



**Mbarak v Abubakarabdulkarim (Civil Appeal 001 of 2021)
[2022] KEHC 238 (KLR) (24 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 001 OF 2021
MW MUIGAI, J
MARCH 24, 2022**

BETWEEN

YUNUS SHEE MBARAK APPLICANT

AND

WAHIDA ABUBAKARABDULKARIM RESPONDENT

RULING

1. Vide Application dated the 21st of January 2021 under section 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, the Applicant seeks the following orders;
 - a. Spent.
 - b. That there be stay of execution of the judgement entered by the Hon. Kadhi's Court at Machakos on the 10th December 2020 pending the hearing and determination of the Appeal.
 - c. Costs.
2. The Application is supported by the affidavit of Yunus Shee Mbarak deposed on 21st of January 2021 in which he contends that the Kadhi's court had jurisdiction to hear and determine the dispute between the Respondent and himself contrary to Section 15 of the [Civil Procedure Act](#) as he alleged they are strangers to Machakos. Further, that he was ignorant of the existence of Civil case number KCDC E06 of 2020 until the Respondent and the policemen went to their home to collect items that we rein the house which act he terms as 'mob justice'.
3. He claims to be shocked by the order of dissolution of the marriage as well as the copy of the divorce certificate as he alleges never to have been served with any document in any court proceeding and therefor his right to fair hearing had been infringed. He contends that violation of due process was violated by not notifying the Mombasa Kadhi's Court of the execution of the judgement dated 10th December 2020 in Civil case number KCDC E06 of 2020, 30days of Appeal had not lapsed when



enforcing the order and that he is yet to be served with a notice to show cause regarding execution of the said judgement. He opines that his appeal has a high chance of success and thus the orders sought should be granted.

Respondent's Replying Affidavit

4. The Respondent filed a Replying Affidavit dated 31st January 2022 in which she opined that the application is mischievous, a 'mere red herring' and devoid of merit for reasons that they got married on 23rd of March 2018 and the Applicant is yet to pay her dowry of Kshs. 20,000. She contended that she lived and worked for gain in Machakos and only returned to Mombasa after the novel pandemic. That due to the violent acts, vulgar language directed towards her, care-free life of the Applicant not wanting to provide for the family or look for employment in the two and a half years of their marriage, she decided to get a divorce. She stated that the objectives of the marriage could not be realized in that marriage and/or relationship.
5. The Respondent contended that the grounds for divorce satisfied the Faskh Principles and the trial court having found that the Applicant could not provide for his wife for over 6 months found that he had negated his duties and using its discretion, dissolved the union. Further, that no prejudice would be suffered if the Respondent took her personal effects and belongings.
6. Parties agreed to dispose of the matter by way of written submissions and as I write this judgement, only the Applicant has filed his submissions.

Appellant's Submissions

7. The Appellant filed submissions on 4th of November 2021 in which counsel submitted while making reference to Order 42 Rule 6 Civil Procedure Rules 2010 that the decree was not for payment of money or performance of and contract or otherwise and therefore not applicable. He submitted that he will suffer prejudice if the Respondent carries household appliances like sofa sets, TV Set, cooking utensils, cupboard among other things. He submitted that some of the items were acquired jointly and others by the Applicant and that he will be disentitled to his share of the household goods if the divorce is heard on merit and granted and lastly that he will be disadvantaged as he will not be left with anything to use in the house.
8. He contended that he had an arguable appeal as he was never served with the pleadings or hearing date and was thus condemned unheard contrary to Article 50 of *the Constitution*.
9. While referring to the case of *Owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] KLR* he submitted that the court did not have jurisdiction as the parties reside, got married and they work and/or carry on business in Mombasa and it is not clear why the Respondent travelled all the way to Machakos.

Analysis And Determination

10. I have considered the Application, the affidavit in reply thereto and the submissions of the parties filed.
11. The Applicant has admitted in his supporting affidavit that he was served with a court order from the court and he denied the law enforcers from executing the order on the ground that he had no knowledge of the same. Compliance with court orders is not optional. One does not choose which orders to comply with and which ones they will not.



12. Justice Mativo in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR* stated that;

“If courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts has to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the Rule of Law and a civilized life in the society.”

13. Such behavior must be frowned upon. Ignorance of the law is not a defence. Parties must comply with court orders despite how astonished they may be by the same. If indeed the Applicant was not served with the orders and/or the pleadings in Civil case number KCDC E06 of 2020 then he ought to have approached the court like he has now for a remedy.

14. The issue of stay of execution is provided for under Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (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.”

15. In the Court of Appeal case of *Visbham Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990* [1990] KLR 365, the Court held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely;

- a. Establishment of a sufficient cause,
- b. Proof of substantial loss and;
- c. The furnishing of security.
- d. The application must be made without unreasonable delay.

16. On the issue of substantial loss, the Applicant contends that the Kadhi’s court in Machakos did not have jurisdiction to handle the matter as both parties got married and reside in Mombasa however the



Respondent alludes that she used to live in Machakos at the time of filing the suit. Further, that to date he has not been served with any pleadings in Civil case number KCDC E06 of 2020 to date and was also not served with a notice to show cause regarding execution of the judgement. The Respondent has also filed an affidavit of service dated 11th December 2020 indicating that the Applicant had been served with the pleadings in that matter. In addition, that picking of her personal effects will not cause any loss to the Applicant therefore this limb fails.

17. The Applicant contends that the 30days of appeal had not lapsed when enforcing the order however he has not produced any document to show that an order of stay of execution for thirty (30) days had been granted.
18. The judgment was delivered on 14th December 2020 and this Application was filed on 21st of January 2021. The application has thus not been filed late.
19. The Applicant has not given any indication of security in his affidavit. Nonetheless, this being a family related matter then this requirement is not mandatory.
20. The issue of whether the Applicant has an arguable appeal
21. The nature of the suit is special and this court cannot issue a stale order. To order stay of a divorce will mean forcing parties to go back to each other against their will which is against their constitutional right of association and choosing a family. Divorce under FASKH Principles is final and only be resurrected through a new wedding/Nikah.
22. Having found that there is no substantial loss in allowing the Respondent to pick her personal effects, furniture and utensils, there are no orders that can be stayed as most of them have been overtaken by events.
23. Consequently, both on the competency and merits of the application, the same fails to meet the legal threshold and is dismissed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH MARCH 2022. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Wanjiru Nyuthi holding brief Mr. Muia for Respondent

Makau for the Respondent

COURT: The application for stay is not granted as it is a divorce and there is nothing to stay

Parties to pursue the Appeal.

Mr. Watuka holding brief for Mr. Amuti for the Applicant – present

Mr. Zedekia Adika for the Respondent – present

Mr. Watuka: We will be filing record of Appeal in 30 days.

COURT: Applicant is granted 30 days. Further mention on 9/05/2022.

M.W. MUIGAI

JUDGE

