



**SNC v AMS (Family Appeal 36 of 2021) [2022] KEHC 14886 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL 36 OF 2021  
JN ONYIEGO, J  
OCTOBER 28, 2022**

**BETWEEN**

**SNC ..... APPELLANT**

**AND**

**AMS ..... RESPONDENT**

**RULING**

1. The respondent herein moved the Kadhi's Court vide Civil Suit No E136 of 2021 instituted by way of a plaint dated June 15, 2021 seeking the following orders: that the defendant immediately returns to the marital home in Mombasa with the child; that the defendant is warned against using the child of the marriage to get at the plaintiff and stop indoctrinating the child against the child's father; that the plaintiff and defendant attend a reconciliation session at a place to be chosen by the honourable court; that the court grants to the plaintiff any other relief which it deems fit to be justified.
2. The appellant/applicant herein (defendant) filed a statement of defense dated July 30, 2021 denying/dismissing the allegations by the respondent herein (plaintiff).
3. The Principal Kadhi Hon Habib Salim Vumbi issued the following order on August 24, 2021; that the defendant to make arrangements and return the child SAM to Mombasa where she was schooling with immediate effect.
4. Thereafter, the appellant/applicant moved the Children's Court Nairobi via MCCC E1081 OF 2021 SNC v AMS filed by way of a plaint dated August 26, 2021 seeking custody and maintenance orders.
5. On the other hand, the respondent herein filed a notice to show cause why execution should not issue in the Kadhi's Court against the appellant herein. In response, the appellant/applicant filed an affidavit to the notice to show cause. The notice to show cause application was heard in the absence of the appellant/applicant and warrants of arrest issued on October 25, 2021.



6. Subsequently, the appellant/applicant moved this court vide a Memorandum of Appeal dated November 2, 2021 and filed on the same day challenging the orders of the Principal Kadhi issued on August 24, 2021. The Memorandum of Appeal was accompanied by a Notice of Motion application dated and filed on the same day.
7. The application which is the subject of this ruling is seeking the following orders;
  - a. Spent
  - b. Spent
  - c. That an order do issue suspending, lifting and /or staying execution of the warrant of arrest issued on October 25, 2021 pending the hearing and determination of the appeal.
  - d. That there be a stay of further steps and or proceedings in Divorce No E136 of 2021 before the honourable Habib Salim Vumbi, Principal Kadhi pending the hearing and final determination of this application.
  - e. That there be enlargement of time to include the period up to November 2, 2021 within which to lodge an appeal against the judgement of honourable Habib Salim Vumbi, Principal Kadhi delivered on 24<sup>th</sup> August in Divorce No E136 of 2021 and the Memorandum of Appeal herein validated and deemed as lodged with leave of the court.
  - f. That there be a stay of further steps and or proceedings in Divorce No E136 of 2021 before Honourable Habib Salim Vumbi, Principal Kadhi pending the hearing and determination of the appeal between the applicant and the respondent herein.
  - g. That cost of this application and other costs be in the cause.
8. The application is premised upon grounds set out on the face of it and averments contained in the affidavit in support of the application sworn November 2, 2021. She stated that the delay in lodging the appeal was for 35 days as it ought to have been lodged by September 28, 2021 which is not unreasonable. That the delay in lodging the appeal was due to the fact that she had already filed a suit in the Children's Court in Nairobi Milimani MCC E1081 of 2021 SNC v AMS and directions as to the custody of the minor who is the subject of the suit granted.
9. She further stated that she became aware of the order of August 24, 2021 when it was served upon her on August 31, 2021 via Whatsapp. That in compliance with the orders aforesaid issued by the children court, she continued staying with the child who also attends school in Nairobi at [particulars withheld] Primary School.
10. The appellant averred that; she was served with the Notice to Show Cause on October 5, 2021 and responded to the same via an affidavit dated September 18, 2021; she was surprised to learn of the warrant of arrest issued against her on November 25, 2021; her affidavit was not taken into consideration; the learned Kadhi does not have jurisdiction to preside over children's matters and therefore orders issued to that effect are null and void and that the respondent shall not suffer any prejudice as appropriate security would be deposited if ordered to do so.
11. In response, the respondent filed a replying affidavit sworn on November 16, 2021. He termed the appellant's application as incompetent, bad in law, misconceived, unmeritorious and an abuse of the court's process and resources.
12. He stated that he got married to the appellant/applicant under Islamic law on March 9, 2011 and have been living together at their matrimonial home at [particulars withheld], within Mombasa County.



