



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 174 of 2006

SHEIKH ALI MOHAMED MWINZAGU.....APPELLANT

-VERSUS-

1 MOHAMED BASHEIKH ALI

2 SWAFIA MOHAMED ALI

3 OMAR MOHAMED ALI

4 FATUMA MOHAMED ALI

5 JILU MOHAMED ALIDEFENDANTS

R U L I N G

This is an application brought under the provisions of Order 41 Rule 4 of the Civil Procedure Rules for stay of execution of the decree in Chief Kadhi's Court Civil Case No. 37 of 2003 pending the hearing and final determination of this appeal. The application is based on the grounds that the appeal is meritorious and has high chances of success; that since the delivery of judgment in that case the Respondents have constituted themselves the trustees of the Wakf properties and have started disposing of them to the detriment of the beneficiaries and that unless stay is granted the appeal will be rendered an academic exercise. The application is also based on several other grounds alleging impropriety in the execution process such as the Respondents demanding an astronomical sum of Sh.163,425/= as costs in that case and there being no basis for the issue of warrants of attachment and sale as there is no signed decree or certificate of costs. The application is supported by the affidavit of the Applicant in which he has basically repeated these grounds.

The Applicant's counsel appeared before me on 20th December 2006 and I granted a temporary stay of execution.

Aggrieved by that temporary order of stay, on 29th December 2006, the Respondents applied to set it aside on the grounds that this application upon which the order was given is an abuse of the process of court as the Applicant has a similar application pending before the Chief Kadhi's Court; that the Applicant has no interest in the suit property; that the application has not satisfied the requirements of Order 41 Rule 4 and that the Applicant is illegally holding large sums of money that he has acquired from the suit property since 1988.

In the course of presenting the application Mr. Mokaya, Counsel for the Applicant harped on the alleged impropriety in the execution proceedings. I pointed out to him that that having come long after the judgment and not being a ground of appeal it cannot form the basis of a stay application and that if the Applicant was aggrieved by those proceedings he should have applied to the Chief Kadhi to have them set aside. I will deal with that impropriety later in this ruling. At this stage I want to consider the merits of the application.

Before I go into the merits of the application, however, there is one point which Mr. Aboubakar, counsel for the Respondents, raised at the end of his submissions which touches on the competence of this application. It is that the Applicant having filed an application in Kadhi's Court similar to this one, the filing of this application before that one is disposed of is an abuse of the process of court. Mr. Aboubakar argued that the Applicant's purported withdrawal of that application is of no effect as under Order 24 Rule 1 it is only the plaint which can be withdrawn without the consent of the parties or leave of the court and only when the case has not been fixed for hearing.

I do not agree with Mr. Aboubakar that a party cannot withdraw his application. In my view Order 24 of the Civil Procedure Rules equally applies to applications and appeals.

I, however, agree with him that in this case the Applicant having enjoyed a stay of execution granted by the Chief Kadhi's Court and the application for stay in that court having been fixed for hearing, although it was not heard on the date fixed, the Applicant could not unilaterally withdraw it and come to this court with a similar application. That is an abuse of the process of this court.

Even if I am wrong in holding that this application is an abuse of the process of court I find that the same is for dismissing for the reasons that the Applicant has not shown what loss, if any, he will suffer if stay is not granted and he has also not offered security. These are the two prerequisites required by Order 41 Rule 4(2) to be satisfied by an applicant for stay of execution before he can be granted that order.

In their amended plaint in the Chief Kadhi's court the Respondents claimed a declaration that they were the bona fide beneficiaries of the Wakf of Mwanate Binti Mwidau, Fatuma Ali and Sheikha Ali and as such they are the ones entitled to appoint the trustee to run the Wakf. The applicant has not exhibited a copy of his defence in that case but from the judgment of the learned Chief Kadhi his defence is said to have been that he is the registered trustee of Wakf; that even if the Respondents were beneficiaries of the Wakf having illegally alienated part of the Wakf properties they had lost their interest and finally that the Wakf having become void the Wakf properties reverted to the estates of the donors.

After hearing the case the Chief Kadhi granted the declaration sought and ordered that the Respondents as the bona fide beneficiaries of the Wakf are the ones entitled to appoint a trustee. It is against that judgment that the Applicant has preferred this appeal.

Neither from his defence, as disclosed in the Chief Kadhi's judgment, nor in his affidavit in support of this application has the Applicant claimed to be a beneficiary under the Wakf and if so whether he is such a beneficiary to the exclusion of the Respondents. His major complaint is that the execution of the order for costs is irregular and will cause him to lose his moveable properties. As I have already said I will deal with that execution later. The Applicant has not made mention of the Respondents being unable to compensate him for the loss, if any, that he will suffer if stay is not granted. I therefore find that the Applicant has not met the first criterion of substantial loss for the grant of stay.

On security Mr. Mokaya for the Applicant said that the nature of this case does not require any form of security. I do not agree with that. There are allegations in this application that the Applicant has since 1988 failed to provide a statement of account and has converted the income from the Wakf property to his own use. He should have provided security for the loss of income the Respondents will suffer while the appeal pends and he continues to manage the Wakf properties. He has not even undertaken to provide a statement of account.

It is for these reasons that I find that the Applicant has not met the criteria for the grant of stay and I

accordingly discuss this application with costs.

As regards the execution for the order of costs I agree with Mr. Mokaya that the same is illegal. As conceded by Mr. Aboubakar the decree and certificate of costs were not signed. There is therefore basis upon which the execution is based.

Although that execution is an irrelevant issue in this application, however, the matter having come to my attention in exercise of my supervisory jurisdiction under section 65 (2) of the Constitution, I set it aside *ex debito justitiae*. The Applicant having complained that the amount claimed by the Respondents as their costs is excessive I direct that the Chief Kadhi do take arguments from both sides on the matter of costs before arriving at the fair quantum thereof and signing both the decree and certificate of costs. The Respondents shall pay the costs of the Court Brokers in respect of illegal execution.

In the upshot this application is dismissed with costs to the Respondent and the execution for the order of costs is hereby set aside with the Court brokers' charges being met by the Respondents.

DATED and delivered this 26th February 2007.

D.K. MARAGA

JUDGE