



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 28 OF 2014**

**S R.....APPELLANT**

**VERUS**

**R R (N N K).....RESPONDENT**

**RULING**

1. The appellant herein filed a memorandum of appeal on 17<sup>th</sup> April 2014, to challenge the decision of the Hon. Hussein, Kadhi, delivered on 28<sup>th</sup> March 2014 in Kadhi's Court Succession Cause No. 60 of 2013.
2. She followed up the appeal with a Motion dated 25<sup>th</sup> April 2014 seeking stay of execution of the decree made in Succession Cause No. 60 of 2013 pending appeal. She argues that her appeal has overwhelming chances of success and she would suffer substantial loss if stay is not granted.
3. She swore an affidavit on 25<sup>th</sup> April 2014 to support the Motion. She attacks the decision of the Kadhi on the ground that it is inconsistent with the Sharia. She argues that the respondent and her children have forced themselves on her matrimonial house and are depositing materials on it and are likely to interfere with it.
4. The respondent responded to the application *vide* her affidavit sworn on 16<sup>th</sup> May 2014. She asserts to be a widow of the deceased. She accuses the appellant with intermeddling with the estate of the deceased, and collecting rent from the premises without accounting for the same. She denies depositing construction material on the alleged matrimonial home of the appellant, and argues that she has not demonstrated that she would suffer substantial loss.
5. The matter was initially placed before me on 2<sup>nd</sup> May 2014 and I granted stay of the judgment in Succession Cause No. 60 of 2013.
6. The application was argued orally before me on 21<sup>st</sup> May 2014. Mr. Ali argued the case of the appellant, while Mr. Nyabena acted for the respondent. Counsel summarised to me the facts as set out in their respective clients' affidavits. Unfortunately, none of them addressed me on the law.
7. The Motion dated 25<sup>th</sup> April 2014 seeks in the main stay of execution of the decree of the Kadhi's court. This is a case of stay of execution pending appeal. Such stay orders are grantable under Order 42 of the Civil Procedure Rules. The court is enjoined under that provision to consider the following:

1. Whether stay has been sought without considerable delay;
2. Whether the appellant would suffer substantial loss if stay is not granted; and
3. Whether security for due performance is necessary in the circumstances.

8. Both parties have gone to great depth on the merits of the case. They have addressed me extensively on the question of the validity of the marriage of the respondent to the deceased. This is meant to convince me that there is or is not an arguable appeal. This is neither here nor there. It is not something required under Order 42 of the Civil Procedure Rules. I need not and I will not address my mind to it.

9. The Judgment impugned on appeal was delivered on 28<sup>th</sup> March 2014. Memorandum of Appeal was filed herein on 17<sup>th</sup> April 2014. In my estimation both the appeal and the stay application were filed timeously.

10. On the issue of substantial loss, the appellant's case is that the respondent has stated depositing construction materials on what the appellant refers to as her matrimonial home. This is denied by the respondent. I note all the same that this is a succession matter. What is at stake is property. The dispute turns on whether the respondent is entitled to that property. Whether she is so entitled turns on the question of the validity of her alleged marriage to the deceased. The appeal before me turns on that question too. If the respondent goes on to implement the judgment of the lower court, by accessing the estate property, there is real likelihood of loss to the appellant, for she may alter materially the property or even dispose of it once it vests in her. Should the appellant succeed in her appeal, there is no guarantee that they would be able to restore such property to its original state.

11. The appellant has not offered any security for due performance. This is critical where the appeal fails and the appellant is saddled with costs. The respondent ought to be insured against the appellant's inability to pay or to perform any other obligation under the original decree. Order 42 does not necessarily impose a duty on the appellant to offer security, but there is discretion on the part of the court to order the same.

12. I am convinced that a case has been made out for grant of the prayers sought in the Motion dated 4<sup>th</sup> May 2014 and, in the circumstances, I do hereby made the following orders:-

- a. That there shall be stay of execution of the judgment of the Kadhi's in Kadhi's Court Succession Cause No. 60 of 2013 pending appeal herein;
- b. That the appellant shall deposit in court within the next thirty (30) days a sum of Kshs.250,000.00 as security for due performance;
- c. That in default of (b) above, the stay granted in (a) above shall automatically lapse; and
- d. That costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 3<sup>rd</sup> DAY OF October 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Nyabena advocate for the applicant.**