



NKG v SGB (Civil Appeal E008 of 2020) [2021] KEHC 9779 (KLR) (12 February 2021) (Ruling)

Neutral citation: [2021] KEHC 9779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E008 OF 2020
JN ONYIEGO, J
FEBRUARY 12, 2021**

BETWEEN

NKG APPELLANT

AND

SGB RESPONDENT

RULING

1. The application before me seeking determination is a Notice of Motion dated 5th November 2020 seeking orders that:
 - 1) Spent
 - 2) That this honourable court be pleased to issue a stay of execution of the orders of the learned Principal Kadhi of 28.10.2020 in Mombasa Kadhi's Court Divorce Cause No. 20 of 2019 pending the interpartes hearing of the instant application.
 - 3) That this honourable court be pleased to issue a stay of execution of the orders of the Learned Principal Kadhi of 28.10.2020 in Mombasa Kadhi's court Divorce Cause No.20/2019 pending the inter partes hearing of the appeal filed herein.
 - 4) That there be a stay of proceedings before the trial court Mombasa Kadhi's Court Divorce Cause No 20/29 pending hearing and determination of the appeal filed herein.
 - 5) That the costs of this application be provided for
2. The application is premised upon grounds stated on the face of it and averments contained in the affidavit sworn on 5.11. 2020 by the applicant. It is the Applicant's case that vide Kadhis Court Suit No 20/219 Mombasa, she petitioned for dissolution of her marriage with the Respondent(defendant). That despite the respondent filing his defence dated 13.2.2019 in response to the suit, he opted not to participate in the trial. She averred that upon hearing the suit exparte, the learned Kadhi delivered his judgment on 21.5.19 thus dissolving the marriage between them.



3. He stated that the decree extracted (issued) on 3.4.19 fully dissolved the marriage and parties were at liberty to collect their marriage certificate. According to the appellant, the court became functus officio upon dissolving the said marriage. That the court has since reopened the trial after ordering for the hearing to start denovo.
4. She further averred that the learned Kadhi has set down the main hearing for dissolution of marriage on 24.11.20 with the possible consequences of ordering parties back to a non-existent marriage which has already been dissolved by a competent court with jurisdiction. That she has no intention of returning back to a dissolved marriage a fact that might be interpreted to be an act of contempt of court.
5. She contended that the appeal has high chances of success and that the respondent will not suffer any prejudice or loss should the application be allowed. Regarding the timing of the application, she stated that it was filed within reasonable time.
6. In response, the Respondent filed a replying affidavit sworn on 20.11.2020 opposing the application. He stated that the Learned Kadhi had properly exercised jurisdiction under Order 10 rule 11 of the CPRS in setting aside the exparte judgment and the consequential decree.
7. He averred that the Learned Kadhi set aside the exparte Judgment after being satisfied that the process server who purported to have served him with the amended plaint did not serve hence the irregular exparte proceedings.
8. He contended that an order for proceedings to start afresh does not offend any rules of procedure and that the Applicant/Appellant will not suffer any prejudice by the case starting a fresh. That the order to start the case denovo does not amount to taking the applicant back to marriage as they were separated even before the suit was filed.
9. In his view, he will have an opportunity to cross-examine the Applicant/Appellant and also to challenge the other orders besides dissolution of marriage which have serious ramifications. He also contended that the appeal does not have high chances of success and that the applicant/appellant has not deposited any security.
10. During the hearing, Mr.Siminyu for the applicant adopted the averments contained in the Affidavit in support of the application. Counsel opined that the Kadhi's Court had no powers to reopen the suit hence re-engaging the parties in a matter that had been fully determined.
11. That the Applicant should have sought to set aside the exparte Judgment or review it but not to start afresh. In support of this proposition, counsel referred to the decision in the case of *Ngugi v Kinyanjui & 3 others* (1989) KLR. Learned counsel contended that if the court allowed reopening of the case, the judgment holder will be prejudiced.
12. On his part, Mr. Mgupu submitted orally thereby reiterating the averments contained in the affidavit in reply to the application. Counsel contended that the appeal lacks high chances of success and that there was no proof that the Applicant will suffer substantial loss should the court reject the prayer for stay of execution or stay of proceedings. He further contended that the suit was to start denovo after the court found that there was no proper service effected upon the respondent.

Determination

13. I have considered the application herein and the response thereto. Further, I have considered Counsel's oral submissions. The twin issues that arise for determination are; whether the applicant has met the threshold for grant of stay of execution or proceedings.



