



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kibwana v Juma & another (Family Appeal 31 of 2021)  
[2023] KEHC 24639 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24639 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL 31 OF 2021  
G MUTAI, J  
OCTOBER 27, 2023**

**BETWEEN**

**KIBWANA JUMA KIBWANA ..... APPELLANT**

**AND**

**MWINYI KIBWANA JUMA ..... 1<sup>ST</sup> RESPONDENT**

**ABDILLAHI KIBWANA JUMA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Notice of Motion before me is dated 27<sup>th</sup> March 2023. It seeks the following orders:-
  - a. Spent;
  - b. Spent;
  - c. That this honourable court be pleased to order stay of proceedings of this matter before Hon. Omar K. Swaleh (SRK) pending the hearing and final determination of the appellant's appeal filed in the High Court;
  - d. That this honourable court be pleased to make any orders it deems just and expedient; and
  - e. That this application ought to be granted in the interest of justice.
2. The application is premised on the grounds that the Honourable Kadhi delivered a ruling on 27<sup>th</sup> September 2022, which the applicant is aggrieved with. The impugned ruling allowed the application dated 24<sup>th</sup> February 2023 despite there being stay orders in Appeal No. 31 of 2021. The said ruling committed the applicant to civil jail for contempt of the Court orders. The applicant avers that the said orders are irregular. Unless orders are issued by this Court, the applicant may be committed to civil jail. The application is further supported by a supporting affidavit sworn by the applicant on 27<sup>th</sup> March 2023.



3. The applicant stated that the Kadhi's Court, in its orders of 22<sup>nd</sup> June 2021 and 22<sup>nd</sup> September 2021, declared Plot No.20/19 Chaani, property of the estate of Kibwana Juma Athman's (deceased), whereas according to him and the evidence in his custody, it belongs to the estate of their father Juma Kibwana Juma(deceased). Aggrieved by the orders of the Kadhi Court, his father Juma Kibwana Juma, appealed vide Mombasa HCCA No. 31 of 2021; Kibwana Juma versus Abdilahi Juma, which is still pending in court. The court issued an eviction order from the subject property to the respondent against his father(deceased). He was then forced to file an application dated 27<sup>th</sup> September 2022 seeking orders to set aside, vary and or review the said orders as they were issued against a deceased person (their father), thus amounting to a nullity.
4. He stated that on 29<sup>th</sup> September 2022, the court issued orders staying Succession Cause No.80 of 2010 pending hearing and determination of the appeal. That on 24<sup>th</sup> February 2023, the 1<sup>st</sup> respondent filed a contempt of court application seeking to have him committed to civil jail. The Kadhi's Court allowed the application vide its orders of 17<sup>th</sup> March 2023. He further stated that the said orders are improper considering the fact that it is the same court that issued stay of execution orders on 21<sup>st</sup> September 2022.
5. The applicant averred that the respondent would suffer no prejudice and urged the court to grant the orders sought in the interest of justice.
6. In response, the respondents filed a replying affidavit sworn on 5<sup>th</sup> April 2023.
7. They denied the averments by the applicant in his supporting affidavit and stated the application lacks merit and is meant to delay justice. Further, the issue of ownership of the suit property was dealt with by the Kadhi's Court.
8. They stated that they were never served with the Memorandum of Appeal and that they were not aware of the same until after the filing of the application before the Kadhi. Further, the applicant's advocate attended all hearings leading to the issuance of the orders referred to herein and never raised any objection thus, the application herein is an abuse of court process and a delaying tactic.
9. The application was canvassed by way of written submissions. Subsequently, the applicant, through his advocates Odindiko & Company Advocates, filed written submissions dated 18<sup>th</sup> September 2023. Counsel reiterated the applicant's position in his supporting affidavit and submitted that the orders of 17<sup>th</sup> March 2023 were improperly issued as there is an appeal pending determination, and if a stay of execution is not issued, the appeal will be rendered nugatory.
10. The respondents, on the other hand, through their advocates Were Geoffrey & Company Advocates, filed their written submissions dated 25<sup>th</sup> September 2023. Counsel submitted that the orders of 17<sup>th</sup> March 2023 were properly issued as the applicant was given ample time and opportunity to explain himself and offer his defence before committing him to civil jail. Counsel urged the court to dismiss the applicant's application with costs.
11. I have considered the application herein, the responses and rival submissions by both counsels and I am now tasked to determine whether the orders sought should issue.
12. Before I delve into the issue for determination I do note that the application has been brought under order 42 rule 6, order 51 rule 1 of the [Civil Procedure Rules](#), 2010 and sections 1A, 1B and 3A of the [Civil Procedure Act](#).

Order 42 rule 6 provides;

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court



appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order for stay of execution shall be made under sub-rule (1) unless—
    - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
  3. Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  4. For the purposes of this rule, an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court, notice of appeal has been given.
  5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
  6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
13. My understanding of the applicant’s claim is that the honourable Kadhi issued two contradictory orders which ought to be stayed in the interest of justice as there is a pending appeal which will be rendered nugatory if a stay is not granted. I must, however, note that in the prayers sought, the only prayer that is pending determination is for stay of proceedings before the Kadhi’s Court.
14. In dealing with the issue of stay of proceedings, the court in the case of [\*Kenya Wildlife Service v James Mutembei\*](#) [2019] eKLR stated: -

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, the right to be heard without delay and overall, the right to a fair trial. Therefore, the test for the stay of proceeding is high and stringent. See Ringera J in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* persuasively stated thus:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity



and optimum utilisation of judicial time and whether the application has been brought expeditiously” (emphasis added)

15. The honourable Kadhi, in his orders of 21<sup>st</sup> September 2022 issued orders that all occupants vacate the house within Plot No.20/19 Chaani with immediate effects. Further, in the orders of 27<sup>th</sup> September 2022 the honourable Kadhi stayed the orders issued on 22<sup>nd</sup> June,2021 pending the hearing and determination of Appeal No.31 of 2021. On 17<sup>th</sup> March 2023, the Honourable Kadhi further issued the following orders: -
  - a. That the 3<sup>rd</sup> respondent and other occupants are hereby ordered to give out a vacant possession of the deceased house on Plot No.20/19 situated at Chaani in Mombasa County immediately following the orders issued on 21<sup>st</sup> September 2022;
  - b. That the 3<sup>rd</sup> respondent be arrested and committed to civil jail for contempt of several court orders and proceedings thereof; and
  - c. That the OCS Changamwe Police Station to reinforce the arrest with immediate effect.
16. The applicant herein, being the 3<sup>rd</sup> respondent/interested party in the Kadhi’s Court Succession Cause No.80 of 2010, moved this honourable court vide a memorandum of appeal dated and filed 1<sup>st</sup> October 2021 appealing against the ruling of the honourable Kadhi delivered on 22<sup>nd</sup> September 2021.
17. I must note that the applicant did not annex the orders of 22<sup>nd</sup> June 2021 and those of 22<sup>nd</sup> September 2021 thus, this court cannot tell what the orders entail. However, it’s evident that proceedings have been ongoing at the Kadhi’s Court despite there being an appeal pending before this court. The said proceedings have resulted in several orders going to the root of the matter, which, if not stayed, will render the appeal nugatory.
18. The application has merits and is allowed. The proceedings before the Kadhi’s Court, and all pending orders, are hereby stayed pending hearing and determination of the appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 27<sup>TH</sup> DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS**

**GREGORY MUTAI**

**JUDGE**

In the presence of :-

No appearance for the applicant;

No appearance for the Respondent;

