



**Ahmed v Ahmed (Miscellaneous Application E048 of 2022)
[2023] KEHC 19489 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E048 OF 2022**

HK CHEMITEI, J

JULY 4, 2023

**IN THE MATTER OF THE ESTATE OF THE LATE ABDULAZIZ
AHMED (DECEASED)**

BETWEEN

FAIZ ABDULAZIZ AHMED APPLICANT

AND

FEISAL ABDULAZIZ AHMED RESPONDENT

RULING

1. The applicants Notice of Motion dated September 21, 2022 prays for the following reliefs;
 - (a) This court does order stay of execution of the orders of Hon J K Tsanuo (Principal Kadhi) issued on August 30, 2022 in Nakuru Kadhis Succession cause no 2 of 2015 and all the consequential orders thereof directed at land registrar Samburu county pending the hearing and determination of the intended appeal.
 - (b) There be stay of execution and judgement by the principal Kadhi dated August 26, 2022 in Nakuru Kadhis court succession cause no 2 of 2015 pending the hearing and determination of the intended appeal.
 - (c) This court be pleased to extend time to file an appeal to this court against the judgement by the honourable Kadhi delivered on August 26, 2022 and August 30, 2022 in the succession cause no 2 of 2015.
 - (d) Costs be provided for and any other relief that the court may deem fit to provide.
2. The application is premised on the grounds on the face of the application and the affidavit of the applicant sworn on September 21, 2022 as well as the further affidavit sworn on November 21, 2022.



3. The applicant's affidavit in support clearly explains the history taken by the matter herein. It is evident that the matter emanated from the Case no 2 of 2015 at Kadhis court at Nakuru. The said court delivered a ruling transmitting the properties to various beneficiaries which the applicant was not comfortable with. The said distribution was obviously in line with the Islamic laws.
4. It is his complain that some of the beneficiaries who included some grandchildren were included in the list of the distribution yet their father died in 2017. The other complain includes part of the properties and the directives given to the land registrar Samburu county.
5. In effect the applicant prays that he be granted leave to file his appeal out of time as the 14 days' delay was due to the lower court delaying in processing the proceedings.
6. The respondent has opposed the application vide a lengthy affidavit sworn on October 19, 2022 in which he has accused the applicant of coming to this court with unclean hands as the court delivered its judgement on June 29, 2015 and the applicants efforts to appeal against the same were unsuccessful.
7. The applicant went ahead to show that the applicant made a similar application vide misc. application no 386 of 2015 but it was dismissed for want of prosecution. The applicant made another attempt vide succession cause no 1 of 2018 but this court dismissed it on July 10, 2019.
8. It is the respondent's case that what was before the honourable Kadhi was effecting the orders and decree of June 29, 2015 and May 30, 2016.
9. The respondent prayed that the application was res judicata and it ought to be dismissed with costs as the applicant has been a great impediment to the estate. That it was the applicant and their house that are enjoying the use and benefit from their father's estate more than all the others.
10. The court directed the parties to file written submissions which they have complied. The applicant basically relied on the provisions of Order 42 rule 6 of the [civil procedure rules](#) and the attendant authorities which the court has perused. He argued that unless stay is not granted the estate shall suffer great loss and the intended appeal shall be rendered nugatory.
11. The respondent as well submitted that the application is not merited for the reasons that the same was hopelessly out of time as it seeks to appeal the 2016 judgement through the back door. That the applicant has used all manner of delaying tactics against the execution of the Kadhis judgement by filing multiplicity of applications which this court has constantly dismissed.
12. He therefore prayed that the applicant should not be allowed to stand in the way of the estate and that in any case he has not brought himself within the grounds laid down in [Butt v. Rent Restriction Tribunal](#) (1982) KLR.

Analysis and determination.

13. The court has perused the application and the rival affidavits as well as the submissions and the respective cited authorities. The grounds for a grant of stay of execution pending appeal are well clearly spelt out under Order 42 rule 4(2) (b) of the [civil procedure rules](#).
14. Before looking at the same it is appropriate to put clearly the history of this matter in a proper perspective. It is evident that the substantive cause was Succession cause no 15 of 2015. The matter proceeded to full hearing and the honourable Kadhi delivered his judgement on June 29, 2015 and a decree followed on May 30, 2016.
15. The applicant made an application seeking to appeal on August 13, 2015 under miscellaneous application no 386 of 2015 which was not prosecuted.



16. Later the applicant made a similar application dated September 14, 2016 which was not prosecuted and it was as well dismissed.
17. The applicant made yet another application similar to this application dated February 22, 2018 vide Succession cause no 1 of 2018 which was dismissed by this court on July 10, 2019.
18. All the above chronology of cases and applications and the results were not controverted by the applicant.
19. It appears that the application that led to the decree dated August 26, 2022 was a follow up of the original judgement of June 29, 2015. In his ruling dated August 26, 2022 the honourable Kadhi stated in his Swahili ruling (uamuzi) that;

“kesi yenyewe, mwanzo ilifunguliwa tarehe 29 01.2015, ikatolewa hukumu tarehe 29.6.2015, na uamuzi tarehe 30.5.2016. ilipelekwa rufaa ni mwenye kujibu maombi mwaka wa 2015 application no. 386 of 2015, iliyo tupiliwa mbali tarehe 26.10.2016 kwa kuto fuatiliwa.”
20. The implication of the above portion of the ruling in Swahili language clearly shows that the court was aware that it was dealing with an application emanating from the original decree and judgement. In this regard therefore I agree with the respondent that all that the applicant is asking this court is to extend leave to file appeal out of time in respect to the original judgement though disguised as the ruling of August 26, 2022.
21. In that regard this court has already pronounced itself when it dismissed similar applications alluded to above. In any case if the ruling of August 26, 2022 was a follow up of the original 2015 decision then the best way if at all the court err in its interpretation of the distribution of the estate was to go back and seek a review of the same but not to file the current application.
22. To allow the application herein is to allow the applicant challenge the ruling which was essentially a follow up of the original judgement. In any event the same is hopelessly late and the applicant has not given explanation of the applications which he filed and abandoned without prosecuting them.
23. In short the application before this court is a mere delay of the judgement of the Kadhis court and I find the same vexatious and abuse of the court process. Let the applicant seek a review of the original judgement if indeed the Kadhis court introduced other external matters that ran contrary to the decision made on June 29, 2015 and May 30, 2016.
24. The application is otherwise dismissed with costs to the respondent.

Dated signed and delivered via video link at Nakuru this 4th day of July, 2022.

H. K. CHEMITEI

JUDGE

