



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
MISC. APPLICATION NO. 4 of 2018

ABUBAKER MOHAMED AL AMIN.....APPLICANT

VERSUS

FIRDAUS SIWA SOMO..... RESPONDENT

RULING

1. By a Notice of Motion dated 2.3.18 and filed under Certificate of Urgency, Abubaker Mohamed Al Amin the Applicant seeks the following orders:

1. Spent

2. Spent

3. That there be a stay of execution of the judgment and decree of the Kadhi's Court issued on 27.3.17 pending hearing and determination of the Appeal.

4. That the Applicant be granted leave to file an Appeal out of time against the Decree and Judgment of the Kadhi's Court delivered on 27.3.17.

5. That costs be provided for.

2. The Application is founded on the grounds that the Kadhi's Court entered Judgment for Firdaus Siwa Somo, the Respondent herein in the sum of Kshs. 6,925,000/=. The Applicant being aggrieved by the said Judgment preferred Appeal No. 11 of 2017 against the same which was struck out on the ground that the Applicant was of unsound mind and no leave of the Court was obtain to join a next friend or guardian. The Appeal was struck out on a technicality and not merit. The Applicant has since recovered and wants to appeal against the decision of the Hon. Kadhi in respect of which the Respondent has commenced execution. The Applicant contends that his Appeal has overwhelming chances of success and unless the orders sought are granted the appeal will be rendered nugatory and the Applicant will suffer irreparable harm as his property will be sold. If the appeal succeeds the Respondent will not be able to refund the amount.

3. It was submitted for the Applicant that the Respondent got Judgment against him in the Kadhi's Court for Kshs. 6,925,000/= on 27.3.17. The Respondent seeks to execute by selling the Applicant's property known as Plot No. Msa/Block XLVII/4. The Applicant stands to suffer substantial loss as the property is the home where his children reside and the sale will render them homeless and destitute. The house also has sentimental value to the Applicant. The Respondent is not a person of means and if stay is not granted

and the appeal succeeds, recovery will be difficult. The Applicant contends that the Application was brought without undue delay. It was further submitted for the Applicant that the exhibited annexed grounds of appeal show that the appeal has high chances of success. It was further argued that there was no undue delay.

4. In her Replying Affidavit sworn on 15.3.17 (sic) and filed on 15.3.18, the Respondent opposes the Application. She contends that no evidence of the Applicant's recovery has been exhibited. The delay in filing the appeal has not been satisfactorily explained. Upon the striking out of the earlier appeal the only remedy available to the Applicant was an appeal against that decision. The orders sought herein will result in the Court sitting on appeal of its own decision.

5. It was submitted for the Respondent that no explanation has been given for the delay in filing the appeal against the judgment which was delivered on 27.3.17. The earlier appeal was heard and determined on 19.1.18 when ruling was delivered. It was further contended that no grounds of appeal have been filed and the Court cannot give orders without knowing what they are to assist. In the absence of a draft appeal there is no appeal. The medical report relied on by the Applicant does not show that he is now able to stand trial. If the orders sought, the Respondent will suffer prejudice as the money ought to have been paid in 2010.

6. I have given due consideration to the Application, the rival affidavits and the oral submissions by the parties' respective counsel. Section 79G of the Civil Procedure Code provides:

“79G Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

7. The foregoing provision requires that an appeal from a subordinate Court be filed in the High Court within a period of 30 days from the date of the decree or order. Parliament however recognized that it may not always be possible for an aggrieved party to file an appeal within the stipulated period and thus gave the High Court discretion to admit an appeal filed out of time. The wording of the proviso in Section 79G clearly shows that the leave to be sought is for admission of a filed appeal and not for filing an appeal. This was the holding of **Emukule, J.** in the case of **Gerald M'limbine V Joseph Kangangi [2009] eKLR**, and I concur with him:

“My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a nonexistent appeal out of the statutory period.”

8. The Applicant relies on the memorandum of appeal in Appeal No. 11 of 2017. With respect, this appeal together with an application for stay of execution was struck out for being incompetent vide this Court's ruling of 19.1.18. The Applicant ought therefore to have filed a competent appeal and at the same time seek the Court's leave to have such appeal admitted out of time. As things stand, there is no appeal before this Court in respect of which the Court can exercise its discretion to admit.

9. The Applicant further seeks stay of execution pending the Appeal. The jurisdiction of the Court to entertain an application for stay of execution pending appeal is stipulated in Order 42 of the Civil Procedure Rules. Order 42 Rule 6(1) provides:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, THE COURT TO WHICH SUCH APPEAL IS PREFERRED shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.” (Emphasis mine)

10. The foregoing provision indicates that stay of execution may be granted by the Court appealed from or by the court appealed to. In order for this Court to consider the application for stay, it must be the Court appealed to. The wording of the provision contemplates that an appeal must be in existence before an application for stay can be entertained. An application for stay of execution of a judgment must be filed within an appeal against that judgment. As stated above, there is no appeal before this Court. Where an application for stay is directed to a decision against which no appeal has been filed as in the present case, the Court has no jurisdiction to entertain the same.

11. In Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, Makhandia, J (as he then was) held:

“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against.”

12. As per the holding of Makhandia, J (as he then was) with which I concur, the Court cannot order stay of execution of an order or decree against which no appeal has been filed. The struck out appeal in no appeal at all. In the absence of an appeal for the Court to consider, the arguments that the appeal will be rendered nugatory and that the same has high chances of success are mere statements which are of no persuasive value. Indeed any attempt by this Court to entertain the Application is tantamount to the Court arrogating to itself jurisdiction not conferred upon it by law. I am fortified in this by the holding in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the Supreme Court had this to say concerning the jurisdiction of a Court:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

13. The upshot of the foregoing is that the Application herein lacks merit and the same is hereby dismissed. This being the second application for stay of execution, I award costs of the same to the Respondent.

DATED, SIGNED and DELIVERED in MOMBASA this 11th day of May 2018

.....

M. THANDE

JUDGE

In the presence of: -

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

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

.....**Court Assistant**