



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION CIVIL APPEAL NO. 14 OF 2020

IN THE MATTER OF THE ESTATE OF MBARAK AWADH SALIM (DECEASED)

FREEDOM LIMITED.....APPELLANT

VERSUS

OMAR AWADH MBARA.....RESPONDENT

RULING

1. The application before Court is a Notice of Motion dated 17th December, 2020 brought under the provisions of Order 42 Rule 6(1) & (2) of the Civil Procedure Rules, Section 1A, 1B & 78 of the Civil Procedure Act, the inherent jurisdiction of the High Court and all other enabling provisions of the law. The appellant seeks the following orders from this Court;

1) Spent.

2) Spent.

3) That this Honourable Court be pleased to stay the execution of the orders of the Honourable Almuhdhar A.S. Hussein issued on the 18th June, 2013 and 2nd December, 2020, in the Kadhi's Court Mombasa, Succession Case No. 68 of 2013 pending the hearing and determination of this appeal.

4) That this Honourable Court be pleased to stay further proceedings in the Kadhi's Court Mombasa, Succession Case No. 68 of 2013 pending the hearing of the appeal herein.

5) That the costs of this appeal be provided for.

2. The application is anchored on the grounds stated on the face of it and an affidavit sworn on 17th December, 2020 by Harji Govind Ruda (*one of the directors of the appellant herein*).

3. The appellant deposed that it is the registered owner of all that parcel of land being LR. 1948/V/MN, C.R 32564 Original Title No. LR. 287/V/MN, C.R 6302 by virtue of transfer dated 12th October, 2000 from Dr. Naseem Chaudry, Mohamed Jaffer Abdulrasul Panju and Abdul Manan Abdul registered on 12th November, 2010. It was stated that the respondent filed a succession petition dated 11th June, 2013 and obtained confirmation orders dated 18th June, 2013. That among the properties listed as belonging to the estate of the respondent's grandfather was plot No. 287 section V South East Mazaras station which parcel of land belongs to the appellant.

4. The appellant averred that it was not made aware of the succession proceedings at the time they were taking place. That he did not participate in the proceedings. It was further stated that failure to include the appellant herein as a respondent/interested party in the petition before the Kadhi's Court who proceeded to issue a confirmation order touching on the appellant's parcel of land is an apparent mistake on the face of the record thus forming a ground of review for the orders issued on 18th June, 2013. He further stated that, the said confirmation orders were obtained through material non-disclosure and deceit in that the ownership documents used by the respondent were irregular.

5. The appellant stated that it filed an application for review dated 22nd September, 2020 at the Kadhi's Court Mombasa seeking that the said orders be set aside or revoked on grounds that they were obtained based on material non-disclosure and that there was new material evidence presented to the Court which the Court did not have the benefit to consider at the time of issuing the confirmation orders. It was further deposed that after the hearing of the said application, the Hon. Chief Kadhi Sheikh Al Muhdhar A.S Hussein delivered a ruling on 2nd December, 2020 dismissing the said application.

