



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT MOMBASA

SUCCESSION CASE NO. 168 OF 2008

IN THE MATTER OF THE ESTATE OF MSWABAH KARAMA DECEASED

IDHA MSWABAH KARAMA.....PETITIONER

VERSUS

MAHMOUD ABEID MSWABAH KARAMA.....RESPONDENT

SHAFIGA BINT MUSABBAH INTERESTED PARTY / APPLICANT

RULING

INTRODUCTION

The Interested party / applicant's Notice of motion dated 9th May 2016 seeks orders:

1. That the application be certified urgent and be heard ex parte in the first instance
2. That the Hon. Court do grant a stay of the proceedings and or execution herein pending the hearing and determination of the High Court Civil appeal No. 29 of 2015
3. Costs

It is based on the grounds that the applicant has appealed against the ruling of this court with high chances of success and if the application is not granted the appeal would be rendered nugatory.

The applicant deponed that she was served with an eviction order to give vacant possession of Mombasa / Block XLI/174, contrary to order 22 that she is a beneficiary of the said property pursuant to the court's order of 12th June 2014. She states she has nowhere to go and will suffer irreparable damage if the application is not granted.

The petitioner opposes the application through his replying affidavit dated 20th May 2016. He deponed that Mr. Aboubakar is not properly on record for the applicant and that the eviction orders are not against the applicant but the respondent who has not at all complained about it. He acknowledges the applicant is his sister and has a share in the property and is welcome to live in together at any time.

The respondent also opposed the application. He deponed that the court awarded him and others [Jum'a, Husna & Nadya Abeid Mswabah] Mombasa/ Block XVII/1275 but the respondent has refused to hand it

over to her claiming it is hers. He states he has been evicted from Mombasa /XLI/ 174 and has no home to go to and is being deprived possession of his rightful share of the estate. He prays for orders for the applicant to handover possession of Mombasa/ Block XVII/1275 to him.

SUBMISSIONS

Mrs. Mwanakitina for the applicant relied on the applicant's supporting affidavit. Mr. Odongo for the petitioner submitted the applicant was not the person evicted and that the applicant is invited to that house but she does not want to. He further submitted that Mr. Olaba is on record for the applicant and Mr. Aboubakar cannot come on record without notice of change of advocates.

Mr. Khatib for the respondent submitted that the applicant does not reside in but collects rent of Mombasa / Block XVII/1275 and has refused to give possession of the same. He submitted further that an appeal from the Kadhis court must be lodged within thirty [30] days of the decision but the applicant filed hers five months after the ruling without leave of court.

ANALYSIS

The first prayer has been dispensed with.

Mr. Olaba came on record for the interested party / applicant through Notice of appointment of advocates dated 15th September 2014. Mr. Aboubakar filed his notice of appointment of advocates dated 9th May 2016, the same day he filed this application. There is no application for change of advocates and leave of court as required by law as the main petition had been determined. For this reason the application is incompetent.

Be that as it may, the application seeks to stay all proceedings in this matter whilst manly complaining about the eviction from Mombasa /Block XLI/174. She was allocated this property together with the petitioner, Dhukne and Swalhe. The respondent, Jum'a, Husna & Nadya Abeid Mswabah were awarded the deceased share in MSA/ Block XVII/1275 & 93. The eviction order was not directed or issued against her. She cannot suffer any damage. The petitioner in fact invites her to the house allocated to them. There is no basis for stay for this purpose.

It would seem the petitioner is pre-empting a vacant possession order of MSA/ Block XVII/1275. The respondent have already filed but not prosecuted an application for execution against her. Her right to appeal is protected by the Constitution. She has exercised her right. A right to appeal must be exercised within [30] days. Court may, with leave, allow appeal out of time. Such application is for the High Court to determine. while the aggrieved party has right to appeal, the winning party is entitled to enjoy the fruits if his victory and litigation must come to an end. It is trite law that Filing of appeal does not act as stay. The memorandum of appeal annexed to the application has been drafted but not received by the High Court registry. It cannot prove an appeal has even been filed in the High Court.

FINDING

The application is incompetent, lacks merit. It is hereby dismissed with costs.

Regarding the respondent's prayer for orders against the interested party, they may list their application for execution for necessary orders. Those orders are not an issue in this application.

Orders accordingly.

Dated and delivered at Mombasa on 18th August 2016

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Yusuf K. Abdulrahman, Court Assistant

Mr. Odongo for petitioner

Mr. Khatib for respondent

Mr. Aboubakar for interested party.



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