



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL APPEAL NO. 11 OF 2018**

**K M A.....APPLICANT/APELLANT**

**VERSUS**

**H H Y.....RESPONDENT**

**RULING**

1. Before me is an application by way of Notice of Motion dated 10<sup>th</sup> April, 2018 for stay of execution of judgement of the Wajir Kadhi's Court, in which the applicant did not cite the law under which it was brought. It was filed by K M A and seeks the following orders –

**1) (Spent).....**

**2) Stay of execution of judgement in Wajir Kadhi's Court Civil Case No. 15 of 2018 – H H Y –vs- K M A be granted pending hearing and determination of the application.**

**3) Stay of execution of judgement in Wajir Kadhi's Court Civil Case No. 15 of 2018 – H H Y –vs- K M A be granted pending the hearing and determination of appeal.**

**4) That costs of the application be in the cause.**

2. The application has grounds on the face of the Notice of Motion, the main ground being that the applicant was not served with pleadings filed in the trial court; and was not given an opportunity to be heard by the Kadhi and lastly, that there was a related pending case in the Wajir Children Court Case No. 4 of 2018 – in the matter of A – minor (suing through next of friend) – H H Y –vs- K M A.

3. The application was also filed with a supporting affidavit sworn by the applicant K M A on 11<sup>th</sup> April, 2018.

4. No replying an affidavit was filed in response to the application. Before the application was heard, and due to delays caused by lack of proper service on the respondent and the wet state of the Wajir road wherein the respondent was initially not able to attend this court, the court granted stay of execution orders, except for the custody and maintenance of the child.

5. Today, both the applicant and respondent attended court for the hearing and addressed me orally on the application.

6. The applicant stated that his main issues were two. The first issue was with the order of the Kadhi for him to construct a traditional house for the respondent. Secondly, the applicant felt prejudiced by the order of the Kadhi that he pays Edda to the respondent. According to him, he had already built a house on marriage worth Kshs.30,000/=, which was currently vacant, and, could not afford building an additional house, with his present salary of Kshs.15,000/= per month.

7. With regard to Edda, the applicant submitted that same was paid only to a wife who was chased away by the husband, not a wife who was taken away by her parents like the respondent.

8. In response, the respondent stated that the applicant chased her away at 7 pm and told her to pick everything belonging to her, and the next morning he brought her a mattress and a letter of divorce. She stated that she informed the applicant that she had filed the case at the Kadhi's Court, but the applicant did not bother to attend court.

9. With regard to building a traditional house for her as ordered by the Honourable Kadhi, the respondent said she was entitled to such a house. She complained that she was a poor woman who could not afford even fare to come to Garissa – and only managed to come to court from Wajir, with the financial assistance of friends.

10. This is an application for stay of execution of judgment or decree. The only items of the judgment which the applicant wants to be stayed at this stage are the order for construction of a traditional house and payment of Edda. He does not appear to be asking for stay of execution of other orders at the moment.

11. Such applications are governed by the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, which states as follows –

**“6 (2) No order of 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.”**

12. Was the application made without unreasonable delay? The judgment of the Kadhi’s Court was delivered on 19<sup>th</sup> March, 2018 and the application was filed on 11<sup>th</sup> April, 2018. That was a period of almost a month. However, the judgment was delivered in the absence of the applicant and there is no indication that he was given prior notice of delivery of the same. It is also not clear when the applicant became aware of this *ex parte* judgment.

13. I thus hold that the application was filed without unreasonable delay in the circumstances of this case, and in this North Eastern area where the High Court is situated several hundreds of Kilometres away from Wajir with a rough and unsecure road in between.

14. Will the applicant suffer substantial loss if stay is not granted? The appellant wants two specific orders of the Kadhi’s Court to be stayed pending appeal. The respondent holds otherwise. In my view, the nature of the two orders in issue and the fact that the applicant was not present at the trial; mean that if implemented before the appeal is heard, then the applicant will suffer substantial loss.

15. With regard to provision of security by the applicant, I find no reason to require the applicant to provide security in this domestic family matter.

16. To conclude, I find merits in the application and will allow it on the following terms –

**1) Stay of execution of judgment is hereby granted only against the Kadhi’s Court orders in Wajir Civil Case No. 15 of 2018 relating to building a traditional house and paying Edda by the applicant until hearing and determination of the appeal.**

**2) The appeal filed will be fast tracked and preferably heard within July, 2018.**

**3) The Deputy Registrar of this court will in the meantime call for the original trial court file. I will hereafter fix the appeal for mention for directions by which mention date the Wajir trial court file should be availed to this court.**

**4) Costs will follow the decision in the appeal.**

Read, signed and delivered in open court at Garissa this 19<sup>th</sup> day of June, 2018.

.....

**George Dulu**

**Judge**