6. The appellant averred that being aggrieved by the said order, it filed an appeal which is arguable and has overwhelming chances of success as can be discerned from the memorandum of appeal dated 16th December, 2020. It contended that it was apprehensive that the respondent will continue to endeavor to sell the subject parcel of land using the said confirmation orders as a basis, to grant legitimacy to the claim that he is a beneficiary and proprietor of the said parcel of land which does not form part of the estate of his grandfather the late Mbarak Awadh Salim.
7. The appellant stated that the instant application has been filed without inordinate delay and urged this Court to grant the appellant reprieve by suspending the orders issued on 18th June, 2013 pending hearing and determination of the appeal.
8. The respondent filed a replying affidavit sworn by Omar Awadh Mbarak (*the respondent herein*) on 3rd February, 2021 in opposition to the said notice of motion application.
9. He further averred that the appellant has not annexed any evidence in form of documentation that confirms that it is the registered owner of the plots herein. That it is also in his knowledge that the appellant has filed petition No. 42 of 2019 dated 2nd October, 2019 against the Director of Survey seeking for orders that the director of survey should be compelled to release the said deed plans of the plots herein
10. The respondent further averred that he filed a succession petition and obtained a confirmation of grant and during that time, no objection proceedings were ever filed by any party challenging the succession process at any stage. He deposed that plot No. 287 section V S.E Mazeras station was purchased by his grandfather and a sale agreement together with a transfer were executed in his grandfather's name. The respondent stated that the appellant could not have known of the succession proceedings since it was not the registered owner of the said plot or a family member.
11. He further stated that the appellant has not demonstrated that it has been adversely affected by the outcome of the succession proceedings. That the appellant is not the registered owner of plot No. 287 section V S.E Mazeras station. He further averred that the grant issued by the Chief Kadhi has not been registered hence there is no way he would attempt to sell it nor has any evidence been tendered to show that he intends to sell the aforementioned plot.
12. It was stated by the respondent that there was no material non-disclosure nor error apparent on the face of the record to warrant a review. He further stated that the confirmed orders issued on 18th June, 2013 by the Chief Kadhi are genuine and no good grounds have been set forth to warrant suspension of the same.
13. The respondent deposed that the application for review was brought after a lengthy and inordinate delay thus the present application should be dismissed with costs.
14. In its rejoinder, the appellant filed a further affidavit sworn on 12th February, 2021 by Harji Govind Ruda (*one of the directors of the appellant herein*). It was averred that it filed a petition to compel the Director of Survey to issue the remainder deed plan in respect to plot No. L.R 2028/V/MN; That the said remainder deed plan was supplied on 14th August, 2020 to Hime & Zimmerlin Licensed Surveyors by the Director of Survey and it withdrew the said petition on 5th November, 2020 having been overtaken by events. It was further averred that the said petition did not touch on the issue of succession which is the subject matter in this appeal.
15. The appellant deposed that Kadhi Court Succession Causes are never gazetted thus there was no way it could have become aware of the same. It further deposed that the agreement relied on by the respondent is suspect as the said Mohamed Afzal Khan had transferred the said suit property to a third party back in 1957.
16. It was stated by the appellant that it has not been able to develop the said land due to the restriction that was placed on the property based on a complaint initiated by the respondent. Further, that the respondent complained against the Land Registrar for refusing to register his purported Title documents to which the Registrar replied that he had sufficient reasons not to register the respondent's documents.
17. The appellant further averred that the respondent's actions were geared towards defrauding the appellant of the suit property. They contended that the orders issued on 18th June, 2013 were granted erroneously based on material non-disclosure by the respondent. That the death certificate attached by the respondent at the time of filing the petition at the Kadhi Court bears the name Barak Awadh Baali. The appellant averred that it is willing to provide security as the Court may deem necessary.
18. On 5th February, 2021, directions were taken that the application dated 17th December, 2020 be canvassed by way of written submissions to be highlighted on 24th February, 2021. The appellant's submissions were filed by the firm of Borona & Associates Advocates on 16th February, 2021. The firm of Muturi Gakuo & Kibara Advocates filed written submissions on behalf of the respondent on 22nd February, 2021.

Applicants/Appellant's Submissions.

19. It was submitted by **Mr. Borona** learned Counsel for the appellant that the appellant has met the criteria for grant of the orders sought among them, proof that it is likely to suffer substantial loss if the orders are not granted. In support of this proposition, counsel relied on the case of **In Re Estate of Henry Karigu (Deceased) [2020] eKLR** where the Court in dealing with an application for stay of execution pending appeal held that such stay is at the discretion of the Court guided by the following conditions; whether substantial loss would ensue unless stay is granted; whether the application was made without unreasonable delay and, the need for furnishing appropriate security where necessary.
20. Counsel submitted that in the present case, the appellant is the bonafide registered owner of the plot known as LR. 2028/V/MN. He

further submitted that plot No. L.R MN/V/2028 and plot No. MN/V/287 are distinct numbers but touch on the same piece of land which is the bone of contention between the parties herein.

21. **Mr. Borona** contended that plot No. MN/V/287 which the respondent purports that it forms part of the estate of his late grandfather does not exist due to the many subdivisions that have been effected over the said piece of land over the years. Learned counsel opined that stay of execution is a matter of discretion which should be applied reasonably without preventing a party from pursuing his appeal. In support of this assertion, reliance was placed on the case of **Butt vs Rent Restriction Tribunal Civil App. No. NAI 6 of 1979.**

22. Counsel opined that the appellant has demonstrated in its further affidavit by way of statements by its security provider, that there have been attempts by the respondent to dispose of the appellant's property to any willing buyers hence sufficient proof that, if stay orders are not granted, the appellant shall suffer substantial loss should the property be sold to third parties who would be claiming as bonafide purchasers for value hence posing real danger to the appellant's right to property as guaranteed under Article 40 of the Constitution, and consequently rendering the appeal nugatory.

