



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 17 OF 2017**

**K K.....APPELLANT**

**VERSUS**

**F O.....RESPONDENT**

**RULING**

The application dated 20.3.2017 seeks the following orders:

- 1. That the Ruling and order of the Hon. Kadhi's Court given at Kilifi on 6<sup>th</sup> March be set aside and the case be re-instated.**
- 2. That costs of this application be in the cause.**

The application is supported by the applicant's affidavit sworn on 20<sup>th</sup> March 2017. The respondent filed replying affidavit sworn on 3<sup>rd</sup> April, 2017 and a notice of preliminary objection filed on the same date. Both parties relied upon their respective pleadings.

The background to the dispute is that the parties herein were married but the marriage has been dissolved by the Kadhi's Court in Kilifi. On 11.8.2016 the Kilifi Kadhi delivered his judgement. On 15.11.2016 the Kadhi delivered a ruling. The ruling is the subject of the current application. The ruling of the Kadhi was in relation to an application by the applicant herein seeking to restrain the respondent from interfering or digging pit latrines (toilets) on the applicant's side of the house in dispute. The Kadhi dismissed the application. This promoted the filing of the appeal together with the application.

The applicant's position is that the Kadhi divided the house in dispute in his earlier judgement. The applicant has been utilizing the land in dispute from time immemorial and the respondent has encroached on his side of the land where the house stands. The Kadhi went ahead and ordered the applicant to share part of the portion of land with the respondent who has no right of ownership on that portion. It appears that the matrimonial house that was divided by the Kadhi is located on a plot measuring 25 x 25feet. The applicant contends that he bought a plot measuring 30 x 50feet and the respondent has encroached on 4 feet of the applicant's share of the house and a further 12 feet of the land where she is digging a toilet.

On her part, the respondent maintains that the Kadhi divided the house between the two. The applicant got a bigger share of the house than the respondent. The applicant got five rooms, a kitchen, a bathroom, a toilet and a big verandah while she got two rooms, a bathroom and a small verandah with no kitchen or toilet or bathroom. The Kadhi visited the house and saw a wall being built to divide the two portions.

The record shows that before the Kadhi delivered the ruling on 6<sup>th</sup> March, 2017, parties had presented to the Kadhi a sketch plan of the house. On 15.11.2016 the Kadhi divided the house into two portions. Upto that moment each party was satisfied with the Kadhi's decision. The respondent started digging a pit latrine on her side since the portion distributed to her did not have a toilet. This prompted the filing of the application dated 3.2.2017 by the applicant seeking orders of injunction. The Kadhi visited the suit premises and in his ruling indicated that the respondent was within her right to dig the toilets in her verandah space within her distributed portion. A wall is being put up to divide the two portions.

From the record herein, I do find that there is no good reasons advanced by the applicant to warrant the setting aside of the Kadhi's ruling at this interlocutory stage. The record shows that the respondent contributed the plot upon which the house is built. The respondent's portion has no toilet or bathroom and these are essential facilities. By digging the toilet on her portion of the property, the respondent is within the parameters of the Kadhi's judgement which has not been the subject of an appeal.

In the end, I find that the application dated 20<sup>th</sup> March, 2017 lacks merit and is hereby dismissed there shall be no orders as to costs.

**SAID CHITEMBWE**

**JUDGE**

**Dated and Delivered at Malindi this 20<sup>th</sup> day of June,2017**

**WELDON KORIR**

**JUDGE**