HLDO v TFDO (Appeal E065 of 2022)
[2023] KEHC 380 (KLR) (Family) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 380 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

APPEAL E065 OF 2022

MA ODERO, J

JANUARY 27, 2023

BETWEEN

HLDO ..... APPLICANT

AND

TFDO ..... RESPONDENT

RULING

1. Before this Court is the Notice of Motion (undated) by which the Applicant HLDO seeks the following orders:-

> " 1. Spent
>
> 2. That this Honourable court be pleased to grant the Applicant leave to file an appeal against the judgment of Hon. A.N. Makau of 18th May 2022 in Divorce Cause No. 954 of 2018 - HL – DO v TFDO out of time.
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> 3. That this Honourable court be pleased to deem the Memorandum of Appeal filed herein as duly filed.
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> 4. Spent
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> 5. That the Honourable court be pleased to stay the execution of the orders of the court Hon A.N. Makau issued on 18th May 2022 pending the hearing and determination of the intended appeal filed against the said orders.
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> 6. That the costs of this application be provided for."

2. The application which was premised upon order 5 Rule 2(2) of the *Civil Procedure Rules* was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent TFDO opposed the Application through the Replying Affidavit dated 11th September 2022. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 11th October 2022 whilst the Respondent relied upon his written submissions dated 25th October 2022.

Background

4. The Applicant and the Respondent were a couple who solemnized their marriage on 29th January 1996 in New York city, USA. The couple cohabitated as man and wife in New York City until August 1999 when they relocated to Kenya. Their union was blessed with two (2) daughters –

   (i) HDO born on 4th August 2000

   (ii) MDO born on 24th October 2002

5. The Applicant herein filed in the Magistrates court a Petition dated 16th November 2018 in which she made the following prayers:-

   "(a) That there be a dissolution of the marriage herein.

   (b) That the Respondent does provide reasonable alimony to the Petitioner.

   (c) That the Respondent be condemned to pay costs of these proceedings.

   (d) That such other order be made as this Honourable court may deem fit."

6. The Divorce petition was heard in the lower court. Vide a judgment delivered on 18th May 2022 Hon A.N. Makau Principal Magistrate allowed the Petition for Divorce but dismissed the prayer for Alimony (maintenance). Being aggrieved by the decision of the trial court the Applicant sought to file an appeal out of time.

7. In explaining the failure to file an appeal within the time stipulated by law the Applicant explained that she was away on a trip to Ethiopia when the judgment was delivered. That due to the situation in Ethiopia she was unable to contact her advocate to give him instructions in filing the appeal.

8. The Applicant argues that she stands to suffer prejudice if the orders of the trial court are not stayed as she is not in any gainful employment.

9. The Respondent on his part averred that the application has been brought under the wrong provision of law. He stated that the Applicant has not advanced sufficient reasons for her failure to file the appeal within the statutory timelines. That there was no positive order made by the trial court thus there was nothing to stay. The Respondent urged the court to dismiss the application with costs.

Analysis and Determination

10. I have considered the application before this court, the Replying Affidavit filed by the Respondent as well as the written submissions filed by both parties.

11. The Respondent had submitted that the applicant as filed was incompetent as the same was stated to be Order 5 Rule 2(2) of the *Civil Procedure Rules* 2010 which deals not with extension of time but rather with issue and renewal of summons to enter appearance.

12. Whilst the Respondent is correct that the wrong provision of law was cited I do not find that this renders the entire application incompetent. It is clear from the application what orders are being sought. Furthermore, Article 159 (d) of the *Constitution* of Kenya 2010 exhorts courts to administer substantive justice "without undue regard to procedural technicalities".

13. The Applicant has prayed for an extension of time within which to file her appeal. Section 79 G of the *Civil Procedure Act* sets out the timelines for filing an appeal as follows:-

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order provided that an appeal may be filed out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time." (Own emphasis)

14. In this matter the trial court delivered its judgement on 18th May 2022. The Applicant did not file a Memorandum of Appeal until 15th July 2022 which was 58 days after the judgement had been delivered. This is way beyond the thirty (30) day period provided for in law.

15. Section 79G does contain a proviso that the court may in its discretion extend the period of time within which an appeal may be filed subject to the Applicant advancing sufficient cause for failing to file the appeal within the statutory period.

