



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
FAMILY AND SUCCESSION DIVISION
CIVIL APPEAL NO.48 OF 2018

AT MOMBASA

ABUBAKAR MOHAMED AL AMIN.....APPELLANT

VERSUS

FIRDAUS SIWA SOMO.....RESPONDENT

R U L I N G

1. By a Notice of Motion application dated the 11th June, 2019, the Applicant is seeking from this court the following orders: -

a. Spent

b. Spent

c. That pending hearing of the appeal filed herein, an order for stay of execution pending the appeal filed herein be issued restraining the Respondent either acting by herself, her servants, employees or agents from selling, disposing or in any manner whatsoever from interfering with the suit property known as Plot No. MSA/BLOCK/XVII/41

d. That the costs of this application be provided for.

2. The application is supported by grounds on the face of it, a supporting affidavit sworn on the 28th November, 2018 and a supplementary affidavit sworn on the 24th June, 2019 both by **Mr. Mohidin Abubakar Al-Amin**. The Respondent has filed a replying affidavit sworn on the 19th June, 2018. Both parties have filed submissions herein and cited several authorities in canvassing the application.

3. I have considered the material placed before me. I wish to restrict myself to the prayer of stay of execution so that the rest of the issues are handled by the court that shall be seized of the appeal when it comes up for hearing on the 23rd July, 2019.

4. I note that in the ruling on stay of execution delivered by my sister **Thande J**, it was held as follows:

“That the Appellant/Applicant was neither in a position to instruct his advocate to file that application nor to swear the supporting affidavit on his behalf. The purported instructions to file the application have no legal effect. The application was found to be incompetent, bad in law and an abuse of the court process and the same was struck out.”

5. The Appellant has not sought for review and/or appealed against the said ruling. In the present application, the appellant seeks for similar orders as the ones that he had sought for in the application dated 4th April, 2017. I therefore, find that this court is *functus officio* on the issue of the capacity of the Appellant/Applicant as he is still incapable of executing a power of attorney authorizing the deponent to act on his behalf unless proven otherwise through a medical report.

6. I have looked at the Memorandum of Appeal dated 16th November, 2018 and filed on the 19th November, 2018 and note that the property herein is not a subject matter in the Appeal.

7. Also, the Appellant/Applicant has not offered security as required under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 as

follows:

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

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

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.’

8. The Court of Appeal in the case of **Butt vs. Rent Restriction Tribunal [1982] KLR 417** gives guidance on how a court should exercise this discretion and held that:

‘1. a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

d. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

e. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.’

9. It is noteworthy that the appeal herein comes up for hearing on the 25th July, 2019 which is three days from today and that no prejudice would be suffered if this current application is struck out for want of capacity since before sale of the said property by auction, notice has to be issued by the Respondent and the applicant will have time to react or take action to respond to it.

10. I thus find that this present application is incompetent, frivolous, bad in law and an abuse of the court process and the same is hereby struck out for want of capacity.

11. Costs of this application shall abide the outcome of the Appeal.

It is so ordered

Dated, signed and delivered at Mombasa this 22nd day of July, 2019.

D.O CHEPKWONY

JUDGE