REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION MATRIMONIAL CAUSE NO.9 OF 2018

IN THE MATTER OF MARRIAGE ACT (2013)

IN THE MATTER OF MATRIMONIAL PROPERTY ACT (2013)

FMS.....APPLICANT

VERSUS

MAS.....RESPONDENT

RULING

1. The Notice of Motion Application before this court is dated 23rd April,2021.The application seeks the following orders:

a) This honourable court do certify this application as urgent and service thereof be dispensed with in the first instance.

b) This honourable court do grant the respondent leave to appeal out of time.

c) This honourable court do deem the draft notice of appeal as being duly filed upon payment of the requisite court fees.

d) Pending hearing of this application inter-parties, this honourable court do grant a stay of execution of the judgement and /or orders given on 23 February, 2021.

e) Pending the hearing and determination of the intended appeal, this honourable court do grant a stay of execution of its judgement and/or orders given on 23rd February, 2021.

f) Costs be in the cause.

2. The application is premised on the grounds thereof and the supporting affidavit of MAS sworn on 23rd April, 2021.

3. The respondent/applicant's case is that; judgement in this case was reserved for 20th November 2020; the said judgment was not ready on the scheduled date hence delivery was to be on notice; without any notice being served neither on him nor his advocate, judgment was delivered on 23rd February 2021 in his absence and that of his advocate; it was until 20th April, 2021 when the applicant/respondent wrote a letter through an e-mail requesting for approval of the decree that his advocate became aware that judgement was delivered on 23rd February, 2021; he is dissatisfied with the said judgement and that, he intends to appeal against the same.

4. It was further averred that; the delay in filing the notice of appeal in time was not occasioned by the respondent/applicant; the delay is not so inordinate or so great as to be inexcusable; if the orders sought are not granted, he will suffer irreparable harm/damage and, that he has a good case on appeal with a high probability of success.

5. However, in his rejoinder to the replying affidavit in response to the application, the respondent/applicant's advocate filed a Supplementary Affidavit sworn on 21st May, 2021 confirming that the notice was sent to his e-mail but the same was not brought to his attention by his staff hence the reason he never saw it. That he never expected the notice through internet as the ordinary practice on issuance of notices by the court has been by the court sending process servers to effect personal service.

6. Learned counsel stated that he accepts the blame and urged the court to have mercy as it would be unjust to punish the respondent

/applicant for a mistake on his part. He reiterated that the delay is not inordinate.

The response

7. The applicant/respondent filed a replying affidavit sworn on 17th May, 2021 stating that; the allegation by the respondent/applicant that he did not receive the notice of judgement is not true as the notice was sent by this honourable court and disseminated to all advocates through the Mombasa Law Society by email on 11th February 2021 at 11.38 am; service of the said notice was confirmed by the administrator of Mombasa Law Society who indicated to her advocate that the respondent/applicant's advocate was part of the mailing list and annexed a copy of the mailing list sent to her advocate.

8. The applicant/respondent further stated that; there is no competent appeal as no Notice of Appeal has been filed; there can never be a stay of execution pending an intended appeal where there is none; the respondent can only seek stay of execution pending hearing and determination of intended appeal once his application for leave to appeal out of time has been allowed; it is irregular to apply for an order for stay of execution in the same application seeking leave to appeal out of time; the respondent/applicant has not explained what prejudice he will suffer if stay is not granted and urged the court to dismiss the application with costs.

9. The applicant/respondent's advocate filed a supplementary affidavit sworn on 7th June, 2021 stating that; the allegation by the respondent's advocate that the email by Mombasa Law Society containing the notice of judgement was not brought to his attention is not true and is an afterthought as he had a telephone conversation with the respondent/applicant's advocate Mr.Hamza on 23rd April, 2021 who informed him of the email and subsequently forwarded the said e-mail; that the turnaround and admission in the supplementary affidavit that the MLS e-mail was received by the respondent's advocate is a knee –jack reaction to the replying affidavit filed on 17th May 2021; the main basis of the application dated 23rd April, 2021 is that the judgement notice was not served upon the respondent and thus the admission by the advocate the ground of the application has crumpled and the same cannot be allowed; with the outbreak of Covid-19 physical service by the court process server is no longer tenable and that email service has become common practice and has in fact been recognized through amendments introduced in the Civil Procedure Rules 2020.

