

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.25 of 2004

HASSAN MOHAMED ABDULA..... APPELLANT/APPLICANT

VERSUS

HABIBA MOHAMED JARSO..... RESPONDENT

RULING

By chamber summons dated 21.05.04 brought under Order XLI rule 4 of the Civil Procedure Rules under the Civil Procedure Act (Cap.21), the applicant sought from this court an order of stay of execution of the judgment of the Garissa Kadhi dated 02.04.04 pending the hearing and determination of the applicants appeal against the said judgment.

The judgment in question was given by the Kadhi in Garrisa Kadhi's Court Civil Suit No.139 of 2003 which involved ownership dispute over animals between the applicant and respondent herein. It was the case of the plaintiff in the Kadhi's court (respondent herein) that the animals, whose number she gave as 17 and said they sprang from a single cow given to her by her husband as dowry under Muslim law, were hers while the defendant in that case (applicant herein) said the original animal had been given by his father by error since the animal belonged to his (applicant's) mother who was the respondent's co-wife and who died about 30 years ago. In the Kadhi's court, both parties called witnesses and they gave evidence in support of the parties' competing claims to the animals and the Kadhi found for the respondent herein. Part of the evidence in the lower court record is to the effect that the animals in dispute were taken away from the respondent herein around November – December, 2003 and appear to have been in the custody of the applicant herein since.

The applicant's position is that the Kadhi erred in favour of the plaintiff in the Garissa case and the applicant has appealed against the Kadhi's judgment in the appeal captioned hereinabove. The applicant contends that his appeal has high chances of success and has applied to this court for an order staying execution of the Kadhi's judgment awarding the animals to the respondent herein as it's execution during pendency of the appeal may render a successful appeal nugatory since the respondent, if given custody of the animals now, could dispose of them and put them out of the applicant's reach.

I am not in this application called upon to decide on the merits or demerits of the pending appeal but I note from the Kadhi's court record that evidence was sharply divided between those who testified in support of the parties competing claims over the subject animals. The applicant herein drew attention to the fact that the parties are from a pastoralist community whose members rely on animals for livelihood and expressed the fear that if the respondent herein is given custody of the animals before the appeal is heard and determined, she might dispose of them and render a successful appeal nugatory. If such argument is pursued to its logical conclusion, then even the applicant can, if he retains custody of the animals, also dispose of them and put them out of reach of the respondent in the event of the pending appeal failing.

The applicant was represented by learned counsel, Mr. Mailani while the respondent was represented by learned counsel, Mr. Aminga. Applicant's counsel contended, inter alia, that it would be risky for the animals to be released to the respondent now as she had filed no evidence of means to compensate the applicant in case she disposes of the animals and the applicant's appeal succeeds. I cannot find in the file evidence that the applicant is a person of means either and the only evidence in the applicant's favour seems to be the fact that he is already in possession of the animals. So, there is a risk either way.

I have given due consideration to the competing claims of ownership over the animals. There is in existence a judgment by the Kadhi in favour of the respondent herein. On the other hand, the applicant herein is having custody of the animals and has had such custody for some time.

In my view the balance of convenience is in favour of the status quo being maintained and that the animals should be preserved until the parties' competing ownership claims have been finally determined upon conclusion of the pending appeal.

Accordingly, I hereby make the following orders:-

1. That execution of the judgment in Garissa Kadhi's Court Civil Suit No.139 of 2003 in favour of the respondent herein be and is hereby stayed pending the hearing and determination of High Court Civil Appeal No.25 of 2004 by the applicant herein.
2. That the animals subject matter of the Garrissa Kadhi's Judgment aforesaid preserved by the applicant here4in pending the hearing and determination of High Court Civil Appeal No.25 of 2004.
3. Costs in the cause.

It is so ordered.

Delivered at Nairobi this day of, 2004.

B.P. KUBO

JUDGE