



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 19 OF 2017**

**IRSHAD ABDALLA AZAM.....APPLICANT**

**VERSUS**

**MAZAR ABDALLA KHAN.....1<sup>ST</sup> RESPONDENT**

**ASHFORD KARANI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an Application dated 10.5.17, Irshad Abdalla Azam, the Applicant herein seeks the committal to civil jail for a period not exceeding 6 months of Mazar Abdalla Khan the 1<sup>st</sup> Respondent and Ashford Karani the 2<sup>nd</sup> Respondent herein for wilful and deliberate disobedience of the Kwale Kadhi's Court order of 21.4.17 and served upon them on the same day. The 2<sup>nd</sup> Respondent is the OCS Ukunda Police Station.

2. The Application is predicated upon the grounds as set out in the Application and further in the Applicant's affidavit sworn on even date. The Applicant avers that the Kadhi Court Succession Cause No. 327 of 2016 in respect of the estate of Ali Khan Rahim Khan was filed in the Kadhi's Court in Kwale by one Nazir Ali Khan Rahim Khan. The matter was heard *ex parte* and the said Nazir Ali Khan Rahim Khan was allowed to administer the estate of the deceased. The Applicant claims that though he is entitled to premises on Plot No. Kwale/Ukunda/830 and has lived thereon for the last 30 years, the matter was heard without his involvement.

3. The Applicant claims that on 20.4.17, the 1<sup>st</sup> Respondent who was not a party to the suit and the 2<sup>nd</sup> Respondent together with a contingent of over 10 policemen came onto the premises. They served the Applicant with an eviction order issued by the Kadhi's Court on 23.1.17. That immediately thereafter the policemen under the command of the 2<sup>nd</sup> Respondent removed the belongings of the Applicant from the premises without prior notice as required by law. The Applicant immediately instructed his advocate who obtained a stay order from the Kadhi's Court which order was served upon the Respondents. The Applicant claims that the 1<sup>st</sup> Respondent continues to reside in the premises to date and has refused to move out despite the Court order staying the eviction order. He further alleges that the 2<sup>nd</sup> Respondent, to whom the order was directed to ensure compliance, has in total disrespect of the Court order failed, neglected or refused to remove the 1<sup>st</sup> Respondent from the premises.

4. The Applicant further claims that the 1<sup>st</sup> Respondent was not a party to the suit in the Kadhi's Court and it is not clear why the 2<sup>nd</sup> Respondent installed him in the premises. He alleges that the Court record

has no order for eviction nor written or oral application for the same. That this notwithstanding, he filed the application for stay which was granted but the 1<sup>st</sup> Respondent has however declined to move out of the premises. The Applicant accuses the Respondents of colluding to defeat the order of stay of execution of the eviction order.

5. In his Replying Affidavit sworn on 26.5.17, the 1<sup>st</sup> Respondent denies disobeying any Court order. He claims that pursuant to the judgement in Kadhi Court Cause No. 324 of 2014 between him and the Applicant, the property Kwale/Ukunda/690 was transferred to the 1<sup>st</sup> Respondent by the said Nazir Ali Khan Rahim Khan on 29.3.17. The 1<sup>st</sup> Respondent claims that the eviction orders were from cause No. 327 of 2016 and were effected on 19.4.17 and the Applicant rushed to Court on 21.4.17, 3 days later. The 1<sup>st</sup> Respondent further claims that he was not served with any order and that even if he were served, he was not a party in Cause 327 of 2016. He is a stranger in these proceedings and the Applicant has not demonstrated that he has served Nazir Ali Khan Rahim Khan.

6. It is the 1<sup>st</sup> Respondent's case that the Applicant has not challenged the Kadhi's Court's judgement that found that the property belonged to the 1<sup>st</sup> Respondent. The Applicant, having been evicted cannot seek orders to be reinstated in a property that does not belong to him. The 1<sup>st</sup> Respondent claims that when he left the property to Alikhan Rahimkan Jundu Khan the father of Nazir Ali Khan Rahim Khan and went to work in England, the Applicant and his family were rent paying tenants thereon. When the said Alikhan Rahimkan Jundu Khan died in 2014, the Applicant and his family refused to pay rent and began to say they are entitled to the property.

