



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 50 OF 2018

KOMBO KHAMIS SHAMBI.....APPELLANT/APPLICANT

VERSUS

1. SHAMBI ALI SHAMBI

2. MOHAMED ALI SHAMBI

3. RAJAB ALI SHAMBI

4. BAKARI SWALEH SHAMBI

5. AISHA SWALEH SHAMBI.....RESPONDENTS

AND

ALI OMAR ALI.....INTERESTED PARTY

RULING

1. By a Notice of Motion dated 14.2.18, Kombo Khamis Shambi the Appellant herein seeks stay of proceedings and the Judgment of the Hon. Senior Kadhi Sheikh Khamis Ramadhan of 7.11.18 in Succession Cause No. 188/2015 (the Succession Cause) in regards to land Plot Numbers: 90/11/MN & 88/88/MN on the open space where the Appellant's garage is situate, pending the hearing and determination of the Appeal filed herein.

2. The Appellant avers that he built his garage on the open space on Plot Numbers 90/11/MN & 88/88/MN (the suit property). He has operated the garage for the last 29 years uninterrupted and without contest from any person. Following the judgment, the Respondents have commenced the process of selling, distributing and subdividing the suit property and his garage may be sold or given to another beneficiary of the estate, the subject of the succession cause, thereby cutting off his matrimonial home.

3. The Appellant being dissatisfied with the decision of the Hon Kadhi has preferred the Appeal herein. He asserts that he stands to suffer substantial and irreparable loss and damage and his Appeal will be rendered nugatory if the orders herein sought are not granted. He is ready to abide by any orders this Court may issue. His appeal is meritorious and has a high chance of success.

4. The Respondents oppose the Application in a replying affidavit sworn on 14.12.18 on behalf of Rajab Ali Shambi, Bakari Swaleh Shambi and Aisha Swaleh Shambi, the 3rd, 4th and 5th Respondents respectively by Mohamed Ali Shambi the 2nd Respondent. He avers that 3 deceased persons owned the estate, the subject of the Succession Cause, jointly in equal shares. Ali Shambi died in 1993, Swaleh Shambi died in 2002 and Khamis Shambi died in 2003. The suit property is leased out to tenants who have constructed houses thereon and they are paying ground rent to Amor Homes estate agents on behalf of the estate and the expenditure thereof must always be sanctioned by the Kadhi's Court. Now the estates have 2 administrators from each family. The beneficiaries have agreed to subdivide the suit property to enable sale of plots to the tenants who have put up structures thereon. The open space was to be divided into 3 portions so that each of the 3 families gets a portion thereof. In all the arrangements, the Appellant as an heir will not be deprived of his share and is guaranteed of the same. The Appellant and the 3rd Respondent had been allowed to use a portion of the open space and were to put up temporary sheds. The in 2015, the Appellant began to put up permanent structures and the other heirs protested. The Respondents urged the Court to dismiss the Application.

5. In a further affidavit sworn on 24.1.19, the Appellant asserted that the garage in respect of which he seeks the protection of the Court was built 29 years ago and not in 2015. He is not a party to Succession Cause No. 334 of 2002 and there was no such case and filed in any Court.

What the Respondents have filed is a forgery. There is no letter to show that the family agreed to subdivide the land or that the open spaces should be divided into 3 portions.

6. The Application and indeed the Appeal herein arise from the decision of the Kadhi's Court in Succession Cause No. 188/2015. The Application is however brought under the provisions of orders 42 and 51 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A Civil Procedure Act. These provisions are inapplicable by dint of the provisions of Rule 63 of the Probate and Administration Rules which provides:

Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

7. The Applicable law is therefore the Law of Succession Act. Section 47 of the Law of Succession Act confers jurisdiction upon this Court to entertain any application and determine any dispute under the Act make such orders therein as may be expedient. Likewise, under Rule 73 of the Probate and Administration Rules, the inherent power of the Court to make such orders as may be necessary for the ends of justice, may not in any way be limited. This Court therefore has unfettered discretion to issue any orders for the ends of justice.

8. Grant of stay of execution of an order pending appeal is discretionary. It is trite law that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant as the appeal would be rendered nugatory if there is no stay. The Appellant avers that he built and operated his garage on the open space on the suit property uninterrupted for the last 29 years and without contest from any person. The Applicant alleges that following the judgment, the Respondents have commenced the process of selling, distributing and subdividing the suit property. He is now apprehensive his garage may be sold or given to another beneficiary. The Respondents have not denied this and have indeed acknowledged that the beneficiaries have agreed to subdivide the suit property to enable sale of plots to the tenants who have put up structures thereon. They have also stated that the open space is to be divided into 3 portions so that each of the 3 families gets a portion thereof. This acknowledgement in my view validates the Applicant's apprehension. If the suit property is subdivided and sold as proposed then the Appeal will be rendered nugatory. It is therefore necessary to preserve the subject matter of the Appeal.

9. In the end, I find that the Application has merit and the same is allowed on terms that the record of appeal shall be filed within the next 30 days. In default the stay herein shall lapse. Mention on 10.4.19 to confirm compliance. The costs of the application shall abide the outcome of the Appeal.

DATED, SIGNED and DELIVERED in MOMBASA this 8th day of March 2019

M. THANDE

JUDG

In the presence of: -

.....**for the Appellant/Appellant**

.....**for the Respondent**

.....**for the Interested Party**

.....**Court Assistant**