



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL NO. 35 OF 2016

KIBIBI MWAMADI

RUKI SALIMU MWACHARO

HADIJA SALIMUAPPELLANTS/APPLICANTS

VERSUS

GOGA ABDALLA MASEMO..... RESPONDENT

RULING

1. By a Notice of Motion dated 30.9.16 and filed under Certificate of Urgency on even date, the Appellants/Applicants seek stay of execution of the orders issued by the Hon. Said Hamisi Bedzenga, Kadhi 1 delivered on 29.8.16 in Kwale Kadhi's Court Succession Cause No. 88 of 2015 pending the hearing and determination of the Application and the Appeal herein. They also seek stay of the said proceedings in the Kadhi's Court pending hearing and determination of the Application and the Appeal herein.
2. The Application is founded on the grounds set out on the face of the Application and on the facts set out in the Affidavit of Kibibi Mwamadi.
3. The background of this case as can be gleaned from the record is that the Respondent filed Kwale Kadhi's Court Succession Cause No. 88 of 2015 in respect of the estates of Mama Hasina Mohamed, Fatuma Mwinyi Mwakulema and Amina Salimu Mwacharo. By his application dated 25.4.16 in the Kadhi's Court, the Respondent sought a temporary injunction restraining the Appellants/Applicants from dealing with Title No. Kwale/Ng'ombeni/1104. He also sought an order for the Registrar of Lands Kwale to place a restriction on the said property until the matter was concluded. The Appellants/Applicants did by their Preliminary Objection dated 11.5.16 oppose the application on the grounds that succession in respect of the estate of Mama Hasina Mohamed (the Deceased) had been determined by the High Court in Succession Cause No 444 of 2011. The matter was therefore *res judicata* and the Kadhi's Court had no jurisdiction to entertain the same. By a Ruling delivered on 29.8.16, the Hon. Kadhi dismissed the Preliminary Objection and allowed the Respondent's Application.
4. Being aggrieved by the said Ruling, the Appellants/Applicants filed a Memorandum of Appeal dated 22.9.16 on 23.9.16 and on 30.9.16 filed the Application herein.

The Appellants/Applicants' Case

5. The Appellants/Applicants claim that they are the legal representatives of the estate of their mother, the Deceased. The estate's only asset is Title No. Kwale/Ng'ombeni/1104 ("the Suit Property"). A Grant of Letters of Administration was issued to them on 24.9.12 and the same was confirmed on 30.10.15 in High Court Succession No. 444 of 2011. The Respondent filed Succession Cause No. 88 of 2015 in the Kadhi's Court in Kwale staking a claim in the suit property. In addition, the Respondent filed an application seeking a temporary injunction restraining the Appellants/Applicants from dealing with the Suit Property. He also sought an order for the Registrar of Lands Kwale to place a restriction on the said property until the matter was concluded. The Appellants/Applicants in their reply and in their Preliminary Objection brought to the Kadhi's Court's attention that the matter of the estate of the Deceased was *res judicata* having been heard and determined by the High Court.

6. The Hon. Kadhi by his Ruling of 29.8.16 allowed the Respondent's Application and dismissed the Appellants/Applicants Preliminary Objection. It is the Appellants/Applicants case that the effect of the decision of Hon. Kadhi is that the Appellants/Applicants being the legal representatives of the estate of the Deceased are restrained from dealing with the Suit Property. The Ruling also effectively strips them of the powers conferred upon them as legal representatives of the estate. According to the Appellants/Applicants if the orders are enforced, the same will affect them and other beneficiaries of the estate of the Deceased resulting in substantial loss. The Appellants/Applicants claim that the orders were issued by a court without jurisdiction and prayed for a stay of execution of the same and stay of the proceedings pending the hearing and determination of the Appeal herein.

7. In their submissions, the Appellants/Applicants argue that the Kadhi's Court did not have jurisdiction to entertain Succession Cause No 88 of 2015 as the same was *res judicata* having been heard and concluded by the High Court in Succession Cause No. 444 of 2011. They relied on Section 7 of the Civil Procedure Act to bolster their submission. They also cited the Supreme Court cases In the matter of the Interim Independent Electoral Commission [2011] eKLR and Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR where the Supreme Court noted that a Court's jurisdiction is conferred and regulated by the Constitution and legislation or both and principles laid out in judicial precedent.

8. It was further submitted that if the stay sought herein are not granted, the orders of the Hon. Kadhi will be enforced which orders are in direct contradiction of the orders of the High Court.

9. For the Respondent it was submitted that the Application herein is aimed at denying the Respondent peace of mind that the suit property will not be sold or interfered with while the matter is still in Court. That his Application in the Hon. Kadhi's Court was only brought to maintain *status quo* pending the hearing of the substantive case which is still pending. It was argued that the orders issued by the Kadhi's Court were not final. Should the orders sought be granted there will be no guarantee that that the Appellants/Applicants will not dispose of the suit property to defeat the matter to the prejudice of the Respondent and his family.