7. The 1<sup>st</sup> Respondent claims that the Applicant lost Cause No. 324 of 2014 which he had filed, a fact he concealed from the Court. He has therefore not come to Court with clean hands. He further avers that since the Kadhi Court's order for status quo to be maintained was made on 21.4.17 while eviction was done on 19.4.17, it is only fair that the Applicant remains out of the premises till the hearing is concluded.

8. The 2<sup>nd</sup> Respondent produced in Court a Replying Affidavit sworn on 15.5.17. However, the same is filed in the Kadhi's Court and not in this Court. This Court therefore disregards the same.

9. The parties made oral submissions before me on 30.5.17. Counsel for the Applicant submitted that the Respondents were served with the Court order for stay of execution of the eviction order but they disobeyed the same. He submitted that the 1<sup>st</sup> Respondent who was not a party to the suit is staying in the premises. He contends that Court orders must be obeyed and that this Court must stamp its authority so that parties obey Court orders regardless of their position in society otherwise the country will be ungovernable. It was further submitted that there is an order for stay of execution and that status quo was to be maintained. There is a document titled "status quo to be maintained" but it is not clear when it was issued and to whom it was directed. Counsel for the Applicant submitted that he was in Court on 17.5.17 but did not see the order on file. He submitted that status quo as at 15.5.17 is that there is a stay. Counsel further submitted that in case of contempt proceedings, the person who becomes aware of a Court order and fails to act is the one in contempt.

10. For the 1<sup>st</sup> Respondent, it was submitted that in Kadhi's Court Cause No. 327 of 2016, none of the parties herein was a party. Nazir Ali Khan Rahim Khan who was a party in that suit has not been enjoined in the proceedings herein. This omission as well as failure to show he was served is fatal. It was further submitted that the 1<sup>st</sup> Respondent has shown that he is the owner of the property the same having been transferred to him Nazir Ali Khan Rahim Khan on 29.3.17. The eviction was done pursuant to an order of 23.1.17 and effected on 19.4.17 at which time the 1<sup>st</sup> Respondent was already the owner of the property. The Applicant failed to bring to the attention of the Court he had filed Succession Cause No 324 of 2014 against the 1<sup>st</sup> Respondent wherein judgement was entered on 21.8.16 dismissing the same. The Applicant has not appealed against the judgement.

11. It was further submitted that when stay was obtained on 21.4.17, eviction had already been done on 19.4.17 thus the order had been overtaken by events. It was argued that the 1<sup>st</sup> Respondent was not a party

to the suit and failure to bring in Nazir was fatal. The 1<sup>st</sup> Respondent won the case in the Kadhi's Court and that has not been overturned. As far as the 1<sup>st</sup> Respondent is concerned, this is a matter for the Environment and Land Court.

12. On his part, the 2<sup>nd</sup> Respondent informed the Court that he is the OCS Ukunda Police Station. He received an eviction order on 13.4.17 and because it was during Easter time, he wrote a letter on 19.4.17 to the Kadhi's Court to confirm if it was genuine. On 19.4.17, he executed the order at around 1400 hours. On 21.4.17, he was served with a stay order. The order had neither addressee nor the name of the person to execute the same. On 3.5.17, he got another stay order which directed the OCS Ukunda Police Station to execute the same. On the same day he wrote to the Kadhi's Court to confirm authenticity and on the letter, the Kadhi wrote "status quo to be maintained". Thereafter, he was served with summons to attend Court. The 2<sup>nd</sup> Respondent asked the Court to consider that by the time the stay order came, he had already effected the eviction. He stated that he would not disobey Court orders and that in his 30 years of service as a police officer he has never disobeyed Court orders.

13. I have considered the Application, the rival affidavits and submissions by and on behalf of the parties. The jurisdiction of this Court to punish for contempt is found in the Contempt of Court Act No. 46 of 2016, which was assented to on 23.12.16 and commenced on 13.1.17. This Court has powers under Section 5(c) of the Act to uphold the dignity and authority of subordinate courts as follows:

***"5. Jurisdiction of superior Courts***

***Every superior court shall have power to —***

***a. punish for contempt of court on the face of the court;***

***b. punish for contempt of court; and***

***c. uphold the dignity and authority of subordinate courts***

14. In this case, this Court has been called upon to uphold the dignity and authority of the Kadhi's Court in Kwale which in the Applicant's view is under threat by the Respondents. The Applicant perhaps not being aware of the existence of Act No 46 of 2016 has filed the Application under RSC Order 52(2) Civil Procedure Rules. Nevertheless, as enjoined by Article 159(2)(d) of the Constitution of Kenya 2010, in exercising its judicial authority this Court shall administer justice in this matter without undue regard to procedural technicalities.

