



**KOS v FAS (Family Appeal E133 of 2021)  
[2023] KEHC 127 (KLR) (Family) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 127 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**FAMILY APPEAL E133 OF 2021**

**MA ODERO, J**

**JANUARY 20, 2023**

**BETWEEN**

**KOS ..... APPLICANT**

**AND**

**FAS ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Notice of Motion dated November 16, 2021 by which the Applicant KOS seeks the following orders:-

1. Spent
2. Spent
3. There be an order of stay of execution issued with respect to the judgment and decree entered against the Applicant on October 8, 2021 in KCDC Cause No E073 of 2021 - FAS pending the inter partes hearing and determination of this appeal.
4. The Applicant herein be and is hereby granted leave to file a Memorandum of Appeal out of time against the whole judgment and decree in in KCDC Cause No E073 of 2021 - FAS of the Hon Deputy Chief Kadhi SH Omar, delivered on October 8, 2021 at Nairobi.
5. The Applicant herein be and is hereby granted leave to file and serve the Record of Appeal out of time.



6. This Honourable court be pleased to make such further orders to meet the ends of justice.
  7. The costs of this application be in the cause.'
2. The Application which was premised upon order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#), Sections 1A, 1B and 3A, 65 (1) (c), 79G and 87 of the [Civil Procedure Act](#) and all other enabling provisions of law was supported by the Affidavit of even date sworn by Mwanaidi M Rama an Advocate of the High Court of Kenya.
  3. The Respondent FAS opposed the application through her Replying Affidavit dated March 22, 2022.
  4. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated June 2, 2022 whilst the Respondent relied upon her written submissions dated June 22, 2022.

### **Background**

5. The Applicant and the Respondent were a couple who got married on December 22, 2006 under Islamic Law. The Respondent filed a suit in the Kadhi Court being KCDC No E073 of 2021 seeking dissolution of the marriage and arrears of maintenance.
6. On October 8, 2021 the Hon Deputy Chief Kadhi H Omar delivered his judgment in which the following orders were made:-
  - ' 1. That by consent the marriage between the parties is hereby dissolved and divorce certificate to issue.
  2. That the Respondent to pay the Petitioner Kshs 248,800/- being the money he borrowed from her payable within three months.
  3. That the Respondent to pay the Petitioner Kshs 2,400,000 being her monthly maintenance of the last 120 months payable within 48 months.'
7. Being aggrieved by this judgment the Applicant now seeks leave to file a Memorandum of Appeal out of time. The Applicant also seeks a stay of execution of said judgment pending the hearing and determination of his appeal.
8. As stated earlier the application was opposed. The Respondent submits that the Applicant has not met the required threshold for stay. She avers that the jurisdiction of the Kadhi Court was admitted by both parties and that the Applicant admitted owing her the monies in questions. The Respondent urges this court to dismiss the application in its entirety.

### **Analysis and Determination**

9. I have carefully considered the application before this court, the Reply filed thereto as well as the written submissions filed by both parties.
10. The Applicant has sought for leave to file the appeal out of time. Section 79G of the [Civil Procedure Act](#) provides 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



any time 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 admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.'

11. The judgment in this matter was delivered on October 8, 2021. As such the appeal ought to have been filed on or about November 8, 2021. The Memorandum of Appeal as well as the instant application were not filed until November 16, 2021 being close to forty-five (45) days after delivery of the judgment.
12. The Applicant has explained the delay and attributed said delay to the failure of the Kadhi Court to provide him with certified copies of the proceedings and judgment in time.
13. It was averred by counsel for the Applicant that they wrote to the Kadhi Court on October 12, 2021 requesting certified copies of the proceedings and judgment. A copy of said letter is annexed to the Supporting Affidavit (Annexure MMR '4').
14. No response was forthcoming and so the Applicants Advocate wrote a second letter dated November 11, 2021 (Annexure MMR-'5') reminding the Kadhi Court to provide them with the proceedings and judgment.
15. In the circumstances the Applicant cannot be said to have been indolent in filing the Appeal. The delay cannot be attributed to the Applicant who did all that could be expected to obtain certified copies of the proceedings and judgment.
16. In the case of *County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR* the Supreme Court of Kenya stated as follows:-

' The issue of delay of typed proceedings is well known in our legal system and on this basis; this Court has previously extended time and held that such a delay is not on part of the party but the court and that this issue consists of facts beyond a party's reach. In *Hassan Nyanje Charo v Khatib Mwashetani and 3 Others, eKLR [2014]* this Court stated:

Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail.

Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not.'

17. The Applicant was only supplied with the certified copy of the proceedings on November 15, 2021. The very next day the present application was filed. I find that the application was filed in a timely manner. The Applicant cannot be blamed for the failure to file the appeal within the thirty (30) days stipulated by law. I therefore grant the Applicant leave to file his appeal out to time.
18. The Applicant has prayed to have the judgment delivered by the Kadhi Court stayed pending the hearing and determination of his appeal.
19. Order 42 Rule 6 (2) of the Civil Procedure Rules provides for guiding principles that one must satisfy before the court can grant a stay of execution, it provides as follows:-

' No order for stay of execution shall be made under subrule (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.'
20. It is appreciated that stay of execution is a discretionary power however the court in setting out the guidelines for granting a stay, stated in the case of [Butt - vs - Restriction Tribunal \[1979\] eKLR](#) as follows:-
- ' 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.'
21. In the case of [Loice Khachendi Onyango v Alex Inyangi & another \[2017\] eKLR](#) it was stated:-
- ' The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly 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.'
22. As stated earlier the certified proceedings in this matter were not received by the Applicant until November 15, 2021. The present application was then filed on November 16, 2021. I find that the application was filed without undue delay.
23. The Kadhi Court ordered the Applicant to make a payment in excess of Kshs 2,400,000 to the Respondent. The Applicant submits that he stands to suffer substantial loss if the orders of stay are not granted as his appeal would be rendered nugatory. The Applicant further submits that if this amount is paid out to the Respondent who is unemployed then the likelihood of his recovering the money should the appeal succeed is remote.
24. In the case of [Kenyan Shell Limited - Vs - Kibiru \[1986\] KLR](#) it was held thus:-
- ' If there is evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is



the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.'

25. The court here has to strike a balance between the rights of the Respondent to enjoy the fruit of her judgment and the Applicants right not to have his appeal rendered nugatory. As a general rule the party seeking a stay must offer security for due performance of the orders. In *Gianfranco Manentbi & Another v African Merchant Assurance Company Ltd [2019] eKLR*, Hon Justice Nyakundi stated as follows:-

' The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.'

26. In *Focin Motorcycle Co Limited v Ann Wambui Wangui & another [2018] eKLR*, the Court of held:-

' Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.'

27. The Applicant has submitted that he is ready and willing to execute such security as the court may deem fit. In the premises I do grant a stay of execution Subject To the Applicant depositing security in the amount of Kshs 1.0 million (one million only).
28. Finally I allow the Notice of Motion dated November 16, 2021 and make the following orders:-
- (1) Leave is hereby granted to the Applicant to file appeal out of time. The Appeal to be filed and served within twenty (20) days of the date of this Ruling.
  - (2) A stay of execution to issue with respect to the judgment and decree entered against the Applicant on October 8, 2021 in KCDC No E073 of 2021 pending the hearing and determination of the Appeal

### **Subject To**

The Applicant depositing security in the amount of Kshs 1.0 million within thirty (30) days.

- (3) The above mentioned security to be deposited into a joint interest earning account opened in the names of counsel for both parties with a reputable bank.
- (4) In the event of failure to comply with orders (3) and (4) above the stay will automatically lapse with no further reference to the Applicant.
- (5) Each party to meet its own costs for the application.

**DATED IN NAIROBI THIS 20TH DAY OF JANUARY, 2023.**

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**MAUREEN A. ODERO**



**JUDGE**

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