23. It was submitted by **Mr. Borona** that the respondent is not in possession of the suit property hence will not suffer any prejudice that would not be compensated by way of damages. To advance this argument, Counsel relied on the case of **Re Estate of Beth Wago Kimani (Deceased) [2020] eKLR** where it was held that the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute and the appeal if successful is not rendered nugatory.

24. **Mr. Borona** further contended that the appellant has established a prima facie case to warrant grant of the orders sought. To support this argument counsel relied on the decision in the case of **Re Estate of Gerald Mwangi Mugo (Deceased) [2019] eKLR** where the Court cited the case of **Daniel Walter Rasugu Nbi HCC No. 15 of 2006: Global Tours and Travel Limited: Nairobi HC Winding up Cause No. 43 of 2000** where Ringera J. held that in dealing with an application for stay of execution pending appeal the Court should consider the prima facie merits of the intended appeal, in the sense of whether or not it will probably succeed or not but whether it's an arguable one. Counsel submitted that the present application has been brought without delay the same having been filed within 16 days of the ruling of the Chief Kadhi which was issued on 2nd December, 2020.

25. **Mr. Borona contended** that the appellant is willing to provide security should this Court find it necessary. Counsel urged this Court to grant the orders sought in the application dated 17th December, 2020 having satisfied the requisite conditions for the Court to grant the orders sought by the appellant.

Respondents' submissions.

26. **Mr. Gakuo** learned Counsel for the respondent relied on the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 thus submitting that the appellant has not demonstrated that he has met the conditions precedent to warrant stay. Counsel opined that the first critical element that this Court ought to consider in determining the appellant's application is whether the appellant has filed an appeal. **Mr. Gakuo** submitted that the present application is seeking to stay orders issued on 18th June, 2013 by the Chief Kadhi pending the determination of an appeal which has not been filed and is not in the Court records. Further, that the appellant has not annexed a memorandum of appeal to the application to satisfy the Court that the appellant has an arguable appeal.

27. **Mr. Gakuo** asserted that this Court cannot issue an order for stay of execution when there is no present appeal filed in Court. To fortify that argument, counsel relied on the case of **Kungu Muthua vs James Icharia Kungu [2015] eKLR** where the Court dismissed an application for stay of execution on grounds that no appeal had been filed.

28. It was submitted by **Mr. Gakuo** that the Court must scrutinize the document of ownership in order to ascertain whether the appellant shall suffer substantial loss in the event the orders sought are not granted. He further submitted that the appellant is claiming ownership in Plot No. L.R 1948/V/MN, CR 32564 which property is completely different from the property against which an order for grant was made by the Kadhi's Court being plot No. 287V S.E Mazera's station hence granting the Orders sought would be akin to frustrating the respondent as the properties are different.

29. Learned counsel contended that this Court has no jurisdiction to make a determination at this juncture as to who between the appellant and the respondent herein is the beneficial owner of plot No. 287V S.E Mazera station as the issue is currently pending in the Environment and Land Court (E.L.C No. 358 of 2016). To this end, Counsel placed reliance on the case of **In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR and the case of James Mbatia Thuo & Ephantus Mwangi v Kenya Railways Corporation & Attorney General of Kenya [2018] eKLR.**

30. It was further submitted that the order made by the Chief Kadhi was made way back in the year 2013 and the application for stay has been filed 7 years later hence abuse of the Court process. He also submitted that the present application has not met the threshold set for grant of stay orders pending appeal. He urged the court to dismiss the application dated 17th December, 2020 with costs.

Analysis and determination.

31. I have considered the application herein, affidavits in support, response thereto, written submissions by the parties' respective Counsel as well as their oral submissions. The main issue for determination therefore is whether the application herein has met the threshold for grant of stay orders;

32. It is trite that the equitable relief of stay pending appeal is discretionary in nature. However, needless to say that discretion must be exercised judiciously. In **Absalom Dora vs Tarbo Transporters [2013] eKLR** the Court held that: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

33. In determining the present application before me, this court is under a duty to balance the interests of the parties taking into account the fact that an appellant has an undoubted right of appeal whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason. In that regard, I am guided by the provisions of Order 42, Rule 6. (2) of the Civil Procedure Rules which provide as hereunder;

“No order for stay of execution shall be made under sub-rule (1) unless:

a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay;

b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

34. In **Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay.

35. Nevertheless, pursuant to the provisions of sections 1A & 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions. When confronted with such circumstances, Courts ought to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and in exercising its discretion, this Court should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**.