15. The Applicant accuses the Respondents of disobeying the order issued on 21.4.17 by the Kadhi's Court and served upon them on the same date. In his Affidavit, the Applicant avers that on 20.4.17, the Respondents and over 10 policemen came onto the said premises and served him with an eviction order. Immediately thereafter the policemen under the command of the 2<sup>nd</sup> Respondent removed the belongings of the Applicant from the premises. He then states that he immediately instructed his advocate who obtained a stay order from the Kadhi's Court, which order was served upon the Respondents. The 1<sup>st</sup> Respondent states that eviction was done on 19.4.17 while the stay order was obtained on 21.4.17, 3 days later. The 2<sup>nd</sup> Respondent stated that he executed the eviction order on 19.4.17 at around 1400 hours. He was served with the stay order on 21.4.17 after eviction had been done.

16. The 1<sup>st</sup> Respondent further stated that the Applicant had filed Kadhi's Court Cause No. 324 of 2014 against him but the Court found in its judgement that the suit premises belonged to the 1<sup>st</sup> Respondent. It is unfortunate that the Applicant opted not to file a further affidavit which would have shed more light on the matter. Be that as it may, I have perused the stay order annexed to the Applicant's affidavit and I note that the same is dated 21.4.17. While the Applicant claims the eviction was effected on 20.4.17, the Respondents claim it was done on 19.4.17. Whether the eviction was done on 19.4.17 or 20.4.17, it is not disputed that on the date the stay order was issued, eviction had already taken place. In the circumstances therefore, there was nothing to stay. The horse had bolted as it were.

17. The Applicant further states in his Affidavit:

***“11. THAT the said Mazar Ali Khan is still residing on the said house to date and he has refused to move out despite the Court Order staying the eviction order.***

***12. THAT even the OCS, Ukunda police Station to whom the order is directed to ensure compliance has failed, neglected or refused to remove the said Mazar Ali Khan in total disrespect of the Court Order.”***

In this regard, I reproduce the Kadhi's Court order of 21.4.17:

**“IT IS HEREBY ORDERED:-**

***1. THAT this application is certified urgent and service be dispensed within the first instance.***

***2. THAT there be a temporary stay of execution of the eviction order issued on 23<sup>rd</sup> January, 2017 pending hearing of the application interparties.”***

18. Nowhere in the order of 21.4.17 does it say that the 1<sup>st</sup> Respondent is to move out of the premises. Again nowhere in the order is the 2<sup>nd</sup> Respondent directed to ensure the execution of the said order contrary to what is alleged by the Applicant. Further as stated earlier, on the date this order was issued, eviction had already taken place. There was nothing to stay. It would appear that the Applicant is labouring under the mistaken belief that the stay order meant that the 1<sup>st</sup> Respondent vacates and/or the 2<sup>nd</sup> Respondent removes the 1<sup>st</sup> Respondent from the premises. My reading of the order of 21.4.17 shows that the Kadhi's Court granted temporary stay of execution of the eviction order pending hearing of the application *interpartes*. It is plausible that it was not brought to the attention of the Kadhi's Court that eviction had already taken place. The order was therefore in my view issued in vain as it was not possible to execute the same. What perhaps the Applicant ought to have sought from the Kadhi's Court was a reinstatement into the premises having been evicted rather than a stay order.

19. The standard of proof in contempt proceedings is well established and though it is higher than proof on a balance of probabilities it is not proof beyond reasonable doubt as that remains in the realm of criminal cases. This is as was held in the case of **Mutitika v Baharini Farm Limited [1985] KLR 229, 234**, where the Court of Appeal stated:

***“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”***

20. In order to be deserving of the orders sought, the Applicant was required to lay before this Court proof beyond a balance of probabilities that the Respondents disobeyed the stay order issued by the Kadhi's Court on 21.4.17. Regrettably this he has not done.

21. In the result, I do not consider that the Applicant has made out a case to warrant the grant of the orders sought. Accordingly the Application dated 10.5.17 is hereby dismissed with costs to the Respondents.

**DATED, SIGNED and DELIVERED in MOMBASA this 16<sup>th</sup> day of June 2017**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the 1<sup>st</sup> Respondent**

..... **for the 1<sup>st</sup> Respondent**

..... **Court Assistant**