakani Police Station where he was given the deceased's personal documents. The appellant and other relatives also visited the aforesaid police station for purposes of taking possession of the deceased's personal belongings. They were shocked to learn that the same had been handed over to the Respondent. The appellant claims he is a brother to the deceased. In the process of haggling over who is entitled to possession of the deceased's documents, a dispute over burial arose.

The Respondent filed a suit before the Kadhi's court, Mombasa against the appellant. On the 20th day of February 2008, the Respondent obtained exparte orders of prohibitive and mandatory orders of injunction. In essence, the appellant was restrained from removing the body of the deceased from the Coast Provincial General Hospital Mortuary for burial. The Respondent was given mandatory orders of injunction to remove the deceased's body for burial from the aforesaid hospital. Being aggrieved by these orders, the appellant filed this appeal. He has now sought for temporary orders of stay of execution pending appeal.

Under Order XLI rule 4 of the Civil Procedure Rules, such an order can be issued if the following conditions are met:

First, an applicant must show the substantial loss he would suffer. Mr. Gakuo, learned advocate for the appellant has stated that the applicant may not be able to give last respects to his deceased sister. Mr. Abubakar, learned advocate for the Respondent on the other hand is of the view that the loss does not amount to a substantial loss. I have considered the two competing arguments. I have also perused the affidavits filed for and against the motion. I am persuaded by the submissions of Mr. Gakuo that the appellant and his family are likely to suffer substantial loss if the order is not granted in that they may not be in a position to pay their last respects to the deceased. I agree they may be forced to seek for exhumation orders if they succeeded on appeal. The process will obviously involve a huge amount of money and the exercise will be tedious and cumbersome.

Secondly, an applicant must show that the application was filed without undue delay. The order sought to be challenged was made on 20/2/2008. This application was made and filed on 26/2/08. I am convinced the same was timeously filed.

Thirdly, an order on security for the due performance of the decree must be considered. The appellant has promised to abide by any order of this court regarding security. On his part Mr. Abubakar is of the view that the appellant should deposit a sum that will off-set the mortuary fees. I have carefully considered the arguments over this requirement and I am of the view that in the circumstances of this case, it is necessary to make an order directing the appellant to deposit some money to meet the mortuary fees in case he loses the appeal. A fair order in this regard is to fix an estimate of

Ksh.10,000/-. Consequently an order of stay of execution pending appeal is given on condition that the appellant deposits with the Deputy Registrar of this court the aforesaid sum within 30 days from the date hereof. Costs of the motion shall abide the outcome of the appeal. In default of the above requirement the motion shall stand dismissed.

Dated and delivered at Mombasa this 28th day of March 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Kibara for Appellants and Mr. Weloba h/b Timamy & Co. Advocates for the Respondents.