



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 48 OF 2017**

**ZUBHEIR ABDALLA.....APPELLANT/APPLICANT**

**VERSUS**

**YUSSUF JUMA.....RESPONDENT**

**JUDGMENT**

1. On 31<sup>st</sup> May, 2017, Hon. Abdulhalim H. Athman, the Principal Kadhi of Isiolo delivered a judgment whereby he distributed the estate of the late Juma Bin Yussuf (deceased) in accordance with Islamic Law. Aggrieved by that decision, the appellant preferred an appeal to this court challenging the said decision. Simultaneous with the filing of the Memorandum of Appeal, the appellant took out a Motion on notice under **Order 42 Rule 6 of the Civil Procedure Rules**, seeking a stay of execution of that judgment pending the determination of the appeal. The application was dated 5<sup>th</sup> June, 2017.

2. The grounds for the application were contained in the body of the Motion and in the affidavit in support. These were that; the respondent had threatened to execute the judgment of the lower court which will render the applicant and his entire family squatters, vagabond and homeless as they have no other place to call home; that the appellant has occupied **Ntima/Ntakira/610** for over 50 years; that the appeal has high chances of succeeding and that if the orders sought are not granted, the threatened execution will be undertaken whereby the applicant will suffer irreparable loss and damage.

3. The application was opposed vide Grounds of Opposition dated 19<sup>th</sup> June, 2017 and a Replying Affidavit of Yussuf Juma sworn on the same date. It was contended that the application is bad in law and fatally defective; that it was brought under a wrong regime of law; that the appeal has no chances of succeeding; that the applicant will not be rendered homeless if the orders are not granted as he has a home in Murang'a and that the respondent had not threatened to execute the decree.

4. In his submissions, Mr. Kiogora Learned Counsel for the applicant submitted that, this court has jurisdiction under **section 65 of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules, Article 165 of the Constitution and sections 47 and 50 (2) of the Law of Succession Act** to entertain the application. Counsel referred to the decision of **Fauzi Said Ali & 3 Others v. Said Ahmed Ali & Another [2014] eKLR** in support of the proposition that, this court has jurisdiction to entertain an appeal from the Kadhi's court. Counsel urged the court to exercise its inherent power and grant the orders sought.

5. On his part, Mr. Ndubi Learned Counsel for the respondent submitted that, **Order 42 of the Civil Procedure Rules** is not one of the provisions of the Civil Procedure Rules that have been imported into the Law of Succession Act vide **Rule 63(1) of the Probate and Administration Rules**; that since abuse of court has not been pleaded in the Memorandum of Appeal, this court cannot exercise the jurisdiction under **section 3A of the Civil Procedure Act**.

6. Mr. Ndubi further submitted that the appeal has no chances of succeeding as the judgment appealed against is water tight; that **Article 159 of the Constitution** is not applicable as the issue of **Rule 63 (1) of the Probate and Administration Rules, is not a matter of technicality**. Counsel cited the Court of Appeal decision in **Narok County Council v. Trans Mara County Council & Another [2000] 1 EA 161** for the proposition that the High Court can only exercise jurisdiction granted to it by the Constitution or Statute. He also cited the cases of **In the Matter of the Estate of Joseph Mwinga Mwaganu NBI Succ. Cause No. 1814 of 1996 and In Re Estate of Joram Waweru Mogondu (Deceased) [2004] eKLR** in support of the proposition that, this court is bound to apply the provisions of **Rule 63(1) of the Probate and Administration Rules** which oust most of the provisions of the Civil Procedure Rules. Counsel therefore urged that the application be dismissed.

7. I have considered the affidavits on record, the submissions of learned Counsel and the authorities cited. The issues for determination are; *is Order 42 Rule 6 of the Civil Procedure Rules applicable in matters under the Law of Succession Act and secondly, whether the orders sought should issue?*

8. The first objection raised by the respondent is that **Order 42 of the Civil Procedure Rules** is not applicable in matters succession in that, it is not one of those Orders of the Civil Procedure Rules that have been imported by **the Probate and Administration Rules, Rule 63(1)** of

those Rules provides:-

**“63 (1) Save as 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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (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.”**

9. From the foregoing, it is crystal clear that the objection by the respondent is not without merit. The drafters of the **Law of Succession Act, Cap 160 Laws of Kenya** intended that the said Act be a complete piece of legislation by itself. That is why they enacted the **Probate and Administration Rules** as the Practice Rules applicable in matters touching on the Act.

