



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO 14 OF 2015

MUNIRA AHAMED BAAZAN.....APPELLANT

VERSUS

GAMAR OMAR SALIM.....RESPONDENT

RULING

1. The Appellant's Notice of Motion application dated 1st February 2017 and filed on 6th February 2017 was brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all the enabling provisions of the law. Prayer No (1) was spent. It sought the following remaining prayers:-

1. Spent.

2. THAT there be a stay of execution of Kadhi Court's ruling/judgment herein pending the hearing and determination of the appeal filed herein.

3. THAT there be a stay of execution of Kadhi Court's ruling/judgment herein pending the hearing and determination of VOI H.C.C.A. NO 14 OF 2015.

4. The costs of this Application be in the cause.

THE APPLICANT'S CASE

2. The Appellant's application was supported by the Affidavit that was sworn on 30th January 2017 and her Supplementary Affidavit that was sworn on 14th March 2017 and filed on 15th March 2017. Her Written Submissions were dated 13th March 2017 and filed on 15th March 2017.

3. Technically, there did not appear to be any difference between Prayers Nos (2) and (3) of the said application. Be that as it may, the gist of the Appellant's application was that her Appeal had overwhelming chances of success, that she would suffer huge losses if the house was sold and her Appeal would be rendered nugatory if an order for the stay of execution pending appeal was not granted.

4. She averred that the Respondent had already identified a buyer to purchase her house and that in fact, a Valuer visited her house sometime in February. She said that this was irregular because the Respondent had not extracted a decree or served her with the requisite notice.

5. It was her contention that it was fair and just for this court to grant the orders she had sought as there was a possibility that the Appeal herein would take time to be heard. She annexed copies of several letters showing that the proceedings in the matter herein were yet to be typed.

THE RESPONDENT'S CASE

6. In response to the said application, the Respondent filed a Replying Affidavit that was sworn on 15th February 2017 and filed on 17th February 2017. On 20th February 2017, he filed a Supplementary Affidavit on even date. His Written Submissions were dated 17th March 2017 and filed on 20th March 2017.

7. His contention was that the Appellant had taken an inordinately long time in prosecuting her Appeal that was lodged on 11th June 2015 and that it ought to have been dismissed for want of prosecution as provided for under Order 42 Rule 35(2) of the Civil Procedure Rules. He submitted that the Judgment by the Kadhi had clearly set out her share of inheritance.

8. Further, he averred that this court lacked jurisdiction to entertain the Appeal herein as the Judgment the Appellant had sought to be overturned was delivered at the Kadhi's Court at Mombasa.

9. He was categorical that he ought not to be denied the right to enjoy the fruits of his judgment and that because the Appellant's application was frivolous and her appeal could not be rendered nugatory if the orders she had sought were not granted, he urged this court to dismiss her application as equity does not aid the indolent.

LEGAL ANALYSIS

10. There were substantial issues that were raised by both parties in their respective Affidavits. However, what was of utmost importance to this court was the question whether this court had jurisdiction in hearing and determining the Appeal herein. This was a preliminary issue that went into the root of this case, hence the need to have it resolved right at the outset before delving into the merits of the application herein.

11. As was rightly pointed out by the Respondent, the Judgment from which the Appellant wished to be set aside was given by Hon Abdulhalim H. Athman Principal Kadhi in **Succession Cause No 89 of 2012 In the matter of the Estate of Omari Salim Said** that was filed at the Kadhi's Court at Mombasa.

12. Despite the Respondent having challenged the jurisdiction of this court in hearing and determining the Appeal herein in his Further Affidavit that was filed on 17th February 2017, the Appellant did not proffer any explanation in her Supplementary Affidavit that was filed on 15th March 2017 why she opted to file the Appeal herein at the High Court of Kenya, Voi. She did not even address her mind to this pertinent issue in her Written Submissions filed on 15th March 2017.

13. It did appear to this court that the Appellant was skirting around the issue of jurisdiction by avoiding to respond to the Respondent's assertions. Notably, the purpose of having appellate court exercise jurisdiction over subordinate courts and tribunals under their territorial jurisdiction is to avoid forum shopping. Filing proceedings in a wrong court cannot therefore be deemed to be a procedural technicality that can be overlooked by virtue of the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010.

14. Whilst the subject matter of the Appeal was Parcel No Mwatate "A" /42, it was the firm view of this court that the proper court to have heard the Appeal arising from the decision of the said Principal Kadhi was the High Court of Kenya Mombasa as the Kadhi's Court at Mombasa fell under the jurisdiction of that court. The position would have been different had the matter been heard by a court within the jurisdiction of the High Court of Kenya, Voi and the appeal filed at the High Court of Kenya, Mombasa as the High Court at Voi only became operational in September 2015.

15. Accordingly, without much further ado, having considered the pleadings herein and the Written Submissions that were relied upon by the respective parties, this court found that as it had no jurisdiction to hear and determine the Appeal herein, it opted not to consider the merits or otherwise of the Appellant's present application to avoid the appellate court that will hear the substantive Appeal herein being embarrassed by any decision this court may give and which decision it might not agree with.

DISPOSITION

16. Accordingly, the upshot of this court's ruling is that **HCCA No 14 of 2015 Munira Ahamed Baazan vs Gamar Omar Salim** filed at the High Court of Kenya, Voi be and is hereby transferred to the High Court of Kenya Mombasa for hearing and determination of all the pending matters herein.

17. In view of the nature of the orders sought, it is hereby directed that the file be placed before the Presiding Judge of the High Court of Kenya, Mombasa for a mention on 22nd June 2017 for his or her further orders and/or directions.

18. This court did not make any orders as to costs as it did not deal with the substantive issues that had been raised herein.

19. It is so ordered.

DATED and DELIVERED at VOI this 15th day of June 2017

J. KAMAU

JUDGE