



Medi v Kadir & 4 others (Civil Appeal 44 of 2003)
[2004] KEHC 2256 (KLR) (Civ) (19 March 2004) (Ruling)
HAWA ISMAIL MEDI vs ZEINAB ABDUL KADIR [2004] eKLR

Neutral citation: [2004] KEHC 2256 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 44 OF 2003

MK KOOME, J

MARCH 19, 2004

BETWEEN

HAWA ISMAIL MEDI APPELLANT

AND

ZEINAB ABDUL KADIR 1ST RESPONDENT

MARIAM ABDUL KADIR 2ND RESPONDENT

SAUMU ABDULKADIR 3RD RESPONDENT

FATUNA ABDUL KADIR 4TH RESPONDENT

AHMED ABDUL KADIR 5TH RESPONDENT

(Ruling on the Application dated 27th January 2004 brought by way of Chamber Summons under Order VLI Rule 4 of the Civil Procedure Rules)

RULING

1. The applicant who is also the appellant filed a Memorandum of Appeal on 25th November 2003. The appellant is dissatisfied with the judgment/decree/order of the learned chief Kadhi of Kenya dated 31st October 2003.
2. The appellant also filed the above Chamber Summons seeking for an order of stay of execution of the decree/order dated 31st October 2003 in Kadhi's Court Civil Case No. 67 of 2001 pending the hearing and determination of the appeal.



3. The application is supported by the applicant's affidavit sworn on 27th January 2004 as well as the grounds stipulated in the summons. According to the appellant, the appeal has overwhelming chances of success for reasons that the decree was founded on an incompetent plaintiff disclosing no cause of action and was supported by a defective verifying affidavit contravening order 18 rule 5 of the Civil Procedure Rules.
4. Secondly the respondents had not obtained a grant to give them legal capacity to represent their father's estate.
5. Thirdly the appellant would suffer irreparable loss if the decree was executed as she has been residing in the suit premises since 1971 which was given to her by her late brother. She claims she was a dependant of the late Marjan Abdulkadir.
6. The application was opposed by the respondents. They relied on the affidavit of the 5th respondent Ahmed Abdulkadir sworn on 20th February 2004. Counsel for the respondent submitted that the appellant has failed to satisfy the cardinal principles in granting the order of stay as follows:
7. That the appellant has an arguable appeal and secondly that the appellant will suffer irreparable loss.
8. According to the respondents the appellant has not demonstrated what interests she has in the suit premises as she did not file a counterclaim. The respondents counsel argued that the appellant has not provided security as ordered by the subordinate court and therefore should this court be inclined to grant a stay the appellant should provide security not only on the order of execution but also for costs.
9. I have carefully considered the above application and the material placed before me and very good and concise submissions by the counsel for both parties.
10. This appeal was lodged timeously and even this application was made without delay. Certain issues have been raised:

- Whether the respondents had capacity in law to file a suit without a grant of Letters of Administration. The counsel for the appellant referred to a Court of Appeal decision in - Civil Appeal No. 145 of 1991 Trouistik Union International & another vs Mrs. Jane Mbeyu & another where the bench of five Court of Appeal judges had this to say:

- "To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the Law of Succession Act. That Section confers that power on personal representatives and on them alone..... Section 3, the interpretive Section, provides an all inclusive answer. It says personal representative means executor or Administrator of a deceased person....."

According to this decision which is a binding authority, I find that the appellant has an arguable appeal as I would wish to leave the other issues also regarding the competency of the plaintiff to the trial court.

11. Accordingly I turn to the other issue of whether the appellant shall suffer irreparable loss. It was submitted that the appellant has been in occupation of the suit premises since 1971 without interruption and was not paying rent. Since the consequence of execution shall be eviction I am satisfied that the applicant/Appellant has satisfied the second condition as well.
12. In view of the above, I allow the application dated 27th January 2004 on condition that the appellant shall prosecute the appeal within a period of 12 months failure to which the stay of execution order given herein shall lapse.

Costs of this application to abide the outcome of the appeal.



It is so ordered.

RULING READ AND SIGNED ON 19TH MARCH 2004.

MARTHA KOOME

JUDGE

