



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL CASE NO. E004 OF 2022

WAZIR ABDI WAZIR.....APPELLANT/APPLICANT

VERSUS

ATHMAN ABDI WAZIR.....1ST RESPONDENT

RAHMA ABDI WAZIR.....2ND RESPONDENT

MARIAM ABDI WAZIR.....3RD RESPONDENT

(Being an appeal from the Original Kadhi Succession Cause No. 13 of 2018 Ruling that was delivered on 25th March 2021 at Kitui's Kadhi's Court)

RULING

1. **Wazir Abdi Wazir** the applicant herein, in an undated application filed on 24.01.2022 has moved this court for the following prayers: -

i. Spent

ii. That there be an Order of stay of execution of the Order issued by Kadhi in Succession Cause No. 13 of 2018 pending the hearing and determination of this application.

2. The applicant has based his application on a supporting affidavit sworn on 24.01.2022 where he faults the Kadhi by issuing fresh Orders that he claims are contrary to earlier Orders.

3. The applicant claims to have spent Kshs. 300,000 in renovations which he claims are now 95% complete.

4. He avers that the Orders issued on 10.01.2022 should be stayed and an Order of status quo issued to save materials on site which can be damaged.

5. The applicant further avers that he has appealed against the Orders issued on 10.01.2022 and that a stay of execution should be granted pending determination of that appeal

6. He contends that the respondent will not suffer any prejudice if stay is granted and that it is in the interest of justice to grant the said Orders.

7. In his oral submissions in court, the applicant appearing in person submitted that the Kadhi Court directed him to renovate the subject property which forms the estate of her late mother, Fathuma Athumani (deceased)

8. He contended that his sisters wanted the property sold so that they could share the proceeds. He avers that the Kadhi agreed with the proposal to have the property sold and that the valuation carried out indicated that the property was valued at 16 million.
9. He submitted that he was evicted from the house and the house remained unsold for 3 years and began wasting away.
10. He further submitted that he moved the court for review of the Orders and that after the Hon. Kadhi visited the premises, he agreed with him that the house needed renovation and directed him to renovate the house which he did.
11. He submits that when renovations were carried out, the sisters realized that the home was in good condition and brought a buyer who reportedly undervalued the property.
12. The 1st respondent has sworn a replying affidavit to oppose this application.
13. The 1st respondent, Athuman Abdi Wazir avers that, it is the applicant who carried out the destruction in the first place and should not seek to benefit from the wrong doing.
14. He claims that the applicant engaged in wanton destruction of the property by destroying the roofing and selling the same.
15. The 1st Respondent further claims that, the applicant went and applied to be allowed to renovate the property which application was allowed.
16. He claims that their attempt to have the property sold has been frustrated by the applicant who has been scaring away potential buyers which to them has made it difficult to dispose the property.
17. He claims that the amounts the applicants claim to have used to renovate the house are astronomical, false and baseless.
18. The 1st respondent through learned Counsel Mr. Kithome orally submitted that the conditions for stay of execution well spelt out under **Order 42 rule 6(2)** have not been satisfied. He termed the claim that 14 million was used in renovations as audacious and that the application is just aimed at delaying the fruits of judgement.
19. This court has considered this undated application and the response made while this court appreciates the fact that the applicant is unrepresented, as he chose to appear in person, there are legal requirements which must be satisfied before a court can exercise its discretion and Order a stay of execution under **Order 42 Rule 6 of the Civil Procedure Rules**.
20. The application before me is afflicted by a number of defects that cannot be disregarded by a court of law.
21. In first place the application does not cite the provisions of the law it has invoked but that is not a sufficient reason to have an application disallowed. The significant omission, is the basis upon which the substantive prayer (2) is made. The prayer is worded or couched in a way that is predicated upon determination of this application rather than the appeal which means that the lifespan of the prayer ceases with the determination of this application. The applicant in his affidavit in support has stated that he is seeking stay pending hearing and the determination of the appeal herein but that is not consistent with the main prayer sought in the application. A party is bound by his/her pleadings and if the applicant had sought for any other relief deem fit by this court then perhaps I would have basis to grant a relief not sought in the applications but which I find fit or just to grant.
22. Secondly, the applicant has not listed concisely the grounds upon which his application is premised contrary to the provisions of **Order 51 Rule 4 of the Civil Procedure Rules** which requires that every notice of motion should state in general terms the grounds upon which an application is brought. That requirement is important because it accords the opposite party a fair chance to respond to the application so that he is not caught unaware.
23. Thirdly, this court heard the applicant who orally brought out important facts which ought to have been included in his affidavit in support again for the respondents to respond to them. The grounds/reasons advanced, important as they were, were a complete departure of his pleadings as contained in the affidavit in support. The court is precluded from considering contested facts unless they are contained in an affidavit.

24. I also find that the replying affidavit by Athman Abdi Wazir sworn on 26.1.2022 is uncontested because, the applicant did seek leave to file a further or supplementary affidavit to challenge the averments contained in the replying affidavit. That in my considered opinion in effect means that response by 1st Respondent is unchallenged and in effect means that the merits of this application is negatively affected.

In the end, this court finds that the undated application filed on 24.1.2022 is both incompetent and **lacks in merit**. The same is **struck out** but I make *no Order as to costs* as this is a family matter.

DATED, SIGNED AND DELIVERED AT KITUI THIS 21ST DAY OF APRIL, 2022.

HON. JUSTICE R. K. LIMO

JUDGE



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