The respondent's/applicant's submissions

10. The respondent/applicant through his advocate filed written submissions dated 24th May, 2021 reiterating the averments contained in the affidavit and supplementary affidavit in support of the application. It was submitted that the applicant will not suffer any prejudice as she is residing in one of the matrimonial properties to the complete exclusion of the respondent /applicant. It was urged that the mistake of the respondent/applicant's counsel ought not to be visited upon the respondent/applicant. To fortify this proposition, reliance was placed on the holding in the case of **Patrick Maina Mwangi –Versus- Peter Waweru Miscellaneous Application Nrb No. 15 of 2015 (2015)eKLR** in which the high court cited with approval the holding in the case of Mwai v Murai (1982) KLR where Madan JA held as follows:-

> **"a mistake is a mistake, it is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known BETTER. The court may not forgive or condone it but it ought certainly to do whatever necessary to rectify it if the interest of justice so dictate"**

11. The respondent/applicant further submitted that Order 50 rule 6 of the Civil Procedure Rules allows a party to apply for extension of time for doing an act even after the expiration of such time.

12. To further buttress the submission that an advocate's mistake should not be visited on his client, counsel cited the holding in the case of **Patrick Maina Mwangi –Versus – Peter Waweru (Supra) eKLR where the court held that;**

> **"There is no denial that from time to time, most advocates make blunders which impact negatively on their clients' cases. But in my view, it is not every other blunder that must land an advocate before the Advocates Complaints Commission or Law Society of Kenya's disciplinary table. The level of awareness of the affected client also matters. It has not be shown that the applicant is feigning ignorance of his rights to complain against his former advocates. What I gather from his application is that he is imploring this court to exercise discretion and accord him a hearing. Punishing an advocate for every sundry of blunders does not necessarily accord justice to the client…"**

13. Counsel contended that, an appeal to the court of Appeal is deemed to have been duly filed upon filing a notice of appeal. On whether the respondent has an arguable appeal, learned counsel opined that the appeal has high chances of success. In buttressing that proposition, counsel relied on the holding in the case of **Swanya Limited v Daima Bank Limited [2001]eKLR** where the court of appeal held as follows :-

> **"whilst it is true that this court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up the funds to which prima facie he is entitled pending an appeal, it is equally true that when a party is appealing, exercising his undoubted right of appeal, this court will see that the appeal, if successful, is not rendered nugatory"**

15. As regards the prejudice the respondent/applicant is likely to suffer, the respondent submitted that if the orders sought are not granted the appeal will be rendered nugatory. He relied on the holding in the case of **Swanya Limited vs Daima Bank Limited (supra)** where the court held that;

> **"we are satisfied that if a stay is not granted and a sale of the property the subject matter of the intended appeal takes place,**

the appeal will be rendered nugatory as the substratum of the intended appeal would be destroyed."

The applicant's/respondent's submissions

14. The applicant/respondent through her advocate Oluga and company Advocates filed her submissions dated 8th June, 2021 submitting that the respondent/applicant did not withdraw the averment that neither him nor his advocate received the judgement notice while on the other hand his advocate admitted that he was served with the judgement notice via email. That the respondent/applicant's application is based on false averments made on oath and which have not been withdrawn or corrected by the applicant thus his application cannot be allowed.

15. Further, that the principles guiding grant of stay of execution pending appeal as stipulated under order 42 rule 6 (2) of the Civil Procedure Rules have not been met.

16. Learned counsel contended that the respondent/applicant has not explained the nature of **"irreparable loss, harm and damage"** he will suffer if the application is not granted. That the respondent/applicant must specify and give details of the loss and damage he is likely to suffer for the court to rule in his favour.In support of this proposition, counsel placed reliance on the holding in the case of **Gianfranco Manenthi & Another V Africa Merchant Assurance Company Ltd [2019]eKLR where Nyakundi,J .explained substantial loss as follows :**

"Discussing the very point on substantial loss Platt, JA in the case of Kenya Shell Ltd V Benjamin Keruga Kibiru and Others 1982 - 85 1 KAR 1018 observed:

> **"Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented."**

17. Further, counsel submitted that a successful litigant is entitled to the fruits of his judgment. In this regard, counsel made reference to the holding in the case of **Samvir Trustee Ltd Vs Guardian Bank Ltd Nrb (Milimani) HCCC 795 of 1997 quoted by Odunga, J in the case of Gemstar Importers & Another v Edward Nthiwa Mutiso (sued as a legal representative of the estate of the Charles Nzikok Nthiwa-Deceased) [2019] eKLR as follows:**

> **"It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant /defendant ...for the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss…"**

18. Counsel contended that the respondent has not given an undertaking on security as required by the law and urged the court to dismiss the application.

Analysis and determination.

19. I have considered the application herein, the response thereto and rival submissions of both counsel. Issues that emerge for determination are:

a) Whether the order for extension of time should be granted.

b) Whether the order for stay of execution of the judgement and/or order issued on 23rd February, 2021 should be granted.