10. It was further submitted that appealing against the orders in the Kadhi's Court is an admission that the Appellants/Applicants indeed have plans to dispose of the property well aware of the pending suit. It was argued that seeking stay is to subvert justice. It was further submitted that were it that the concerns of the Appellants/Applicants were to remove the matter from the Kadhi's Court they ought to have made a judicial review application rather than an appeal. The Respondent contended that in land matters, status quo orders should always be granted to preserve the subject matter of the suit. The case of Mugah v Kunga [1988] eKLR and Practice Direction 28(k) contained in Kenya Gazette Notice No. 5178/2014 were cited to buttress the submissions. It was further submitted that the Respondent's interest is in the suit property which is their inheritance from their parents and which the Deceased held in trust for the Respondent and his family. The Respondent contended that he fails to understand what the Appellants/Applicants are seeking given that the substantive matter is still pending in the Kadhi's Court. The Appellants/Applicants have not shown how the orders of maintenance of *status quo* which they are appealing against will affect them.

11. I have considered the Application, the Affidavits as well as the rival submissions by and on behalf of

the parties. The Application before me seeks stay of execution of the Ruling of the Kadhi's Court and of the proceedings therein pending appeal. Grant of stay of execution of an order pending appeal is discretionary. Stay orders are provided for under Order 42 Rule 6 of the Civil Procedure Rules. Sub Rule (2) provides:

“(2) No order for stay of execution shall be made under subsection (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”

12. The above provision contains the factors for consideration by the Court in the exercise of its discretion in determining whether or not to grant a stay of execution. None of the parties submitted on the said factors.

Whether the Application was brought without undue delay

13. The Ruling appealed against was delivered on 29.8.16. The Application for stay herein was filed on 30.9.16 just a month after. The Court is therefore satisfied that the Application was made without unreasonable delay.

Whether the Appellant/Applicant would suffer substantial loss if stay is not granted

14. While the Respondent argued that the Appellants/Applicants have not shown how the orders of maintenance of *status quo* which they are appealing against will affect them, the Appellants/Applicants contended that if the orders sought are not granted, they will be stripped of their powers of administration of the estate of their deceased mother. This in my view does not demonstrate substantial loss as envisaged by Order 42 Rule 6(2) of the Civil Procedure Rules.

Whether security for due performance is necessary in the circumstances

15. Security is critical where an appeal fails and an applicant is saddled with the costs thereof, hence the requirement for such security for the due performance of such decree or order as may ultimately be binding on him. The Appellants/Applicants herein have not offered any security for due performance. They have therefore failed the test in this regard also.

16. As stated earlier, grant of stay of execution of an order pending appeal is discretionary. In considering such an application, the Court must balance between the Appellants/Applicants' right to appeal and that of the Respondent's to enjoy the fruits of the Ruling delivered on 29.8.16 in the Kadhi's Court at Kwale. There must be a demonstrable justification to deprive the Respondent of that right. This is as was observed in the case of M/s Port Reitz Maternity v James Karanga Kabia Civil Appeal No. 63 of 1997:

“That right of appeal must be balanced against an equally weighty right; that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right”.

17. The Respondent was aware that the High Court in Succession Cause No. 444 of 2011 had determined the matter of the estate of Mama Hasina Mohamed. Indeed the Respondent in his affidavit in support of his application dated 25.4.16 before the Kadhi's Court averred:

“2. That it has come to my knowledge that the defendants herein have obtained letters of Administration in the estate of the late Hasina Mohamed Hamisi. Attached and marked GAM-1 is the said letters of Administration.

3. That the said letters were confirmed on 30th October 2015 and the only Asset thereon is the same piece of Land which is the subject matter of this petition being title No. Kwale/Ng'ombeni/1104. Attached and marked GAM-2 is the said Confirmation of Grant."

18. The Hon. Kadhi was also aware of the decision of the High Court. It is trite law that no court has jurisdiction to review or otherwise interfere with the decision of a court superior to it. In the matter herein, the Appellants/Applicants' case is that they obtained a Grant of Letters of Administration in the High Court in Succession Cause No. 444 of 2011, which Grant was duly confirmed. The Appellants/Applicants have an order of the High Court in their favour and have a right to enjoy the fruit thereof. However, they have been deprived of that right by the Ruling by the Kadhi's Court. By allowing the Respondent's application dated 25.4.16 the Kadhi's Court effectively interfered with and reviewed the decision of the High Court in Succession Cause No. 444 of 2011 which is *ultra vires* his jurisdiction.

19. In view of the foregoing, this Court finds, without preempting the Appeal, that the decision of the Hon. Kadhi in his ruling effectively reviewed the decision of the High Court which is a superior Court. In the circumstances, I am satisfied that the Appellants/Applicants have an arguable Appeal and have made out a case for grant of the prayers sought in the Motion dated 30.9.16. Accordingly I make the following orders:

- i) The Application dated 30.9.16 is hereby allowed.
- ii) The Appellants/Applicants shall list the Appeal for hearing within 30 days from the date hereof and in default the stay hereby granted shall automatically lapse.
- iii) Costs in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 2nd day of June 2017

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellants/Applicants**

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

..... **Court Assistant**