REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 385 OF 2017

MOHAMED DIBA DIBA .....APPLICANT

VERSUS

ABDI DADACHA .....1ST RESPONDENT

JOHN MWANZA.....2ND RESPONDENT

RULING

Following the judgment of the lower court the appellant filed an appeal challenging that judgment but in a decision made on 19th December, 2012, the High Court dismissed the appellant's appeal. Long before the appeal was argued the appellant had filed an application dated 17th August, 2015 for stay of execution of the lower court judgment pending the hearing and determination of the appeal.

Following that application, on 8th March, 2018 the parties recorded a consent before Jaden J where it was agreed, *inter alia* that, the appellants should deposit a sum of Kshs. 2 Million in a joint interest earning account in the names of both advocates appearing for the parties. Upon that compliance, the decree in respect of the judgment of the lower court would be stayed until the determination of the appeal. In the event the appellant failed to comply, the stay orders would automatically lapse and the respondent would be at liberty to execute that decree.

After the dismissal of the appeal aforesaid, the respondent filed an application dated 8th January, 2020 seeking an order that the sum of Kshs. 2 Million deposited in compliance with the consent order be released to the respondent's advocates. The grounds in support of that application appear on the face thereof which is a recital of the facts stated above.

There is a supporting affidavit by the respondent/applicant to which the appellant's advocate filed grounds of opposition to the effect that the 1st respondent is now deceased and the application can only be prosecuted as against his estate or personal representatives. In effect therefore, the application is premature and there as there is no valid substitution of the 1st respondent. Any order of the court decreeing payment would be null and void and would inviting the court to act in vain. The application is therefore in bad faith, devoid of merit and an abuse of the court process. Both counsel have addressed the court on the application.

The applicant has denied any knowledge of the demise of the 1st respondent. The death of the 1st respondent has been stated from the bar. Even if one were to accept the statement from learned counsel, the best confirmation of that fact would have been the filing of a death certificate. That fact therefore has not been confirmed.

The judgment of the lower court was in favour of the respondent/applicant against both appellants jointly and severally. The application for stay of execution was filed on behalf of both appellants. Infact, the grounds upon which the said application was based referred to both appellants and counsel signed for both appellants.

That application by the appellants, which was settled by the consent recorded on 8th March, 2018 was grounded on legal provisions which included Order 42 rule 6 of the Civil Procedure Rules. Any order for stay of execution under the said provisions is supposed to stand for security for **"due performance of such decree or order as may ultimately be binding"** on the applicant. A judgment against a party which has not been overturned on appeal is binding on the losing party. The Judgement of the High Court has not been appealed. It is therefore binding on both appellants.

Even if I were to be persuaded that a party may not proceed against the property of a deceased person, before succession proceedings are determined, that would not save the appellants in this case. Other than the statement from the bar that the money deposited belonged to the 1st respondent who is said to be deceased, I have already observed that the judgment was against both appellants.

It is instructive that the 2nd appellant has not sworn any affidavit to oppose the application. The opposition to the application in my view is intended to delay an obvious eventuality, which is, however long it takes, the decree shall be executed in favour of the respondent/applicant, and any delay shall cause prejudice on his part.

I am persuaded that the application by the respondent dated 8th January, 2020 should be, and is hereby allowed. Each party shall bear their own costs of the application.

Dated, signed and delivered at Nairobi this 16th day of July, 2020.

A. MBOGHOLI MSAGHA

JUDGE