20. On whether the court should grant an extension of time the court of appeal in the case of **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR** had this to say:

> **"It is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted. (See MUTISO V MWANGI) [1999] 2 EA 231."**

21. In this case, the impugned judgement was delivered on the 23rd February, 2021 and this application filed on the 23rd of April, 2021 which makes it a delay of two months. The draft Notice of Appeal and draft Memorandum of Appeal marked as annexture "**MAS-3"** and "**MAS-2"** is also dated 23rd April, 2021.

22. The reason given for the delay is that neither the respondent/applicant nor his advocate received any notice of delivery of the judgement. That the delay was caused by the fact that notice of the said judgement was not received on time. The respondent/applicant further stated that he only learnt of the court's judgement on 20th April, 2021 when the applicant/respondent advocate wrote a letter through e-mail requesting for approval of the decree. Later Mr.Hamza advocate for the respondent/applicant through his supplementary affidavit sworn on 21st may,

2021 confirmed receipt of the judgement notice through his email and indicated that it was never brought to his attention by his staff and therefore he never saw it.

23. According to annexture "**FS-3"** of the applicant/respondent's replying affidavit, it's evident that the notice was forwarded on 11th February, 2021 to all advocates through the Mombasa Law Society Secretariat and the applicant/respondent's advocate was one of the recipients.

24. The applicant/respondent advocate in his supplementary affidavit stated that with the outbreak of Covid-19 email service has become a common practice and the same has been introduced in the Civil Procedure Rules and all notices from Mombasa Law Society are now being disseminated through email thus the respondent/applicant advocate to allege that notices must be served physically by the court process server is not correct.

25. It was admitted that notice of delivery of Judgment was duly served upon all parties. For some reason, the Respondent/ applicant nor his counsel chose not to attend nor file notice of intention to appeal. Enlargement of time is not automatic. A delay of even one week, a month or an year must be justified.

26. Where a party chooses to sleep over his rights without any justifiable excuse, then the court cannot be expected to exercise its discretion in his favour. Indeed, in this case counsel for the Respondent/applicant lied to the court that he was not made aware of the notice for delivery of judgment thus accusing the court falsely until he was confronted by evidence which he admitted.

27. The delay of two months has not been satisfactorily explained. See **Jaber Mohsen Ali & Another vs Priscillah Boit & Another E & C No. 200/2012 (2014) eKLR** where the court stated that for delay to be declared unreasonable it will depend on circumstances of each case and that even one day's delay can be unreasonable. Similarly, in **Civil Appeal No. 433/2015** in the matter of the **Judiciary of Kenya vs Three Star Contractors Ltd. (2020) eKLR** the court found three month's delay as unreasonable.

28. In my view, the reasons advanced for the delay are not satisfactory and that extension of time is not a ritual but a serious legal provision which must be supported by convincing reasons for the delay but not lies as it happened in this case. Accordingly, that ground fails.

29. As to whether the appeal has high chances of success, the respondent/applicant stated that he has a good case on appeal with a high probability of success. In the absence of an appeal or notice of appeal, the court can not purport to make a finding on whether the appeal is likely to succeed. Be it as it may, unlike an appeal from the lower court, the intended appeal is to the court of appeal hence the right court to make that determination.

30. The respondent/applicant claimed that the applicant/respondent will not suffer any prejudice. No party has indicated the prejudice the applicant/respondent will suffer if the orders sought are granted or not granted. The respondent/applicant is the greatest beneficiary of the Judgment in question with 60% stake against 40% of the applicant/respondent. I do not see any possible prejudice to be suffered by the respondent /applicant.

31. On whether the prayer for stay of execution of the judgement delivered on 23rd February, 2021 should be granted, I have already found that the reasons advanced for the delay in filing the appeal or notice of intended appeal are not satisfactory and the order for leave to appeal out of time having failed, I will not delve into the order of stay as it cannot operate in a vacuum. In that regard, I am guided by the holding in the case of **Dilpack Kenya Limited v William Muthama Kitonyi (2018) e KLR** where the court stated that;

> "In **this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client. I am therefore not satisfied that the contumelious delay or default on the part of the applicant has been satisfactorily explained. As the applicant has failed in satisfying the first ground for extension or enlargement of time to file an appeal out of time, this application must fail and without an order extending time the stay cannot be granted in vacuum."**

32. The upshot of the above is that the application dated 23rd April, 2021 has no merit hence it is dismissed. As to costs, this a family related matter hence each party shall bear own costs.

Dated, signed and delivered at Mombasa on 22nd October, this day of 2021.

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J.N.ONYIEGO

JUDGE