



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

***(Coram: A. C. Mrima, J.)***

**PETITION NO. E094 OF 2021**

**BETWEEN**

**ABDI SHARRIFF SAID.....PETITIONER**

**VERSUS**

**1. NAIROBI KADHI'S COURT**

**2. YUSRA RAMTULLA NURMOHAMMED**

**3. THE ATTORNEY GENERAL....RESPONDENTS**

**RULING NO. 1**

1. This ruling is in respect of a Notice of Motion dated 23<sup>rd</sup> March, 2021. The application is taken out by the Petitioner. It seeks the following orders: -

1. *THAT exparte this Application be certified as urgent and apt for hearing on a priority in the first instance and service be dispensed with.*
2. *THAT pending hearing and determination of this application, this Honourable Court be pleased to stay execution of warrant arrest issued on the 18/3/2021.*
3. *THAT pending hearing and determination of this suit, this Honourable Court be pleased to stay execution of warrant arrest issued on the 18/3/2021.*
4. *THAT pending hearing and determination of this application, this Honourable Court be pleased to stay proceedings in Nairobi Kadhis Court Suit No. 189 of 2019 between Abdi Sharrif Said vs Yusra Ramtulla Nurmohammed.*
5. *THAT pending hearing and determination of this suit, this Honourable Court be pleased to stay proceedings in Nairobi Kadhis Court Suit No. 189 of 2019 between Abdi Sharrif Said vs Yusra Ramtulla Nurmohammed.*
6. *THAT in alternative, this Honourable Court be pleased to recall the Nairobi Kadhis Court Suit No. 189 of 2019 between Abdi Sharrif Said vs Yusra Ramtulla Nurmohammed.*
7. *THAT this Honourable Court be and is hereby pleased to issue directions necessary towards ensuring the expeditious disposal of this matter by way of video conferencing either through zoom or Skype during the COVID-19 interruption period.*
8. *THAT in view of the COVID-19 pandemic, this Honourable Court be pleased to order the service of this Application/suit herein either physically, through electronic means to wit, email and/or WhatsApp, whichever is possible.*
9. *Costs be in cause.*

10. Any other order that this Honourable Court will be pleased to issue in the circumstances.

2. The application is supported by a 16-paragraph affidavit sworn by the Petitioner on 23<sup>rd</sup> March, 2021. The Petitioner filed written submissions for the main Petition instead of the application.
3. The 2<sup>nd</sup> Respondent opposed the application. She indicated to the Court that she was attempting to file a Replying Affidavit through the e-portal, but it appears she was not successful. The e-portal only has the 2<sup>nd</sup> Respondent's written submissions to the application dated 5<sup>th</sup> July, 2021.
4. I must state that the record is so sketchy that it does not reflect a clear overview of the matter against which the Petition challenges; that is *Nairobi Kadhi's Court Matrimonial Cause No. 189 of 2019*.
5. Despite the insufficiency of the record, I have patiently considered the application, the written submissions and the decisions referred to by the parties. I will, nevertheless, attempt a brief background to the application.
6. The Petitioner and the 2<sup>nd</sup> Respondent herein, *Yusra Ramtulla Nurmohammed* (hereinafter referred to as '**Yusra**') were married under the Islamic system of marriage. In the course of their marriage they were blessed with an unspecified number of children.
7. The Petitioner filed a Nairobi Kadhi's Court Matrimonial Cause No. 189 of 2019 (hereinafter referred to as '**the Cause**') against Yusra. Again the contents of the Cause are not clear. It, however, seems that the parties were later legally divorced.
8. Yusra then filed an application in the Cause dated 20<sup>th</sup> February, 2020 seeking custody and maintenance of the issues of the marriage. In response to the application, the Petitioner filed Grounds of Opposition dated 3<sup>rd</sup> March, 2020 principally objecting to the jurisdiction of the Kadhi's Court to adjudicate on issues relating to the custody and maintenance of children.
9. The application on the custody and maintenance was heard. By a decision of the Kadhi's Court rendered on 6<sup>th</sup> December, 2020 the Petitioner was ordered to maintain the children by providing some money.
10. Being dissatisfied with the said decision, the Petitioner moved to the High Court and filed *Miscellaneous Appeal No. 29 of 2020* challenging the decision. The matter is still pending.
11. As the Petitioner did not satisfy the order on maintenance aforesaid, Yusra initiated execution proceedings. The execution was by way of a Notice to Show Cause dated 27<sup>th</sup> January, 2021 which was heard and allowed on 18<sup>th</sup> March, 2021. The Petitioner was decreed to pay around Kshs. 450,000/= failure to which he be arrested and committed to a civil jail term. To that end, a Warrant of Arrest was accordingly issued.
12. It is also alleged that the Petitioner has filed several other cases in an attempt to frustrate his obligation on his children.
13. The Petitioner moved to this Court *vide* these proceedings. He filed a Petition and the application under consideration. The Duty Court considered the matter and issued prayer 2 of the application thereby staying the execution of the warrant of arrest.
14. The foregoing is the sketchy background of the matter. This Court notes that the matter involves the welfare of children. They are the children of the Petitioner and Yusra. According to Yusra, the Petitioner has not been taking care of the children and she has had to carry the burden alone. As at 12<sup>th</sup> July, 2021 when the matter came before Court, Yusra informed the Court that the children were then not attending school as a result of lack of school fees and other necessities. She emphasized that the Petitioner is a man of means who is deliberately not discharging his duty as the father to the children more so in a case where paternity of the children is not an issue.
15. The Petitioner did not in any way respond to the position that the children were not attending school as a result of lack of school fees, that he is a man of means, that he is the father of the children and that he filed several other cases to forestall the discharge of his parental responsibility.
16. Be that as it may, the Petitioner has, in these proceedings, raised a jurisdictional issue which he alleges that it infringes his rights. In the main Petition, the Petitioner seeks to quash the proceedings leading to the issuance of the warrant of arrest on account of lack of jurisdiction on the part of the Kadhi's Court.
17. At this point in time, and in the interim, this Court ought to attempt a balance between the Petitioner's allegations, the interests of the children and the law.
18. **Article 53** of the Constitution broadly provide the rights of children. The provision states as follows: -

