



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE APPEAL E6 OF 2021

MAHFUDH ABDALLA OMAR MAHFUDH.....APPELLANT/APPLICANT

VERSUS

MWANAKOMBO GREGORY ALEX MWENE

ALI ABDALLA OMAR MAHFUDH

JAMAL ABDALLA OMAR MAHFUDH.....RSPONDENTS

RULING

1 The deceased herein died intestate on 8th January, 2007. According to the petition presented before the Kadhi's court on 3rd May, 2019, the deceased was survived by Aisha chumba (widow), eleven sons and five daughters. Among the assets listed as comprising the estate are; a rented house in Kisauni Mombasa, a house with two flats in Sargoi, Mwembe Tayari and a shamba in Kilifi measuring Approximately 4 Ha.

2 After hearing all interested parties, the Hon. Kadhi dismissed a purported local agreement in terms of distribution of the estate on grounds that it was disputed and that it should have been presented before the court for adoption.

3 The learned Kadhi went ahead to deliver his judgment on 4th October, 2019 thus distributing the estate in accordance with the Islamic law with the widow getting 27/216, sons each getting 14/216 and daughters getting 7/216. The court went further to direct that heirs to sit and agree on how they were to benefit together from the estate and if sharing and benefitting from the estate could not work, then the properties be evaluated and later sold for each of the heirs to get his/her share.

4 Having failed to agree on the distribution arrangement as per the judgment of 4th October, 2019, the petitioner filed an execution notice dated 11th December, 2020 seeking the implementation of the orders of the court. On 21st January, 2021, the court directed implementation of the orders in his judgment which was sale of the estate and distribution of proceeds if sharing proved impossible.

5 It is this order that one Mahfudh Adallah Omar Mahfudh the applicant/ appellant herein seeks to challenge through a memorandum of appeal dated 19th January, 2021 and filed on 1st February, 2021. Contemporaneously filed with the said memorandum of appeal is a notice of motion the subject of this ruling brought under Sections 1A, 1B 3A and 63 of the Civil Procedure Act, Orders 10 rule 11 and 51 rule 1 of the Civil Procedure Rules seeking orders as hereunder;

i. Spent;

ii. That the Honourable court be pleased to stay the ruling delivered on 21st January, 2021 and or execution of the judgment, decree and or order in succession cause No 104/019 Kadhi's court Mombasa, Mwanakombo Gregory Alex Mwene Vs Ali Abdalla Omar Mahfudh and 2 others passed on 4th October, 2019 pending the determination of the appeal filed herein.

iii. That the honorable court be pleased to set aside the ruling delivered herein on 21st January, 2021 and or execution of the judgment decree and or order passed on 4th January, 2021.

6 The application is based on the grounds set on the face of it and content contained in an affidavit sworn on 29th January 2021 by the appellant herein.

7 Basically, the appellant is challenging the judgment of 4th October, 2019 on the ground that the Kadhi distributed the estate on 4th

October, 2019 before a grant of letters of administration could be obtained hence the petition for determination and distribution of the estate was irregular.

8 In response, the 1st respondent (petitioner) filed a replying affidavit sworn on 3rd March, 2021 by Mwanakombo Gregory Alex Mwene who averred that the application herein amounts to an abuse of the court process as it should have been filed before the court that issued the impugned order or ruling/judgment; that the intended appeal against the judgment delivered on 4th October 2019 has not been filed within reasonable time; the appellant is delaying execution process because he is exclusively benefiting by occupying one of the properties (flat) without paying rent; squatters have descended on Kilifi property hence disposing of the same will be a better option; that parties have been unable to agree on the actual and physical division of the estate; the appeal is weak and has no chance of success; the issue of appointment of an administrator is not within the Kadhi's mandate; that it is too late to challenge Kadhi's jurisdiction in handling the petition before a grant could be obtained; the appeal will not be rendered nugatory as the appellant would have gotten his fair share of the estate.

9 Lastly, the respondent was of the view that the applicant has not furnished security and that there is no proof that he will suffer any prejudice if the orders are not granted.