- That their union was blessed with one issue namely SNA the subject herein. He gave a chronology of events of what led to the proceedings in the Kadhi's Court culminating to the issuance of the Notice to Show Cause.
13. The respondent further stated that the subject matter at the Kadhi' court was their marriage and not custody of the child. He averred that the order of August 24, 2021 was served upon the appellant but she failed to comply with the same. It was his case that the appellant/applicant filed the children's matter in Nairobi after the issuance of the orders of August 24, 2021 and intentionally failed to disclose to the said court of the existence of the said orders. That the interim orders obtained from the Children's Court Nairobi on August 26, 2021 were an attempt to defeat and make ridicule of the Kadhi's Court orders which are still in force as they have never been set aside.
  14. He further averred that the orders of the Children's Court Nairobi cannot set aside the Kadhi's Court orders issued on August 24, 2021 as they are courts of concurrent jurisdiction. That the appellant/applicant has never raised a preliminary objection against the jurisdiction of the Kadhi's Court in E136 of 2021 hence urged the court to dismiss the application with costs.
  15. The application was canvassed by way of written submissions.
  16. The appellant through her advocates Muthoni Kiruruti & Company Advocates filed her written submissions dated July 13, 2022 and submitted on 3 issues;
    - a. Whether there are sufficient grounds for enlargement of time for the Memorandum of Appeal filed on November 2, 2021 to be validated
    - b. Whether there are sufficient grounds for stay of proceedings in Divorce No E136 of 2021 pending before the Kadhi's Court
    - c. Whether there are sufficient grounds for stay of execution of the warrants of arrest issued in the Kadhi's Court.
  17. On the first issue on enlargement of time, counsel submitted that the factors that a court should consider are; the period of delay; the reason for the delay; whether the appeal is arguable; the degree of prejudice which could be suffered by the respondent if the extension is granted; the effect if any on the administration of justice or public interest. To advance that argument reliance was placed in the case of *Thuita Mwangi v Kenya Airways Ltd [2003] eKLR*.
  18. Counsel further submitted that the delay in filing the appeal was 35 days which is not unreasonable and or inordinate. To support this position counsel relied on the case of *Mwangi S Kimenyi v Attorney General and Another (2004)eKLR* where the court held that inordinate delay clearly is dependent on the circumstances of each case and should be measured on the basis of whether it is excusable.
  19. Counsel submitted that; the appeal is arguable; the subject matter of the appeal has an effect on the administration of justice or public interest; judicial time is so precious that only matters that are properly before it ought to proceed to their conclusion; this court is bound by Article 53(2) of the *Constitution* of Kenya as the primary interest in these proceedings is the minor and that the respondent will suffer no prejudice as he will have a chance to ventilate his case in the Children's Case MCCC E1081 of 2021.
  20. On the second issue, counsel submitted that the Principal Kadhi pronounced himself on the issue of custody of the minor which power is solely vested in the children's court by the Children's Act. That jurisdiction is everything hence there is no basis in continuation of proceedings touching on custody of a child in the Kadhi's Court. Counsel relied on Article 170(5) of the *Constitution* to express the position that the Kadhi's court had no jurisdiction to determine issues touching on child custody.



21. On the third issue, counsel submitted that it's trite law that for a stay of execution to be granted the application ought to be made without unreasonable delay and that any party seeking such stay will suffer substantial loss. Counsel submitted that there was no unreasonable delay in moving the court for the said orders as the warrants of arrest were issued on October 25, 2021 and the application herein filed on November 2, 2021 a difference of 7 days.
22. It was contended that the orders issued and mode of execution by way of execution of warrant of arrest would amount to substantial loss and urged the court to protect the family unit under Article 45(1) of the Constitution.
23. The respondent through his advocate Kilonzo & Aziz Co Advocates filed his written submissions dated July 13, 2022. Counsel submitted on three issues namely;
  - a. Whether the appellant is entitled to the stay of proceedings at the Kadhi's Court.
  - b. Whether the appellant is entitled to the enlargement of time to lodge appeal
  - c. Whether the warrants of arrest issued on October 25, 2021 were properly issued.
24. On the first issue, counsel submitted that stay of proceedings is a matter of judicial discretion and a very grave action that interferes with the right of a litigant to conduct litigation as it has the effect of depriving ones right to access justice and the right to be heard without delay and fair trial. That the test is therefore high and stringent.
25. Counsel relied on the case of Kenya Wildlife Service v James Mutembei [2019] eKLR thus submitting that the proceedings in the Kadhi's Court are not frivolous, vexatious or harassing neither are they manifestly groundless. That there are no reasons given by the appellant to warrant the grant of stay of proceedings.
26. On the second issue, counsel relied on Section 79G of the Civil Procedure Act and the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others (2014) e KLR on the principles for enlargement of time by the court and submitted that the delay was beyond 30 days thus making it inordinate and inexcusable. That the suit in the children's court Nairobi was an afterthought and a means of forum shopping instead of filing an appeal by the appellant. That the said proceedings have no connection with the matter before this court to warrant the delay in filing this appeal.
27. On the third issue, counsel submitted that the appellant's failure to comply with the orders of August 24, 2021 is what resulted to the Notice to Show Cause. Further, the appellant's failure to attend court for the Notice to Show Cause resulted to issuance of the warrants of arrest which were issued as a means of protecting the dignity of the court.

