



REPUBLIC OF KENYA



GJG v HG (Civil Appeal 122 of 2023) [2023] KEHC 27206 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 122 OF 2023
EM MURIITHI, J
DECEMBER 18, 2023**

BETWEEN

GJG APPELLANT

AND

HG RESPONDENT

*(Being an Appeal against the entire Judgment of the Senior Resident
Kadhi at Isiolo (Hon. Gavava A. Mohamed - SRM) made and
delivered on 25th July 2023 in Matrimonial Case No. E013 of 2022)*

RULING

Applications

1. This is a ruling on an application dated 7/8/2023 for stay of execution of the judgment of Senior Resident Kadhi at Isiolo (Hon. Gavava Mohamed) in Isiolo Matrimonial case NO. E013 of 2023 delivered on 25/7/2023.
2. The application dated 7/8/2023 sought the following specific orders:
 - “ 1. spent
 2. spent.
 3. That this Honourable Court be pleased to issue an order for stay of execution of the judgment and order made by the Senior Resident Kadhi at Isiolo in Matrimonial Case No. E013 of 2012 pending the hearing and determination of the Appeal herein.
 4. That this Honourable Court be pleased to issue such further Orders as it may deem fit under the circumstances of this case.



5. That the costs of this application be costs in the cause.”

3. The grounds of the application as set out in the application as follows:

- “(a) The Appellant/Applicant is aggrieved by the decision and Judgment of the court made in Senior Resident Kadhi at Isiolo in Matrimonial Case No. E013 of 2012 and has filed the Appeal against the said decision.
- (b) The said Appeal is well grounded and has high chances of success.
- (c) The appeal will be rendered nugatory unless an order for stay of execution and/or implementation or enforcement of the said decision, judgment and decree is made herein.
- (d) The respondent is seeking to attach more than half of the Applicant’s salary to enforce the judgment against the Appellant.
- (e) That unless an order for stay of execution of the said order is made, the Respondent will proceed to execute the order and the appellant will suffer irreparable loss and damage.
- (f) This Application is made in utmost good faith and the same has been brought to the court without undue delay and the orders being sought for, if granted will not in any way prejudice the Respondent’s case since, he is in occupation of the suit property.”

4. The applicant’s Memorandum of Appeal dated 27/7/2023 is as follows:

“Memorandum Of Appeal

The Appellant, being dissatisfied with the Judgment delivered by the Hon. Gavava A. Mohamed - SRM at Isiolo Kadhi’s Court on the 25th day of July, 2023 hereby Appeals to the High Court against the entire Judgment on the following grounds:-

1. That the Learned Kadhi erred in Law and fact in entertaining and purporting to adjudicate a claim relating to custody and maintenance of Children, which does not fall under the jurisdiction of his Court as the claim has no bearing whatsoever to Islamic Law and/or rights enforceable thereunder.
2. That the Learned Kadhi erred in Law and fact in presiding over a case involving Children while not being duly gazetted pursuant to Section 90(2) of the *Children’s Act* No. 29 of 2022.
3. That the Learned Kadhi erred in Law and fact in failing to take *viva voce* evidence from the Parties in this proceedings before delivering his erratic Judgment.
4. That the Learned Kadhi erred in Law and fact in ordering the Appellant to be paying a colossal amount of Kshs. 60,000/= per month as accommodation and maintenance for the Children albeit parental responsibility ought to be equally shared by the Parents.



5. That the Learned Kadhi erred in Law and fact in failing to take cognizance That three (3) out of the five (5) Children of the Parties hereof, are adults and can and ought to fend for themselves.

Reasons Wherefore the Appellant prays That the Appeal be allowed and the Trial Court's Judgment and decree given on 25/07/2023 be set aside with costs to him.”

5. The applicant counsel filed written submissions dated 24/10/2023 emphasizing the risk of substantial loss if application for attachment of salary sought by the respondent in execution of the decree were granted. Despite service, the respondent did not attend court or file any response to the application.
6. Having regard to the Memorandum of Appeal herein raising the question of jurisdiction of the Kadhi's Court over children matters and the authority of the particular judicial officer under the *Children Act*, it cannot be said That the appeal is frivolous. There is an arguable case, which need not be a case That must eventually succeed, to warrant an order for stay of execution pending hearing of the appeal.
7. In balancing the interests of the successful respondent and those of the applicant judgment debtor, the court shall and noting That it is a matter for maintenance of children (the applicant concedes That some of them are minors) require That applicant to pay for their continuous upkeep approximately 1/3 of the decretal sum (as at the time of the application for stay on 4/10/2023 as shown on the application for execution of decree) at Ksh.50,000/- within the next 30 days.
8. The court does not consider That payment of 1/3 of the decretal sum to the respondent exposes the applicant to a substantial loss which cannot be recovered in the event of a successful appeal. In other words, the court does not find That the appeal may be rendered nugatory by payment of 1/3 of the decretal sum in the meantime pending hearing and determination of the appeal.

Orders

9. Accordingly, for the reasons set out above, the court grants the application dated 7/8/2023 for stay of execution pending appeal on conditions set out below:
 1. The applicant shall pay to the respondent the sum of Ksh.50,000/- within thirty (30) days.
 2. In default of the terms of stay herein, the stay of execution shall lapse and be of no effect.
 3. As usual with children matter the appeal shall be expedited to hearing and the applicant is required to file the Record of Appeal within thirty (30) days
 4. Costs in the cause.
10. Mention for directions on appeal on 30/1/2024.

Order accordingly.

DATED AND DELIVERED ON THIS 18TH DAY OF DECEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kitheka for the appellant.