14. At a glance, the grounds of appeal cited in the memorandum of appeal reveals that the applicant/appellant is aggrieved by the Kadhi's order to start the trial denovo. There is no dispute that the trial (hearing) leading to the dissolution of the marriage between the Appellant and the respondent was conducted exparte after the trial court considered an affidavit of service confirming that service of the amended plaint and hearing notice was effected upon the respond who failed to respond nor appear during the hearing.
15. During the hearing of the application to set aside the exparte judgment, the respondent sought leave to cross examine the process server on the content and veracity of his averment on service which was disputed. The process server having failed to turn up for cross examination, the court proceeded to deliver its ruling dated 28.10.20 thus setting aside its exparte judgment on grounds that the respondent was not properly served and therefore the case to start denovo.
16. However, the applicant is not happy with this direction on grounds that, once the Kadhi had pronounced himself, he cannot reopen the case for rehearing.
17. This court is duty bound to find whether the appeal herein is arguable or has high chances of success; whether the appellant will suffer substantial loss should the court not issue stay of execution orders; whether the application has been filed within reasonable time; whether this is a case suitable for depositing security and, whether stay of proceedings is necessary.
18. Pursuant to Order 42 rule 1 (1) of the *Civil Procedure Rules*, a party aggrieved with an order, decree or decision may appeal against such order or decree. Such party can seek a stay of execution order which the court to which such application is made may make as it may deem fit.
19. Sub-rule (2) further provides that, no such order of stay of execution shall be made unless the court finds that; substantial loss may result to the applicant unless the order is made; application is made within reasonable time and, that security for due performance of the decree has been deposited.
20. It is incumbent upon the applicant to prove that he is likely to suffer substantial loss should the court decline to grant stay of execution orders. However, it is within the court's wide discretionary powers that such order can issue or be rejected. See *Butt v Restriction Tribunal* (1982) KAR 47 where the court underscored the discretionary power of the court in granting stay orders by holding that the power to grant or to refuse an application for stay of execution is discretionary; such power should be exercised in such away as not to prevent an appeal; a judge should not refuse a stay if there are good grounds merely because in his opinion a better remedy may become available to the applicant at the end of the process. Similar position was held in the case of *Amal Hauliers Limited vs Abdulnasir Abukar Hassan* (2013) eKLR and *Mukuma v Abwoga* (1988) KLR 645.
21. In this case, the applicant is alleging that the Kadhi has no powers whatsoever to order for the case to start afresh. According to the learned Kadhi under order 10 rule 11 of the Civil Procedure rules, he has powers to set aside exparte proceedings including a judgment emanating out of such proceedings where hearing notice or service of pleadings is in question or not proved.
22. Indeed, order 10 rule 11 of the CPRS provides that;

“where judgment has been entered under this order the court may set aside or vary such Judgment and any consequential decree upon such times as are just”
23. The power to set aside exparte judgment is provided in law but at the discretion of the court. Such discretion should be exercised judicially without occasioning any hardship or injustice on any litigant for excusable mistake or error. See *Philip Kiptoo Chemwolo and Mumias sugar Co.Ltd vs*



Augustine Kubende (1982-88) KAR 1036 where the court emphasized the principles for setting aside interlocutory judgment by stating that discretion is unconditional and when exercising it the trial court must exercise it judicially to avoid injustice or hardship caused by excusable mistake or error but not to assist a party to obstruct or delay the cause of justice.

24. Further, in the case of *Bin Khamis v Salim Khamis Korobe and 2 others* (1956) EACA 195 it was held inter alia; that an order made without service of summons to enter appearance is a nullity which must be set aside Ex debito Justitiae. The claim that the amended plaint and hearing notice was not properly served upon the respondent would be a ground for the Kadhi to set aside an exparte judgment. It is not proper therefore, for Mr. Siminyu to state generally that as a matter of principle the Kadhi had no power to set aside an exparte judgment.
25. The only issue which perhaps this court should ask itself for an answer is whether the grounds relied on to set aside the exparte judgment were reasonable, sufficient or sustainable under the circumstances. This should be the paramount question to answer but this court cannot answer it at this application stage. Without delving into the merits of the appeal, the court should first consider the issue whether the applicant will suffer substantial loss should the prayer for stay of execution not issue. Are there positive orders calling for execution?
26. I do not see any danger or substantial loss likely to be suffered should the stay of execution orders prayed for not be granted. Ideally, there is nothing to be executed by the respondent. The fear of likelihood of suffering substantial loss is farfetched and therefore not applicable in the circumstances of this case
27. Is the appeal likely to be rendered nugatory should the appeal succeed? At the centre of the appeal is the critical question as to whether service of the amended plaint and hearing notice was properly done or not. Indeed, there is need to interrogate whether it was necessary for the Kadhi to order for cross examination of the process server having been satisfied originally that service was properly done. Should the hearing continue before the Kadhi and then the appeal succeeds, the same will be rendered nugatory or otiose. Equally, if the fresh hearing proceeds and the appeal succeeds, the fresh proceedings will be a waste of court's precious time as well as resources in terms of legal expenses,
28. In the circumstances of this case, it will be fair and just that the proceedings be stayed to pave way for the respondent to exhaust his legal right on appeal which in any event is raising an arguable appeal. Indeed, an arguable appeal need not be the one which must succeed. See *Global Tours and Travels Limited* Nairobi High Court winding up cause No.43 of 2000 where the court held that;

“...the sole question is whether, it is in the best 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense not whether it will probably succeed or not but whether it is an arguable one, the scarcity and minimum utilization of judicial time and whether the application has been brought timeously”
29. Having held as above, it is clear that parties should not be shut out of due process. Nobody will suffer prejudice if the proceedings before the Kadhi's court were to be stayed. On account of that ground, I am satisfied that the application is merited.
30. Was the application filed within reasonable time?

The impugned ruling was delivered on 20.10.20. The instant application was filed on 5.11.20. It was therefore filed within reasonable time. As regards depositing security, this is a family matter. Depositing



security is not intended to punish anybody but to secure due performance of a decree. I do not find it suitable in the circumstances of this case to so order.

31. Accordingly, the application is allowed with orders;

1. That there be stay of proceedings before the trial court in Mombasa Kadhi's court Divorce Case No 20/2019 pending hearing and determination of the appeal
2. That costs be in the cause

DATED, SIGNED, DELIVERED VIRTUALLY THIS 12TH DAY OF FEBRUARY 2021

J.N. ONYIEGO

JUDGE

