



KAM v AE (Civil Appeal E001 of 2023) [2023] KEHC 24198 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E001 OF 2023
M THANDE, J
OCTOBER 27, 2023**

BETWEEN

KAM APPLICANT

AND

AE RESPONDENT

RULING

1. By a Notice of Motion dated 19.1.23, the Applicant seeks stay of execution of the judgement delivered on 7.12.22 in Garsen KCDC No. E022 of 2022, pending hearing and determination of the appeal filed herein. The Application is supported by the grounds on its face, the supporting affidavit of the Appellant/Applicant sworn on even date.
2. The grounds upon which the Application is premised are that the Appellant/Applicant is dissatisfied with the court's decision that she refunds to the Respondent, the sum of Kshs. 47,000/= . The Appellant/has filed an appeal against the same which she says is s good and arguable with high chances of success. She averred that the Respondent has commenced execution and has issued a notice to show cause upon the Appellant/Applicant scheduled for 20.1.23. If execution is not stayed the appeal will be rendered nugatory. She further averred that the matter in question is about marital benefits compensation and if the orders sought herein are granted, the Respondent will not suffer any harm. Interim orders of stay were granted on 23.1.23.
3. The Respondent opposed the Application vide a replying affidavit sworn on 6.2.23. He stated that the appeal was allowed after the lapse of 30 days which is contrary to the law; that judgement was delivered on 7.12.22 and appeal filed on 19.1.23. He deposed that the Appellant/Applicant ought to have paid to the Respondent, the amount of Kshs. 47,000/= and 2 cows within the stipulated time of 30 days but has instead filed an appeal with a view to delaying justice. Further that the judgment is purely religious and based on Islamic law and therefore there is no heavy case to be argued. He further stated that the continuation of this case will cause him to suffer and affect him psychologically and depress



him. He contended that there are no valid grounds for appeal and urged the court to quash the stay orders granted on 23.1.23 and dismiss the Application.

4. The jurisdiction of the court to grant stay of execution is set out in order 42 rule 6 of the *Civil Procedure Rules*. Sub-rule 2 provides:

(2) 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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

5. The law requires that an application for stay of execution be filed without unreasonable delay. In the instant case, the decision of the lower court by which the Applicant is aggrieved, was made on 7.12.22 while the Application is dated 19.1.23 and filed on 20.1.23 which is within reasonable time. The Application seeks stay pending appeal. Notably, although dated 6.1.23 the appeal was filed on 19.1.23.

6. Section 79G of the *Civil Procedure Act* provides for the time for filing appeals from subordinate courts 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. (emphasis).

7. The law requires that an appeal from a subordinate court to this Court be filed within 30 days from the date of the decree or order appealed against. This requirement is couched in mandatory terms. The period required for the preparation and delivery to an appellant of a copy of the decree or order is excluded and only upon the lower court so certifying. A party who is caught up with delay in filing an appeal may apply for his appeal to be admitted out of time. For the court to admit an appeal out of time, it must be satisfied that there is good and sufficient reason for the delay.

8. As indicated earlier, the decision appealed against was made on 7.12.22 while the appeal herein was filed on 19.1.23, which is 12 days after the period stipulated for filing an appeal in this Court, from a subordinate court. In light of this, the Applicant ought to have filed an application pursuant to the proviso to section 79G for the appeal to be admitted out of time, before or even as she sought stay of execution. As matters stand, the appeal herein upon which the Application can be anchored is defective. Indeed, there is no appeal before me. To allow the Application for stay of execution pending a non-existent appeal, would be to grant stay orders in a vacuum.

9. In this regard, I associate with the sentiments expressed by Odunga, J. (as he then was) who in the case of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR, stated:

34. I am therefore not satisfied that the contumelious delay or default on the part of the applicant has been satisfactorily explained. As the applicant has failed in satisfying the first ground for extension or enlargement of time to file an appeal out of time, this application must fail and without an order extending time the stay cannot be granted in vacuum.



10. The Applicant seeks one prayer from the Court, which is that it stays the execution of the judgment in question pending the hearing and determination of the appeal. She has however not sought to regularize the appeal, by way of applying for enlargement of time. Having found that there is no appeal upon which the Application can be anchored, the same is found to be incompetent and must fail. Accordingly, the Application dated 19.1.23 is struck out. The circumstances herein do not call for an award of costs.

DATED, SIGNED and DELIVERED in MALINDI this 27th day of October 2023

M. THANDE

JUDGE

In the presence of: -

.....for the Appellant/Applicant

..... for the Respondent

..... Court Assistant