10 When the matter came up for hearing on 9th March, 2012 Mr Onduso sought to file submissions in disposition of the application. Mr. Mwawasaa for the respondent urged the court to consider their replying affidavit. The court then allowed Mr. Onduso to file his submissions within 10 days.

Applicant's submissions.

11 The firm of Otieno and Co. Advocates appearing for the appellant filed their submissions dated 19th March, 2021 reiterating their ground and averments contained in the affidavit in support of the application. It was submitted that the hon. Kadhi had no capacity to determine and distribute the estate before parties could obtain a grant of letters of administration intestate hence the sale of the estate will amount to intermeddling with the estate contrary to Section 45 of the Law of Succession.

12 Counsel submitted that it is prudent to preserve the estate pending hearing and determination of the appeal in accordance with Order 40 (1) (a) of the Civil Procedure rules. In support of this submission, counsel relied on the holding in the celebrated case of **Giella Vs Cassman Brown** where the court set out the principles for grant of injunction as; proof of a prima facie case with high chances of success; likelihood of irreparable damage that cannot be compensated in monetary terms and that, where the court is in doubt, decide on a balance of convenience.

13 Counsel further submitted that the appeal has high chances of success and that the applicant is likely to suffer prejudice should the court not grant stay orders

Analysis and Determination

14 I have considered the application herein, response thereto and submissions by counsel for the applicant. The only issue for determination is whether the appellant has met the threshold for issuance of the orders sought.

15 The applicant is challenging the order of the Kadhi issued on 21st January 2012 and the Judgment delivered on 4th October 2019. In its judgment delivered on 4th October 2019, the court determined heirs to the estate and distributed the estate with the widow getting 27/216, the sons getting equal share at 14/216 and the daughters 7/216 each. According to the said judgment, parties were to agree on the practicality of sharing the estate physically if not, the same to be sold and proceeds thereof shared out according to one's share.

16 The order made on 21st January, 2012 was merely directing implementation of the judgment of 4th October, 2019 which the applicant/appellant was said to have frustrated. It is important to state that the appellant is not challenging the mode of distribution as per the Judgment of 4th October 2019. He is merely challenging the order for sale of the estate which he argued should not issue as it affects ancestral land. Secondly, that the Kadhi erred by distributing the estate before parties could acquire a grant of letters of administration.

17 It is therefore incumbent upon the applicant to prove or establish that he has met the conditions precedent for grant of stay of execution orders. The law governing stay of execution orders pending appeal is provided under Order 42 Rule 6 (2) of the Civil Procedure Rules which mandates a court whose orders are being challenged or to which the appeal is being made to issue stay of execution orders. The said rule does provide that;

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

(a) the court is satisfied that a substantial loss may result to the appellant 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.

18 Besides the three conditions above stated, the court may upon proof of sufficient cause grant stay orders. See **Vishram Ravji Halai Vs Thornton and Turpin Civil application Nai. 15/1990 C/1990) KLR365** where 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 an unreasonable delay.

19 It is imperative to note that the power to issue stay orders is purely a matter of discretion exercisable by the presiding Judge or trial court. See **Butt Vs Rent Restriction Tribunal Civil Appeal No Nai 16/1979** where the court held that issuance of stay of execution order is a matter of discretion of the court which must be exercised in such a way as not to prevent or hinder a party from proceeding with his appeal

20 Indeed, it has been held time and again by various courts that, the purpose of an application for stay pending appeal is to preserve the subject matter in a dispute and that if the appeal is successful it should not be rendered nugatory. See **Re estate of Beth Wago Kimani (deceased) (2020) e KLR.**

21 Before I endeavor to consider whether the applicant is likely to suffer substantial loss, I wish to address an equally important requirement whether the application has been filed without unreasonable delay. It is a fact which is not contested that the applicant/appellant is aggrieved by both the judgment of 4th October, 2019 and ruling of 21st January, 2021 which authorized its implementation. For all purposes and intent, the objective of the appeal is geared towards setting aside the orders for sale of the estate in the event the Practical Physical distribution proved difficult.

