



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 109 OF 2007**

THUWEBA MAKHA ..... 1ST APPELLANT  
FATMA MAKHA ..... 2ND APPELLANT  
RUKIYA MAKHA ..... 3RD APPELLANT  
AZIZA MAKHA ..... 4TH APPELLANT

**-V E R S U S-**

AISHA JUMA ..... 1ST RESPONDENT  
MALIK ABU SHEE ..... 2ND RESPONDENT

*(Being an appeal from the Judgment of the Honourable Kadhi Twalib B. Mohamed delivered on 18<sup>th</sup> July 2007 in K.C.C.C No. 147 of 2005)*

**RULING**

1. Appellant filed this appeal against the judgment of Honourable Kadhi Twalib B. Mohamed of 18th July 2007. By that judgment Kadhi found that the Guraya house forms part of the Estate of Mashaka Binti Mbwana Salim (Deceased). Appellants have been in possession of that house. This appeal was heard and determined by Ibrahim J (as he then was) on 20th September 2012 when the Learned Judge upheld the decision of Kadhi. Appellants have filed a Notice of Appeal with an intent to file an appeal before the Court of Appeal.
2. Appellants by Notice of Motion dated 18th December 2013 seek stay of execution of this Court's judgment pending appeal.
3. Although the judgment Appellants seek to stay was delivered on 20th September 2012 they explain the delay to seek stay pending appeal on the ground that their Advocate became ill which necessitated his hospitalization and therefore the filing of the application was delayed.
4. Appellants are in occupation of the Guraya house and they deponed that if Respondents evicts them their appeal would be rendered nugatory.
5. The Respondents opposed the application on the ground that Appellants failed to annex their appeal before the Court of Appeal to enable this Court determine that they have meritorious

appeal. That Appellant had brought the application after prolonged delay. That they needed vacant possession because they were the rightful owners.

6. I have considered the application, affidavit evidence and oral submissions before Court. It is not disputed that Appellants have been in occupation of the Guraya house for the period parties have been litigating in this dispute. The judgment of the Kadhi was delivered on 18th July 2007. Appellants were not ordered to vacate when they failed to succeed before the Kadhi. Even as they waited for the conclusion of this appeal Appellants continue to occupy the Guraya house. In my view the evidence presented before me clearly shows that Appellants will suffer substantial loss if stay as sought is not granted.
7. My concern however is that the order that resulted from the judgment of 20th September 2012 was a negative order incapable of being stayed. This Court on that day dismissed Appellants' appeal. That dismissal of the appeal was a negative order. In the case of **KANWAL SARJIT SINGH DHIMAN -Vs- KESHAVJI JIVRAJ SHAH [2008]eKLR**, the Court of Appeal, while dealing with stay of a negative order, held as follows:

**“The 2nd prayer in the application is for stay (of execution) of the order of the Superior Court made on 18th December, 2006. the order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the Superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (See Western College of Arts & Applied Sciences vs. Oranga & Others [1976]KLR 63 at page 66 paragraph C).”** (emphasis mine)

8. What then should the Court do in view of the above finding. In my view justice for this case requires that Appellants do continue to occupy the house pending appeal. In granting an order for their continued stay in that house I am guided by the overriding objective of Section 1A of the Civil Procedure Act and Article 159 (2) (d). I am also well guided by the discussion of Court of Appeal in the case **NICHOLAS KIPTOO ARAP KORIR SALAT -Vs- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013]eKLR** when the Court considered whether to strike out an appeal. They stated-

**“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”**

9. Accordingly the orders that commend themselves to me are as follows-
  - a. **An order is hereby granted that Appellants do continue to occupy the Guraya house pending the hearing and determination of their appeal on condition that such appeal shall be filed in the Court of Appeal within sixty (60) days from today's date.**
  - b. **For the avoidance of doubt if that appeal to the Court of Appeal shall not be filed as stated in (a) above the order to occupy Guraya house pending appeal shall automatically be vacated/lifted.**
  - c. **The costs of Notice of Motion dated 18th December 2013 shall abide with the outcome of that**

**appeal.**

**DATED and DELIVERED at MOMBASA this 6<sup>TH</sup> day of NOVEMBER, 2014.**

**MARY KASANGO**

**JUDGE**