



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. E032 OF 2021

SVKK.....APPLICANT

VERSUS

ANC.....RESPONDENT

(Being an appeal from the judgment of the Kadhi's Court delivered virtually on 6th April 2021

KDC 66 of 2020 at Nairobi by Hon. Senior Resident Magistrate Kadhi T.W. Karanja)

RULING

1. The applicant SVKK and the respondent ANC got married under Islamic law on 16th November 2019. On 19th May 2020, following request from the respondent, the applicant granted her three “*talaks*”. The respondent followed this by filing a petition for divorce at the Kadhi's Court at Nairobi. The petition was dated 8th June 2020. She sought the dissolution of the marriage on grounds of cruelty, desertion and the applicant's failure to provide for her financially. In the petition she sought a total of Kshs.1,212,000/= as follows:-

- (a) Kshs.772,000/= being rent, electricity, water, house help and grocery bills that the applicant did not pay for the six months that they were married;
- (b) Kshs.340,000/= that the respondent borrowed from her which he did not refund; and
- (c) Kshs.100,000/= being unpaid dowry.

She then claimed Kshs.386,000/= for the three months *iddat* she was forced to observe following the divorce.

2. The applicant filed a defence to oppose the petition which he wanted dismissed with costs.

3. The Kadhi heard the dispute. In a judgment delivered on 6th April 2021 he made the following orders:-

- a) the informal divorce between the respondent and the applicant issued on 19th May 2020 be registered;
- b) a divorce certificate be issued;
- c) the applicant to pay the Kshs.340,000/= advanced to him by the respondent during the marriage, Kshs.180,000/= being past maintenance during the marriage, and Kshs.100,000/= being the unpaid dowry; and
- d) the applicant to pay *iddat* maintenance for 3 months, being Kshs.90,000/=.

4. The applicant was aggrieved by the judgment and its orders and filed an appeal to this court. He sought the reversal and setting aside of the decision. With the appeal, he filed the present application dated 15th April 2021 seeking the stay of execution of the orders in the judgment pending the hearing and determination of the appeal. The application was supported by grounds and supporting affidavit sworn by

him. The application was opposed by the respondent through her replying affidavit sworn on 19th May 2021.

5. The application was substantially brought under **Order 42 rule 6(2)** of the **Civil Procedure Rules** which provides that:-

“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.”

6. I consider that by the time of the petition the applicant had divorced the respondent by pronouncing “*talak*”. The marriage had ended. The order of divorce in the judgment only formalised what had happened. To request for stay of the order of divorce would not make sense if the parties are already divorced under Islamic law.

7. The major complaint by the applicant is in regard to the money that the court ordered him to pay to the respondent. Indeed, in the grounds and the supporting affidavit he stated that the learned Kadhi’s order that he pays her Kshs.780,000/= had placed a heavy financial burden on him, so that, if the order is not stayed, he will suffer substantial loss. His case was that the Kadhi’s court had been turned into a civil court and made orders of payment when it did not have the jurisdiction to do so. He further complained that, in ordering the payments, the court had not considered his financial means. Had it considered, he said, it would have found that he was not able to satisfy the claim.

8. Basically, therefore, the applicant has to demonstrate that if the stay is not granted he will suffer substantial loss.

9. In dealing with the application, I bear in mind that whereas the applicant is entitled to appeal the decision that has aggrieved him, the respondent has a judgment that she is entitled to execute. The court has to balance these competing claims and make a decision, while ensuring that the appeal, if successful, will not be rendered nugatory.

10. The court is dealing with what is essentially a money decree. The sum in the decree is Kshs.780,000/=. The applicant has to demonstrate substantial loss by showing that, if stay is not granted and he pays the money to the respondent and the appeal ultimately succeeds, he will not be able to recover the same from the respondent owing to the fact that she will not be in a position to refund the same. Indeed, in **Nyamu Kimani –v- Lawrence Mburu Muthiga [2006]eKLR** it was observed that an applicant demonstrates substantial loss by showing that the respondent is not a person of means and that payment of the decretal sum prior to hearing and determination of the appeal would put the amount beyond the reach of the applicant, if the appeal succeeds. The applicant did not demonstrate this.

11. The applicant did not propose to provide security for the due performance of the decree that may ultimately be binding upon him, but stated in the application that he was ready and willing to abide by such terms as the court may deem just and expedient to make while granting stay. Considering that this is a marital dispute, and not a commercial dispute, I grant stay on condition that the applicant deposits into court Kshs.300,000/= within 30 days to await the hearing and determination of the appeal. If the money is not deposited, execution shall proceed before the Kadhi’s Court.

12. The applicant has been indulged. He will pay the costs of the application.

DATED and SIGNED this.....day of MARCH 2022

A.O. MUCHELULE

JUDGE

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF MARCH 2022

A.O. MUCHELULE

JUDGE