(1) Every child has the right—

- (a) to a name and nationality from birth;
- (b) to free and compulsory basic education;

(c) to basic nutrition, shelter and health care;

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and

(f) not to be detained, except as a measure of last resort, and when detained, to be held—

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age.

**(2) A child's best interests are of paramount importance in every matter concerning the child.** (Emphasis added)

19. Article 45 of the Constitution is on the sanctity of the family institution.

20. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** gives the conditions precedent to granting a stay of execution order. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, the application is made without any unreasonable delay and the Applicant offers security for the due performance of the decree. (See *Antoine Ndiaye vs. African Virtual University* [2015] eKLR.)

21. The Court of Appeal in *Butt vs. Rent Restriction Tribunal* [1979] KLR discussed what ought to be considered in determining whether to grant or refuse stay of execution. The Court stated that the power of the Court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal Court reverse the Judge's discretion. Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because, in his or her opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

22. Returning to the case at hand, apart from raising the jurisdictional point, the Petitioner has not demonstrated the loss he is likely to suffer if he pays the sum of Kshs. 450,000/= as ordered by the Kadhi's Court on account of maintenance of his children or if the execution of the warrant of arrest is not stayed. Further, the decree being a money decree, it was incumbent upon the Petitioner to give security. The Petitioner did not do so.

23. It is clear that the Petitioner has failed to satisfy any the conditions for the grant of the prayers in the application. To this Court, the Petitioner is likely to be using the Courts not to discharge his parental obligation towards his children. That is a clear case of abuse of the Court process.

24. This Court takes serious cognisance of the fact that the circumstances in this case are very peculiar. The matter concerns the welfare of the Petitioner's children. The children are currently not attending school due to lack of school fees among other necessities. The Petitioner has not in any way reached out to salvage the situation, but he is happy filing one suit after the other. In my considered opinion, this is a matter in which the interests of the children surpass any other interest advanced by the Petitioner.

25. I believe I do not need to say more than the foregoing. In the end, the following orders hereby issue: -

**(a) The Notice of Motion dated 23<sup>rd</sup> March, 2021 be and is hereby dismissed with costs. The interim order of stay of execution issued on 24<sup>th</sup> March, 2021 is hereby set-aside and vacated. For clarity, the execution of the warrant of arrest to proceed accordingly.**

**(b) The Petition shall be heard by way of reliance on Affidavit evidence and written submissions.**

**(c) In view of (b) above, the Respondents shall file and serve their respective responses to the Petition within 14 days.**

**(d) The Petitioner shall, upon receipt of the responses in compliance with (c) above, file and serve any supplementary responses, if need be, together with written submissions within 14 days.**

**(e) The Respondents shall file and serve their respective written submissions within 14 days of service.**

**(f) Highlighting of submissions on a date suitable to the Court and the parties.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 5<sup>th</sup> day of August, 2021.**

**A. C. MRIMA**

**JUDGE**

**Ruling No. 1 virtually delivered in the presence of:**

**Mr. Muchiri**, Counsel for the Petitioner.

**Yusra Ramtulla Nurmohammed**, the 2<sup>nd</sup> Respondent in person.

**No appearance** for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

**Elizabeth Wambui** – Court Assistant.