



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. E098 OF 2021**  
**PNO.....APPELLANT**  
**VERSUS**  
**MAO .....RESPONDENT**  
**RULING**

1. Before this Court is the Notice of Motion dated **10<sup>th</sup> September 2021** by which the Appellant **PNO** seeks the following orders:-

**i. Spent**

**ii. That an interlocutory injunction does issue against the respondents staying proceedings at the lower court pending the hearing and determination of the application in the first instance and thereafter pending the hearing and determination of the appeal.**

**iii. That costs of this application be provided for.”**

2. The application was premised upon **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Cap 21**, Laws of Kenya, **Order 42 Rule 6** of the **Civil Procedure Rules 2010** together with all other enabling provisions of the law and was supported by the affidavit of even date sworn by the Applicant.

3. The Respondent **MAO** opposed the application through the Replying Affidavit dated **8<sup>th</sup> October 2021**. The application was canvassed by way of written submissions. The Applicant filed written submissions dated **15<sup>th</sup> October 2021** whilst the Respondent relied upon her written submissions dated **22<sup>nd</sup> October 2021**.

#### **BACKGROUND**

4. The Respondent herein filed in the lower court a Petition for Dissolution of Marriage dated **4<sup>th</sup> September 2020** vide **Divorce Cause No. 1092 of 2020**. The Respondent then filed the application dated **15<sup>th</sup> April 2021** seeking to have the pleadings in the cause certified and to have the case listed for hearing.

5. The Appellant objected to the listing of the Divorce Cause for hearing and instead filed an application dated **18<sup>th</sup> June 2021** to have the matter referred to Mediation. The Respondent opposed any referral to mediation. The lower court heard the matter and delivered a Ruling on **27<sup>th</sup> June 2021** disallowing the Applicants plea for referral to mediation. Being dissatisfied by that Ruling the applicants filed a Memorandum of Appeal dated **10<sup>th</sup> September 2021** together with the present application seeking a stay of proceedings pending the hearing and determination of the appeal.

6. As stated earlier the Respondent opposed any stay of proceedings.

#### **ANALYSIS AND DETERMINATION**

7. I have carefully considered the present application, the Replying Affidavit filed by the Respondent as well as the written submissions filed

by both parties.

8. **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** sets out the conditions that must be met by a party seeking stay pending appeal. The Applicant must satisfy the court firstly, that the application for stay has been filed within a reasonable time and secondly, that unless stay of execution is granted the applicant is likely to suffer substantial loss.

9. In this case the Ruling of the lower court was delivered on **27<sup>th</sup> August 2021**. The application for stay is dated **10<sup>th</sup> September 2021**. It was filed less than **one (1)** month after the Ruling in question was delivered. I am satisfied that the current application was filed in a timeous manner.

10. It is not the duty of this court to determine the merits or otherwise of the intended appeal, however the court must determine whether the said Appeal is arguable.

11. The Applicant is aggrieved by the decision of the trial court not to refer the dispute to mediation. The court is mindful of the provisions of **Article. 159(2)(a)** of the **Constitution of Kenya 2010**, which exhorts courts to promote alternative forms of dispute resolution Mediation is one such method of **ADR**.

12. However, it goes without saying that mediation is a voluntary process which requires the good will of both parties to succeed. It was manifest from the record that the Respondent was not willing to participate in any mediation process. It would therefore be an exercise in futility and a waste of time to refer the matter to mediation.

13. Mediation is a process which requires the good will and participation of both parties if it is to yield results. Just as one cannot be compelled to remain a marital union against ones will, one cannot be forced to subject oneself to the mediation process.

14. Given the circumstances of this case I am not persuaded that the Appellant has an arguable appeal.

15. In the circumstances, I find no merit in granting the stay requested for. Accordingly, the notice of motion dated **10<sup>th</sup> September 2021** is dismissed in its entirety. This being a family matter each party shall bear its own costs.

**DATED IN NAIROBI THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022**

.....

**MAUREEN A. ODERO**

**JUDGE**