



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CIVIL APPEAL NO. 1 OF 2017

MOHAMMED MOHAMMUD JAMA.....APPELLANT

VERSUS

MARYAM HUSSEIN ALI.....RESPONDENT

(From the Ruling in Garissa –Kadhi’s Court Succession cause No. 2 of 2016 M. S. Hassan Principal Kadhi)

RULING

1. Before me is a Notice of motion dated 17th May, 2017 filed under Section 1 A, 1 B, and 3 A of The Civil Procedure Act Cap 21 and Order 42 Rule 1,6 and 7 and Order 51 Rule 1 of the Civil Procedure Rules.
2. The Application was filed under certificate of urgency and sought following orders:-
 1. The Honourable Court be pleased to certify this application as extremely urgent and service to be dispensed with at the first instance.
 2. The Honourable Court be pleased to grant stay of execution of orders in the Kadhi’s Court Succession Cause No. 2 of 2016 (Garissa) pending the hearing and determination of this application.
 3. The Honourable court be pleased to grant stay of execution of orders in Kadhis Court Succession Cause No. 2 of 2016 (Garissa) pending hearing and determination of this appeal.
 4. The Honourable court be pleased to grant stay of proceedings in Kadhis Court Succession Cause No. 2 of 2016 (Garissa) pending the hearing and determination of this application.
 5. The Honourable court be pleased to grant stay of proceedings in Kadhis Court Succession Court No. 2 of 2016 (Garissa) pending the hearing and determination of this appeal.
 6. The Honourable court be pleased to issue any such further orders it deems fit and convenient in the circumstances of this case.
 7. Costs of this application be in the cause.
3. Before the application was heard inter-partes, this court certified it as urgent, and granted stay of execution of the Kadhi’s Court’s orders pending hearing and determination of the application. Therefore, prayer 1, 2 and 4 of the application have been dispensed with.
4. The application was filed with a supporting affidavit sworn by Mohammed Muhammad Jama the appellant /applicant on 17th May, 2017. It was deponed in the said affidavit that the memorandum of appeal filed raised substantial points of law and facts and had overwhelming chances of success. In addition it was deponed that though the appellant was registered owner of the subject land property, the Hon Kadhi had already ruled that it was part of the estate of one Aurala Abdi Mohammed and as a consequence the appellant stood to suffer irreparable loss and damage should the property be subjected to succession distribution.
5. The respondent Maryan Hussein Ali filed a reply to the memorandum of appeal which she indicated was also a reply to the Notice of Motion. She stated that there was no proof of the transfer of plot GSA/ BOCK/1/25 and GSA/B/1637 to the appellant/applicant as he had used fraudulent methods to claim the same.
6. During the hearing of the application, Mr Farouk for the appellant /applicant requested the grant of orders prayed for, while the respondent stated that she had filed a response to the application and relied on the same.

7. This is an application for stay of execution of Court order pending appeal. Such applications are governed by the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules which state as follows:

“6(2) 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 due performance for such decree or order as ultimately binding on him has been given by the applicant.

8. Was this application filed without delay? The Ruling of the learned Kadhi was dated 15th December, 2016 while this application was filed on 17th May, 2017.

9. The explanation given for the delay in filing the appeal and the application was that the court file had been misplaced in the court registry. Though the appellant/applicant did not give specific details on the delay, since the respondent has not raised any challenge to the delay of several months in filing the application, I find that the application was filed without unreasonable delay.

10. As to whether the appellant/applicant will suffer substantial loss if stay of extension is not granted, I note that the subject matter herein is land. The said land is registered in the name of the appellant/applicant, but the Kadhi's court in the Succession cause ordered that part of it be inherited by the respondent. In my view, if stay of execution of the orders of the Kadhi's court is not granted, then the said land could as well be divided in the Succession cause with consequential transfer of the same into the name of the respondent. Such transfer in my view will cause substantial loss to the appellant/applicant. I will thus grant stay of execution orders.

11. Having said so however, I note that the appellant/applicant, has not offered any security for the grant of stay of execution of the Kadhi's orders. Though, I will grant him stay of execution orders, which I hereby do, I order that he will neither sell the land nor carry out any additional construction or development on the affected land, and if the respondent is already on site then the status quo of that occupation by the respondent will be maintained until the hearing and determination of the appeal filed herein.

12. The costs of this application will follow the decision in the appeal.

13. It is so ordered.

Dated, signed and delivered at Garissa this 10th day of April, 2018.

George Dulu

JUDGE