



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL APPEAL NO. E024 OF 2020**

**KHADIJA SHEE ALI.....APPELLANT**

**VERSUS**

**MOHAMED HASSAN LALI.....RESPONDENT**

*(Being an appeal from the Judgment of the Senior Principal*

*Kadhi at Malindi by Hon. Sheikh Salim S.Mohamed – Principal*

*Kadhi delivered on the 15<sup>th</sup> day of May, 2020 in Malindi KCSC No. 27 of 2014)*

**Coram: Hon. Justice R. Nyakundi**

**Aboubakar, Mwanakitina & Co. Advocates for the Appellant**

**J.K.Mwarandu & Co. Advocates for the Respondent**

**RULING**

In this application the applicant has moved this Court under Order 42 rule 6, 27 (1), (a) or (b) and 32 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Article 48,50, and 159 (2), (d) of the Constitution to stay execution of the judgement delivered on 15.5.2020 pending hearing and determination of the intended appeal. Second, the honourable Court do allow the production of new evidence by the appellant in support of the application is an affidavit sworn by **Jemshid Ali Zuhudi** and **Ali Mohamed Kibwana**. Going by the application both counsels made oral submissions.

**Determination**

On the first relief from a textual analysis of order 42 rule 6 (1) of the Civil Procedure Rules, the Court has unfettered discretion to order for stay of execution pending an appeal. The strictures to be considered include; -

- a) That the application has been filed without undue delay*
- b) That the applicant shows an element of substantial loss nor irremediable by way of damages.*
- c) Sufficient cause for the Court to exercise such discretion.*
- d) Further such security as may be ordered by the Court.*
- e) That if the order of stay is not granted the applicant appeal would be rendered nugatory*

The persuasive authority by Uganda Court of Appeal in *Kyambogo University V Prof Isaiah Omolo Ndiege CA No. 341 of 2013* observed inter alia; -

- a) That for stay of execution to be granted the Court of equity has to be satisfied that evidence so adduced demonstrates that there is serious or eminent threat of execution of the decree or order if the application is not granted, the appeal would be rendered nugatory.*

***b) That the application is not frivolous and has a likelihood of success. That refusal to grant the stay would inflict hardship that it would avoid.***

According to *Kenya jurisprudence in Stephen Wanjohi V Central Glass Industries Limited Hccc No. 6726 of 1991* the same principles are echoed irrespective of whether or not the impugned decree is that of a money decree or not. According to the *Court of Appeal in Kenya Shell Ltd V Kibiru & another 1986 KLR 410 1 KAR*, the Court held *inter alia*:-

***“That the application for stay is only meritorious if the applicant shows the intended appeal would be rendered nugatory, that there is evidence of substantial loss in its various forms that has to be prevented before the appeal is heard and determined. That there is an arguable appeal with high probability of success and would be rendered nugatory in absence of stay of execution.”***

In the instant application it is intrinsic from the affidavits that the issue being pursued is by virtue of a succession cause. The claim by the applicants revolves around the question of heirs and inheritance of the intestate estate left behind by the deceased. That upon delivery of the judgement it became apparent the true heirs have also been excluded in the scheme of distribution. The appeal contemplated by the applicant is to demonstrate that the trial court erred in leaving out some of the heirs to the estate of the deceased. Thus, if the judgement is executed in the interim the applicants would suffer substantial loss and the appeal would be rendered nugatory.

In respect of this matter the Court takes the view that the conditions stipulated under order 42 rule 6 (1) of the Civil Procedure Rules as statutory known have been met by the applicants. In view of that position, I do exercise discretion to grant stay of execution of the trial court judgement pending hearing and determination of the intended appeal.

The second object of the application by the applicants is on the relief of production of new evidence at the hearing thereof. In the cases of *Kibos Sugar & Allied Industries Limited & another V Benson Ambuti Adegga & 6 others CA No. 153 of 2019*, the characteristics of admitting new evidence on appeal as prescribed in the *National Guild of Removers & Stores ltd V Bee Moved Ltd & others [2018] EWCA CIV 1302* was clearly set out as follows; -

***“In determining whether an appellate court can admit additional evidence, the Court must seek to give effect to the overriding objective of doing justice and in, doing so, attempt to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right results, similarly in the case of Wanja & Co. Advocates V Pan African Insurance Co. Ltd CA No. 78 of 2009 the Court held that; -“Allowing a party to introduce new evidence at the appellate level was not only prejudicial to the opposing party but also against public policy and the law.”***

From these principles before the Court can exercise unfettered discretion to admit new evidence in favour of the intended appellant the Supreme Court in *Mohamed Abdi Mahamud V Ahmed Abdullahi Mohamad & 3 others [2018] eKLR* laid down the following principles; -

- a) The additional evidence must be directly relevant to the matter before the Court and be in the interest of justice.***
- b) It must be such that, if given it would influence or impact upon the result of the verdict, although, it need not be decisive.***
- c) It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence.***
- d) Where the additional evidence sought to be allowed removes vagueness or doubt over the case and has a direct bearing on the main issue in the suit.***
- e) The evidence must be credible in the sense that it is capable of belief.***
- f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively.***
- g) Where the additional evidence, discloses a strong prima facie case willful deception of the Court.***
- h) The Court must be satisfied that the additional evidence is not utilized for the purposes of removing lacunae and filling gaps in evidence the Court must find the further evidence needful.***
- i) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.***
- j) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence on the other hand and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other hand.”***

On this matter, the Court having considered the conflicting claims of both parties and especially on the consanguinity and affinity family tree to the intestate estate of the deceased, undoubtedly, this being an appellate Court is being asked to enter into the realm of dependency and inheritance. These are matters which the trial Court is better placed to interrogate.

The starting point for the applicant could have been to invoke section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rule on Review of the impugned judgement. The power can be exercised by an applicant ***on the discovery of new and important matter or evidence which have the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the***

*order was made.* The Court of Appeal in *Pancras T.Swai V Kenya Breweries Limited*[2014]eKLR held that;-“*In Francis Origo & Another V Jacob Kumali Mungala (C.A Civil Appeal No. 149 of 2001(unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review.*” This Court stated; - “*our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.*”

Giving effect the above principles, I am satisfied that this is not a fit case to admit additional new evidence on appeal. Further, the court has also to take into account whether it’s usurping the powers of the trial court which is vested to admit evidence in chief, with a rider of cross-examination and re-examination to test the veracity of the witness in proving existence or non-existence of a fact in issue. The instant motion also seems to delve into the entire spectrum of the integrity of the proceedings before the trial court. I also bear in mind that this Court even on appeal is called upon to give effect the provisions of section 1(A) and (B) of the Civil Procedure Act on overriding objective. In the circumstances of this intended appeal the nature of the evidence would not facilitate the just, expeditious proportionate and affordable resolution of the appeal. This approach essentially is aimed at turning the appeals Court into a trial court on the identification of dependants under section 29 of the succession Act or under Islamic Law to cover issues set for the litigation before the Kadhi’s Court. At the outset it is important to construe order 42 Rule 27 and 28 of the Civil Procedure Rules in a manner that does not result in an applicant building an entirely new case on appeal.

Certainly, to me the relief for introduction of new and additional evidence is denied. The gist of the decision therefore is that the applicant partially succeeds for grant of stay pending an appeal with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 6<sup>TH</sup> DAY OF JULY, 2021**

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**R. NYAKUNDI**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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