36. The respondent in his submissions submitted that there is no appeal hence orders of stay of execution pending appeal cannot issue in the absence of an existing appeal. I note that the Court record has a memorandum of appeal dated 16th December, 2020 that was filed on 18th December, 2020 which essentially confirms that indeed the appellant has preferred an appeal against the ruling of the Hon Chief Kadhi Sheikh Al Muhdhar A.S Hussein that was delivered on 2nd December, 2020.

37. It is thus incumbent upon the appellant herein to demonstrate to this Court how it has satisfactorily met the above three conditions. I will start with a consideration of *whether substantial loss will be suffered* if stay orders are not granted. The Applicant submitted that it is the bonafide registered owner of the plot kwon as LR. 2028/V/MN. It submitted that on the strength of the grant that was confirmed on 18th June, 2013, the respondent has been making attempts to dispose of the said property thus posing a real danger to the appellant’s right to property guaranteed under Article 40 of the Constitution of Kenya, 2010.

38. It is not in dispute that indeed on the face of the pleadings before me, plot No. L.R MN/V/2028 and plot No. MN/V/287 are distinct numbers but touch on the same piece of land which is the subject matter herein. The respondent has submitted that there exists ELC No. 358 of 2016 which is pending before the Environment and Land Court that seeks to determine who is the rightful owner of the suit parcel of land. This Court finds that this issue was not brought up in the affidavits by parties instead it has been brought up in submissions. This Court has no means of confirming the existence of the said suit. Parties are bound by their pleadings. A party cannot use submissions to plead his case. To do so will amount to practice by ambush. Accordingly, I will disregard the said submission by the respondent on that aspect.

39. In the event the Court was to consider the said submissions, it would mean that the respondent did not disclose this fact to the Kadhi’s Court during the succession proceedings, information which was within his knowledge all along. This would therefore amount to material non-disclosure warranting a review.

40. In **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** Warsame J expressed himself as hereunder:

“For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other.”

41. This position was appreciated by the Court of Appeal in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olushi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

“It is an affront to the rule of law to... render nugatory an order of Court whether real or anticipatory. Furthermore...parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity.”

42. In light of the above, I find that the appellant has demonstrated on a prima facie basis that he has reasonable claim and/or interest over the suit parcel of land and it is the duty of this Court to preserve the subject matter of the appeal. It is therefore this Court’s finding that the appellant has sufficiently demonstrated on a balance of probability that in the event the stay orders sought are not granted, and the respondent disposes off the suit property, it shall suffer substantial loss and in the event the appeal is successful, it shall be rendered nugatory.

43. On whether the application has been brought without undue delay, the ruling which the appellant appeals from was delivered on 2nd December, 2020 while the present application was filed on 18th December, 2020. **In Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR** it was stated:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

44. In view of the above, I find that the submissions by the respondent that the application herein has been brought almost 7 years after delivery of the Kadhi’s Court decision is misplaced since the appeal is against the decision of 2nd December, 2020 and not 18th June, 2013. Accordingly, it is this Court’s holding that the application herein has been brought in good time and that there is no unreasonable delay to warrant this Court to deny the appellant an order for stay pending appeal.

45. This court appreciates that the appellant has offered to furnish security should this Court find it necessary. In the case of **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR**, it was held that:

“... Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

46. It is worth noting that neither the appellant nor the respondent resides on the suit parcel of land. Therefore, no prejudice shall be occasioned upon the respondent if stay orders are granted. This being a matter touching on preservation of land which is subject of an appeal, I find that it is not necessary neither is there need for the appellant to furnish security as a condition for stay pending appeal.

47. For the foregoing reasons, the upshot of this court’s decision is that the appellant’s Notice of Motion application dated 17th December, 2020 is merited and the same is hereby allowed in terms of Prayer No 3. Costs of the application shall abide by the outcome of the Appeal.

Dated, signed and delivered virtually this 13th day of May, 2021

HON. JUSTICE J.N. ONYIEGO

JUDGE