### **Determination**

28. I have considered the application herein, the response thereof and the rival submissions by both counsel. Issues that emerge for determination are;
  - a. Whether an order for stay of execution of warrants of arrest should issue.
  - b. Whether an order for stay of proceedings should issue.
  - c. Whether the orders for enlargement of time of lodging of appeal should issue.
29. Stay of execution is provided for under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules 2010 which provides;



1. No appeal or second appeal shall operate as a stay of execution or proceedings 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 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.
30. From the above provision, there are three factors for consideration by a court before issuing a stay of execution order. They include;
  - a. Proof of substantial loss
  - b. Application has been filed without unreasonable delay
  - c. Security for costs offered by the applicant.
31. The applicant stated that she was apprehensive that the respondent will proceed with execution if stay is not granted. In her submission, through her advocate she contended that she would suffer great loss if stay is not granted as a dispute between a husband and wife are so personal and has far reaching consequences that not only affect the mental health of a party but also their physical health.
32. In discussing substantial loss the court in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR stated;

' No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

'The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'



33. Accordingly, it's my finding that the appellant/applicant will suffer substantial loss if stay of execution is not issued as the effect of execution of warrant of arrest will curtail the applicant's liberty hence cannot be compensated if the appeal succeeds and therefore may render the appeal nugatory.
34. On the aspect of unreasonable delay, the application herein was filed on November 2, 2021 while the order of warrant of arrest sought to be stayed was issued on October 25, 2021. In my view, the application seeking stay of execution of warrant of arrest was brought without unreasonable delay. See [Jaber Mohsen Ali & another v Priscillah Boit & another \[2014\] eKLR](#) where the court stated that;
- ' The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.'
35. On security, the appellant stated that she was willing to give the same. This being a matter that touches on a child, it's my view that the issue of security should not arise and thus I will not delve into it.
36. On whether stay of proceedings should issue, the court in the case of *Kenya Wildlife Service v James Mutembei* (supra) stated thus;
- ' Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent. See Ringera J in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000* persuasively stated thus;
- 'As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously' (emphasis added)
37. The main factors to be considered in issuing stay of proceedings from the above citation are whether the appeal is arguable and whether the application was brought expeditiously. Having held that there was no inordinate delay, I am left with the issue of whether the appeal is arguable. From the arguments of both parties and the issue in question is custody of the minor and therefore which court has jurisdiction. In my view that is an arguable appeal.
38. On enlargement of time of lodging appeal Section 79G of the [Civil Procedure Act](#) provides that an appeal may only be admitted out of time if an applicant satisfies the court that he has a good and sufficient cause for not filing the appeal in time. In the case of [Annah Mwibaki Wairuru v Hannab Wanja Wairuru \[2017\] eKLR](#), quoting with approval the holding in *Leo*



*Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (UR)* the court delivered itself as follows: -

' It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted'.

39. In this case, the appellant argued that the reason for not filing the appeal is because by the time she was being served with the orders of August 24, 2022 she had already filed a children's case seeking custody in the Children's Court Milimani, Nairobi and directions on the same issued. That the matter in the Kadhi' court was in respect to their marriage and she did not expect it to extend to the issue of custody of the child.
40. On the length of delay and the reason of delay, it's evident that the memorandum of appeal was filed on November 2, 2021 more than 60 days late from the date of issuance and service of the Kadhi Court's order. The appellant in paragraph 7 of her supporting affidavit stated that she decided to comply with the orders in MCCC E1081 OF 2021 and not the Kadhi as she does not submit to the jurisdiction of the Kadhi's Court over the matter in question. Thus, it's my finding that the reasons given by the appellant on the two months' delay are sufficient and therefore excusable in the interest of justice.
41. On the prejudice to the respondent if the application is granted, the appellant/applicant argued that the respondent will suffer no prejudice if the application is allowed. I am in agreement that the respondent will suffer no prejudice if the application is allowed and that it is in the interest of the child that the orders be granted.
42. It is trite that his court has the discretion to enlarge time where interest of justice requires pursuant to Order 50 rule 6 which provides;

' Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.'
43. Despite there being some delay in lodging the appeal, the same is not unreasonable given the confusion caused by two conflicting court orders. I am accordingly inclined to exercise this court's discretionary powers to enlarge time to file the appeal out of time.
44. The upshot of the above is that the application dated November 2, 2021 is allowed as prayed and the memorandum of appeal filed herein deemed as duly filed. The applicant to file and serve a record of appeal as soon as possible.

**DATED, SIGNED AND DELIVERED IN MOMBASA THIS 28<sup>TH</sup> DAY OF OCTOBER, 2022.**

**J.N.ONYIEGO**



**JUDGE**