22 The order of 21st January, 2021 was merely a follow up of the orders of 4th October, 2019. There was no substantive order made on 21 January, 2021 other than for the prayer for the court to authorize utilization of the second option of distribution of the estate by way of sale of the estate as per the judgment. This was necessitated by the nature of the properties in question which includes a house in a flat plus agricultural land now invaded by squatters.

23 To that extent the order of 21st January, 2021 did not create any new orders capable of being stayed. The application is indirectly intended at setting aside the judgment and orders of 4th October, 2019.

24 In fact, ground No two of the memorandum of appeal seeks to set aside both the orders of 4th October, 2019 and 2nd January, 2021. The question which then arises is, has the intended appeal against the orders or judgment of 4th October, 2019 been filed within reasonable time. The memorandum of appeal was filed on 1st February, 2021 translating to about 15 months since the impugned judgment was delivered.

25 The appellant did not attempt to justify the delay. He simply hid behind the orders of 21st January, 2021 which were not substantive in nature but facilitating execution of the original decree made on 4th October, 2019. I do agree with the respondent's counsel that the appeal has not been filed within reasonable time. The judgment of 4th October, 2019 has been challenged for being irregular as it was issued out of an irregular petition lodged before the grant of letters of administration would be obtained.

26 Having held that the applicant did not file the appeal challenging the judgment of 4th October, 2019 in time as contemplated under Section 79G of the Civil Procedure Act, it is my finding that 15 months period is inordinate. Courts cannot exercise equity in favour of an indolent party.

27 Regarding the question of proof of substantial loss, the applicant does not claim that he will suffer any specific loss if stay is not granted. His complaint is that, the determination and distribution was made before acquisition of grant of letters of administration.

28 It is trite that Kadhi's court draw their jurisdictional mandate from Article 170 (5) of the Constitution which provides that;

“The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court”

29 From the record, all parties submitted to the jurisdiction of the Kadhi's court. Having done so, the strict application of the Law of Succession does not apply. Under the Kadhi's Act, there is no requirement for acquisition of a grant of letters of administration or gazettelement of the same. In fact, the Kadhi does not possess such powers. The argument that the grant of letters of administration intestate ought to have been obtained first is therefore misplaced. To that extent, the appeal does not demonstrate having high chances of success.

30 The appellant /applicant has not established a prima facie cause to prove that he is likely to suffer substantial loss if the orders of the Kadhi's court are implemented. He has been given an equal share like the other sons (beneficiaries). How is he likely to suffer if the properties are sold and each beneficiary gets his or her own share? I do not see any prejudice.

31 In the case of **Samvir Trustee Limited vs Guardian Bank Limited Nairobi Milimani Hcc No 795/1995** Warsame J had this to say regarding the subject on substantial loss as follows;

“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...”

32 In the circumstances of this case, there is no proof of any substantial loss likely to be suffered should the court decline to grant the orders sought. Courts do not as a matter of course or ritual issue stay of execution orders. There must be cogent, substantive and convincing reason adduced to enable the court exercise its discretion prudently. In this case, the applicant has fallen short of that basic proof which is the corner stone in granting stay orders.

33 It is clear that beneficiaries are unable to equally and physically share the house and land now invaded by squatters. The Kadhi did exercise his discretion properly and this court has no reason to interfere by granting stay orders on an appeal which does not have high

chances of success

34 As to whether the appeal will be rendered nugatory, the same is pegged on proof of whether the applicant will suffer substantial loss which I have already alluded to. In the case of **Kenya Shell Limited vs Kibiru (1986) KLR 410** the court held that where there is no proof of substantial loss it will be rare to prove that an appeal would be rendered nugatory.

35 Mr. Onduso in his submissions concentrated on proof of grounds for grant of an injunction order. The application at hand has nothing to do with Order 40 of Civil Procedure Rules which deals with injunction.

36 In a nutshell, the applicant has not established on a prima facie basis that he deserves the orders of 42 rule 6 (2) of the Civil Procedure Rules. Accordingly, the application is dismissed with no order as to costs.

Dated, signed and delivered virtually at Mombasa this 15th day of June 2021.

J. N. ONYIEGO

JUDGE