10. The question that arises then is, does the exclusion of Order 42 of the Civil Procedure Rules from those imported by **Rule 63(1) of the Probate and Administration Rules** take away the jurisdiction of this court from entertaining an application such as the one before me? Is this court left powerless in the event a litigant facing imminent execution approaches it with a stay application? I don't think so. Two provisions within that Act, in my view, give this court jurisdiction to come to the aid of such a distressed applicant. These are **section 47 of the Act** and **Rule 73 of the Probate and Administration Rules**.

11. **Section 47 of the Act** provides:-

**“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:**

**Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”**

12. On the other hand **Rule 73** aforesaid preserves the inherent jurisdiction of this court while dealing with matters succession. The wording of that Rule is *pari materia* with **section 3A of the Civil Procedure Act**. That Rule provides:-

**“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

13. In this regard, the court can entertain any application of whatever nature under **section 47** aforesaid and invoke its inherent power under **Rule 73** and make orders for the sake of justice. I do not agree with the submission that, this court can only exercise its inherent power only in instances where abuse of court process has been pleaded. That jurisdiction in my view, is always inherent in the court to be invoked at any time and at all times when the court is of the view that it will serve the ends of justice.

14. Accordingly, I make a finding that notwithstanding **Order 42 of the Civil Procedure Rules** not being one of those Orders imported by **Rule 63(1) of the Probate and Administration Rules**, this court has jurisdiction to grant orders of stay of execution under **section 47 of the Act** as read with **Rule 73 of the Probate and Administration Rules**. That objection is therefore rejected.

15. As regards the order of stay sought, the strict principles for a grant of stay under **Order 42 of the Civil Procedure Rules** will not apply. In the circumstances, the court will in my view consider whether there is a real threat of execution; whether the application has been made without undue delay; the nature of the order sought to be executed; whether the situation can be reversed if the execution is undertaken and the cost of effecting the reversal and the extent of loss, damage or hardship the applicant may be subjected to as a result of the execution.

16. In the present case, the applicant alleged that there is eminent threat of execution. He never produced any evidence of that fact. The respondent on the other hand denied that he was in no hurry to execute the judgment of the lower court. I have on my part seen the original record of the lower court. The judgment was delivered on 31<sup>st</sup> May, 2017, the decree has not been extracted yet. However, I note that the court ordered the applicant to vacate the property within three months of the judgment.

17. As regards the filing of the application, the same was filed on 19<sup>th</sup> June, 2017, less than a month from the date of delivery of the judgment. The same was accordingly made timeously.

18. The order sought to be executed is the distribution of the estate land of the deceased and the eviction of the respondent therefrom. The applicant has sworn that he and his family has been in occupation thereof for over 50 years and that he has nowhere to go to. On the other hand, the respondent avers that the applicant has his land in Murang'a where he can go to.

19. I have considered the opposing views of the parties. I have also considered the record of the trial court. It is not denied that the respondent has been in occupation of the subject property with his entire family for a very long time and continues to be in such occupation to-date. If he is evicted while his appeal is pending, of course he may be subjected to untold hardship. That eventuality can be avoided if the status quo is maintained, albeit for a short period. This is so considering that in an application for stay of execution, there are always two opposing interests; the right of the applicant not to have his appeal rendered nugatory, and the right of the successful litigant to enjoy the fruits of the litigation.

20. I note that the record of the trial court is ready and the appeal has already been admitted for hearing under **section 79 of the Civil Procedure Act**. Accordingly, the order that commends itself to me is to allow the application on the following terms:

a) There be a stay of execution of the judgment and decree made on 31<sup>st</sup> May, 2017 in the Isiolo Kadhi's Court Case No. 8 of 2015

pending the hearing and determination of the appeal herein.

b) The applicant to file and serve the Record of Appeal within 30 days of this Ruling, in default the appeal shall stand dismissed without any necessity of an application for such an order.

c) The appeal be prosecuted and determined within 120 days of the date of this Ruling, in default the stay to elapse automatically.

d) The costs to be in the appeal.

**DATED and DELIVERED at Meru this 25<sup>th</sup> day of January, 2017.**

**A.MABEYA**

**JUDGE**