16. In *Nicholas Kiptoo Korir Arap Salatt v IEBC & 7 others* the Supreme Court of Kenya set down the principle which are to be considered in allowing an extension of time to file appeal as follows:-

> " The under-lying principles that a Court should consider in exercise of such discretion include-
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> 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
> 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
> 6. Whether the application has been brought without undue delay:
> 7. ....."

17. The parameters for the exercise of a court's discretion were concisely laid out in the case of *Mwangi v Kenya Airways Ltd* [2003] eKLR where the Court of Appeal stated as follows: -

> " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionally. It is also well settled that in general matters which this court

takes into account in deciding whether or not to grant an extension of time are; first, the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted."

18. In this case the delay in filing the appeal is over sixty (60) days. In my view, this is not an inordinate delay.

19. The Applicant in explaining the delay stated that she was out of the country when the judgment was delivered. That she was unable to reach her advocate in order to give him instructions on filing of the Appeal.

20. These reasons advanced by the Applicant are not in my view persuasive. The facts that the Applicant was in Ethiopia on the date the judgment was delivered does not mean that she had no way of knowing the contents of the judgment. Likewise, the fact that the Applicant was outside of Kenya did not prevent her from issuing instructions to her Advocate regarding the filing an appeal.

21. We live a digital age. The judgement would have been available to the Applicant at the click of a button. Proceedings in the court in Kenya are now conducted virtually. The Applicant could log in from wherever she was in the world and follow the proceedings.

22. Further the Applicant does not need to be in Kenya in order to issue instructions to her Advocate. She could have very easily communicated with her Advocate by e-mail, skype, phone call or WhatsApp which services I am sure are available in Ethiopia.

23. The Applicant states that due to the 'situation in Ethiopia' she was unable to communicate with her lawyer. The Applicant did not elaborate on exactly what the 'situation' was. I reject the reasons advanced by the Applicant as 'mere excuses'. The Applicant had ample opportunity to contact her Advocate to file the appeal within the thirty (30) days period but failed to do so. This application is a mere afterthought. The Applicant was simply indolent. Therefore this court is not inclined to exercise its discretion in favour of the Applicant.

(ii) Stay of Execution

24. The Applicant has sought a stay of execution of the judgment of the trial court. In that judgment the magistrate allowed the Petition for divorce but dismissed the applicant's prayer for alimony. The Applicant has no issue with the divorce. However, she is aggrieved by the trial courts dismissal of her prayer for alimony arguing that the said dismissal is prejudicial as she has no means to sustain herself.

25. In dismissing the prayer for alimony the trial court made a 'negative order'. No orders were made which were capable of execution by either party. Where such a negative order has been made then there exists no order capable of being stayed.

26. In *Western College of Arts And Applied Sciences v Oranga & others* [1976-80] I KLR the Court of Appeal for Eastern Africa held as follows:-

> " But what is there to be executed under the judgment, the subject of the intended appeal". The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in an application for stay, it is so ordered." (own emphasis)

27. In *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya)* [2015] eKLR the Court of Appeal (Kantai J.A.) held as follows:-

> " An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with. See, for this general proposition the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation* (Civil Appeal No. 13 of 1984) where it was stated: -
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> ".....an order for stay of execution must be intended to serve a purpose ....." (Emphasis supplied)

28. Further, in the more recent case of *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR, the Court of Appeal expounded on stay of execution stating:-

> " 16. In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:
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> "The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & Others* [1976] KLR 63 at page 66 paragraph C)." (own emphasis)

29. The same reasoning was applied in the case of *Raymond M. Omboga v Austine Pyan Maranga* (Supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the court had to say on the matter:-

> " The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise..." (own emphasis)

30. The dismissal by the trial court of the prayer for alimony is not an order capable of execution. The Respondent was not as a result of that order required to do or to refrain from doing any act. There is therefore nothing to stay.

31. Finally I find no merit in this application. The application is hereby dismissed in its entirety. Each party shall bear its own costs.

DATED IN NAIROBI THIS 27TH DAY OF JANUARY, 2023.

MAUREEN A. ODERO

JUDGE