



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CIVIL APPEAL NO. E003 OF 2021**

SAS..... APPELLANT

VERSUS

WKY..... RESPONDENT

*(Being an appeal from the Judgment of Kadhi's Court at Lamu by Hon. Swaleh M. Ali (S. R. Kadhi) delivered on the 20<sup>th</sup> August, 2020 in Lamu Kadhi's Court Divorce No. 15 of 2020)*

**Coram: Hon. Justice R. Nyakundi**

**Mr. A. M. Omwancha advocate for the appellant**

**The respondent in person**

**R U L I N G**

The appellant herein filed a notice of motion dated 2.8.2021 expressed to be brought under Order 20, Rule 22 and 25 of the Civil Procedure Rule, Section 1A, 3A and 63 (e) of the Civil Procedure Act seeking one substantive order thus:

***(1). That the honourable Court be pleased to grant a stay of execution pending the hearing and final disposal of the Appeal filed herein.***

The application is supported by an affidavit of the appellant and opposed by a replying affidavit sworn by the respondent. Having considered the application and corresponding affidavit evidence, this Court powers are directed at the construction and interpretation of the express provisions of the Law on stay of execution pending an intended appeal.

**Determination**

**The Law**

The Law on stay of execution or proceedings as encapsulated under Order 42 Rule 6 (1) of the Civil Procedure Rules is now well settled in many local decisions and comparative jurisprudence. The general guiding principle of Law is that in money decree/ decree holder by a successful litigant should not be deprived off his or her fruits of the Judgment in anticipation of the outcome of an appeal filed. Stay of execution is one of the common litigated branch of Law by parties seeking leave to exercise their right of appeal.

The cited principles that go along and which resonate with findings to be made by the Court include:

***(1). The application in question must be filed within reasonable time.***

***(2). The applicant must demonstrate sufficient good cause.***

***(3). That if the relief on stay is denied there would be a likelihood of substantial loss not remedied in compensation of damages.***

***(4). That the applicant must be willing to offer security for due performance of the decree.***

*(5). The Court should also consider whether there are special circumstances which militates in favor of grant of stay of execution.*

*(6). Finally, the Court also ought to consider whether the appeal would be rendered nugatory in the event the relief is denied.*

What I have to determine here is whether on the material presented the applicant has satisfied wholly the set conditions precedent for granting the orders on stay of execution. The applicant's case on appeal anchored on the decision by the Kadhi's Court in which various grievances have been raised in the Memorandum of Appeal. It is in this case that the Kadhi's Court had condemned him to pay KShs.500,000/= or in the alternative he be committed to civil jail.

I have enumerated the key pillars on which rests the foundation of any order on stay of execution pending an appeal. It is the Law that all the above enlisted conditions and stages are to be applied to the facts of the case as separate, distinct and logical hurdles which the appellant is expected to surmount sequentially.

On the first ground of timeliness of the application, I find no contest as the same was filed without unreasonable delay. On the second factor, the appellant must establish sufficient cause one of the key battle ground for the two parties is the issue of the Kadhi dismissing the application for stay, which then exposes the appellant to execution proceedings. It is the contention of the appellant that the appeal raises a strong case which require to be ventilated before the original Judgment is enforced. In that regard, the appellant is alluding to the unfairness of the proceedings by the Kadhis Court to show sufficient reasons why stay of execution should be granted enjoining the provisions of Order 42 Rule 6 of the Civil Procedure Rule.

My understanding of the matter is that the appellant has shown sufficient good cause for grant of the order on stay of execution. On the third factor, that the appellant must establish that he might otherwise suffer substantial loss which cannot be adequately remedied by damages in absence of stay of execution.

The leading cases on this condition include: **Century One Trading Co. Ltd v Kenya Shell Ltd HCMCA No. 156 of 2007, Kenya Shell Ltd v Kibiru {1986} KLR 410, James Wangalwa v Agnes Naliaka Cheseto**. To satisfy the burden of demonstrating that substantial loss was likely the appellant must establish as a fact that the loss would leave them financially ruined or inflict such a pain unlikely to compensate him or her by an award of damages.

This case concerns an aspect of Civil Jail as a mode of execution of the decree of the trial Court Judgment. There are preliminary issue pursuant to the provisions of Section 38 of the Civil Procedure which sets the intended standards to be met before an order for Civil Jail is effected by the Court. From the record, the trial Court denied the appellant's request for stay against the orders of payment of KShs.500,000/= or face committal to Civil Jail. In absence of the record showing whether those protocols under Section 38 of the Act have been met before a final order on committal to Civil Jail, there is a clear likelihood of substantial loss of depriving him of his rights to liberty, dignity and freedom protected by the Constitution.

It is clear that the appellant has shown an unmistakable right to be protected which is directly threatened by an act of execution of the Lower Court Judgment. This is also a case by the nature of the facts the respondent has no capacity to pay back the money quantified at KShs.500,000/=. So without stay of execution, the appellant would be financially ruined in the event he succeeds on appeal.

As a consequence, the appellant has shown a prima facie case that has not been controverted by the respondent to warrant the granting of an order staying execution of the Ruling and Judgment of the trial Court pending the hearing and determination of an appeal.

**DATED, SIGNED DISPATCHED AT MALINDI via email ON 29<sup>TH</sup> DAY OF OCTOBER 2021**

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**R. NYAKUNDI**

**JUDGE**