



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**HC NO. 26 OF 2016 (OS)**

**IN THE MATTER OF: THE TRUSTEE ACT**

**IN THE MATTER OF: THE WAKF OF MWANA MISHI BINTI AZIZ BIN JUMA**

**IN THE MATTER OF: APPOINTMENT OF NEW TRUSTEES**

**BETWEEN**

**ALIYA ZAHRAN.....APPLICANT**

**VERSUS**

**KHADIJA KHAMIS SHAFI.....RESPONDENT**

**KULTHUM KHAMIS SHAFI.....RESPONDENT**

**FADHILA ZAHRAN MOHAMED.....RESPONDENT**

**SHAFFA KHAMIS SHAFFI .....RESPONDENT**

**RULING**

1. **Aliya Zahran**, the Applicant by her Application dated 26.7.17 seeks orders that the execution/enforcement of the Ruling and Order made on 30.6.17 be stayed pending the hearing and determination of the intended appeal. The Applicant also seeks costs.

2. The Applicant states she is the only surviving beneficiary of the Wakf of Mwana Mishi Binti Aziz Bin Juma (the Wakf). By the orders made on 30.6.17, the Court appointed **Khadija Khamis Shafi and Fadhila Zahran Mohamed**, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents respectively as trustees of the Wakf yet they are not beneficiaries thereof. According to the Applicant, the effect of the order violates Article 40 of the Constitution by irregularly and unlawfully making the Respondents beneficiaries of the Wakf. The Applicant avers that her intended appeal is arguable and if stay is not granted, the same will be rendered nugatory. The Applicant further states that she is apprehensive that execution of the order will irreparably affect and negate her rights as a successful party in the appeal in that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are not beneficiaries of the Wakf and cannot in law be appointed as trustees. It will be extremely difficult or impossible for her to obtain compensation from numerous 3<sup>rd</sup> parties who will claim under the Respondents or enforce a decree of vacant possession against numerous 3<sup>rd</sup> party beneficiaries in the very likely event that the appeal succeeds because 3<sup>rd</sup> parties will claim to be beneficiaries of the Respondents through a Court order. She further asserts that the Application was made without delay.

3. The Respondents have opposed the Application by way of a replying affidavit sworn on their behalf by the 1<sup>st</sup> Respondent on 19.3.18. It is averred that the Application has been overtaken by events and execution of the orders in the Ruling has taken place. A copy of title to support this assertion was exhibited. It is further argued that this Court has no jurisdiction to order stay of execution pending appeal when there is no appeal filed as the annexed memorandum of appeal does not conform to the statutory form F as stipulated by Rule 86(3) of the Court of Appeal Rules, 2010 hence rendering the same incurably defective. The Applicant has failed to demonstrate that the intended Appeal is arguable and has high chances of success and that it would be rendered nugatory if stay is not granted. To the Respondents, the Ruling can be easily reversed on Appeal. It is further argued that there is no positive and enforceable order which can be the subject matter of the said Application for stay, as the Order sought to be stayed merely seeks to preserve the Wakf property, which does not belong to any of the parties personally. The Respondents prayed that the Application be dismissed with costs.

4. In the orders of 30.6.17, the Court did appoint the 1<sup>st</sup> and 3<sup>rd</sup> Respondents as trustees of the Wakf in addition to the Applicant. The

Respondents have exhibited a copy of the Title Number Mombasa/Block XXXVII/13 which is registered in the names of Khadija Khamis Shafi and Fadhila Zahran Mohamed the 1<sup>st</sup> and 3<sup>rd</sup> Respondents respectively and Aliya Zahran, the Applicant as trustees of the Wakf of Mwana Mishi Binti Aziz Bin Juma. This demonstrates that the order of 30.6.17 has been executed. In the circumstances, the Application dated 26.7.17 has been overtaken by events and there is nothing to stay. The horse has bolted! In the premises, the Application is dismissed but with no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 15<sup>th</sup> day of February 2019**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

.....**for the Respondents**

.....**Court Assistant**