



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO E008 OF 2021

SKM.....APPELLANT/APPLICANT

-VERSUS-

NWM.....1ST RESPONDENT

JWM.....2ND RESPONDENT

- BETWEEN-

NWM.....PETITIONER

-AND-

SKM.....1ST RESPONDENT

JWM.....2ND RESPONDENT

RULING

1. This is a ruling on application dated 22nd June 2020 seeking the following orders: -

1) Spent

2) Spent

3) Spent

4) That pending hearing and determination of this appeal honorable court be pleased to issue an order arresting delivery of ruling scheduled for 22nd October 2021 in NAKURU SEPARATION CAUSE NO. E28 OF 2021(NWM Vs SKM & Another).

5) That pending hearing and determination of this appeal honorable court be pleased to issue an order staying further proceeding in NAKURU SEPARATION CAUSE NO. E28 FO 2021(NWM Vs SKM & Another).

6) That the costs of the application be costs be born e by the 1st respondent.

2. Grounds on the face of the application are that there is already Separation Cause Nakuru CMCC No.E028 of 2021 and in the application the 1st respondent filed application dated 29th January 2021 seeking Alimony *pendente-lite* of Kshs 200,000 per month from the applicant/appellant and on 2nd September 2021 when the matter was mentioned to confirm filing of written submissions, the applicant/appellant had filed a further affidavit together with submissions without leave of Court; and the further affidavit was struck off the record for being filed without leave of Court.

3. The appellant wishes to have the order striking the further affidavit set aside in the appeal herein and argues that if the Court does not stay proceedings in the lower court, a ruling scheduled for 22nd October 2021 will be delivered to the detriment of the appellant/applicant.

4. The application is supported by affidavit sworn by the applicant/appellant sworn on 9th September 2021. He restated grounds of appeal and attached a copy of the application, replying affidavit, supplementary affidavit, further affidavit dated 24th August 2021 and submissions

by both parties.

5. He averred that he filed the further affidavit without leave of Court together with submissions; that his Advocate made oral application to file a further affidavit but the application was denied by the trial magistrate. He averred that he is represented by two law firms but the trial magistrate restricted audience of his legal representation to one Advocate despite being notified that each Advocate wanted to address the Court and was therefore denied opportunity to explain why he needed to file further affidavit which included but not limited to the fact that the 1st respondent herein had already filed supplementary affidavit introducing new issues.

6. The applicant further averred that by striking his further affidavit, the trial magistrate was not guided by **article 159(d) of the constitution** which state that justice shall be administered without undue regard to procedural technicalities; and averred that requirement for leave is more of procedural technicality rather than substantive issue.

7. In response, the 1st respondent filed replying affidavit dated 8th October 2021. He averred that the application is bad in law, incompetent, non-starter, frivolous, vexatious and malicious and a gross abuse of the court process. Further that the purported 2nd respondent in the trial suit and this suit are two different people and the 2nd respondent herein is thus a stranger to these proceedings and lack capacity to be included in the instant appeal.

8. The 1st respondent averred that the application does not meet the threshold for grant of orders sought. She stated that the appellant was granted leave to file cross petition dated 26th July 2021 and served on 27th July 2021 but failed to seek leave to file further affidavit and instead filed a further affidavit on dated 28th August 2021; that on 2nd September 2021, the 1st respondent's Advocate raised the issue of irregularity of the further affidavit and urged the trial court to expunge it from record and upon hearing the appellants counsel from the firm of **Mirugi Kariuki**, the Court struck out the further affidavit.

9. She further averred that upon the court pronouncing itself on the issue of the further affidavit, **Mr. Okiro** from the firm of **Gordon Ogola, Kipkoeh & Co. Advocates** stood to address Court on the same issue and non-service of the submissions; that the Court placed the file aside and asked **Mr. Murithi** and **Mr. Okiro** to agree on who will be lead counsel but later at 12.45 Pm ,the two counsels failed to agree and addressed the court independently pulling from opposite directions contrary to directions of the court; that the court noted that both counsels were representing the appellant and the firm of **Mirugi Kariuki** were dully served and they filed written submission and upon hearing both counsels, struck out the further affidavit.

10. The 1st respondent further averred that other than attaching documents in the said further affidavit, the applicant has not demonstrated the relevance of the documents. She averred that filing further affidavit after he had filed supplementary affidavit, the appellant intended to gain undue advantage over him and stifle justice.

11. The 1st respondent averred that under rule 7(1) of the Advocates practice rules, the two law firms were expected to discuss and agree which of them would be the lead counsel but the two counsels failed and the allegation that the trial magistrate restricted the audience of the appellant's legal representation is far-fetched; that the replying affidavit was struck out upon consideration of well-established legal principle.

12. He further averred that the application is intended to derail delivery of ruling on 22nd October 2021 and stated that he stands to be prejudiced. further that the appellant/applicant has not demonstrated any loss that cannot be compensated by way of damages and urged this court to find that the application has not met minimum threshold for grant of orders sought.

13. In a rejoinder, the applicant filed supplementary affidavit and averred that the issue of names brought by 1st respondent is inconsequential and should not be dealt with by this Court; and allegation that this application does not meet threshold for grant of orders sought is misplaced, misconceived and intended to mislead this Court.

14. He further averred that the further affidavit was struck out on 2nd September 2021 and this application was filed on 9th September 2021 and it was therefore filed timeously.

15. He averred that there is arguable issue for appeal as the applicant was denied a chance to be heard contrary to article 50(1) of the constitution of Kenya 2010. He stated that he was represented by two law firms and the two counsels had agreed that each would address court and the court should have given each Advocate to address the court and he would have explained why he had not regularized the lack of leave if he had been given a chance to address court; that the documentary evidence attached was crucial to this case.

16. Due to the urgency of this application, counsels for the parties herein filed authorities in support of their positions and submitted orally on 18th October 2010.

APPLICANT'S SUBMISSIONS

17. Counsel for the applicant submitted that there is a sister file MATRIMONIAL CAUSE NO. E 009 F 2021 where **Justice Ngugi** has already referred the dispute to mediation and parties are likely to record a consent. Counsel submitted that the applicant has arguable appeal against the trial magistrate's orders of striking out the further affidavit and restated averments captured above; he submitted that leave is procedural and striking out the further affidavit for failure to obtain leave to file, is not in line with **article 159(d) of the constitution** and that alone demonstrate that the appeal is arguable.

18. Counsel further submitted that the respondent is seeking a figure of kshs 200,000 per month as alimony *pendente lite*. He added that the applicant must be able to show distress and it must be done and established with the legal framework; that they had not objected if the

respondent wanted to file further affidavit but they opted to apply for the applicant's affidavit to be struck out.

SUBMISSIONS BY THE RESPONDENT

19. Counsel for the respondent relied on replying affidavit sworn on 8th October 2021 and submitted that for application brought under **order 42 rule 6**, the applicant is required to move timeously and demonstrate substantial loss but the application herein has not met the threshold; that the applicant has not proved loss that he will suffer if the application is not allowed but the 1st respondent has ably shown loss she will suffer if the application is allowed and it has been articulated by the way in which Alimony *pendente lite* has been plead and urged court to look at the replying affidavit to see the nature of evidence before the trial court.

20. Counsel further submitted that the threshold under order 42 rule 6 form the core upon which the court can be persuaded to grant orders for stay and urged this court to find that there is no loss the applicant would suffer. She urged this court to be guided by the case of ALL VS HAS {2020} e KLR where the court held as follows: -

“The applicant must demonstrate that he will suffer substantial loss if the stay is not granted and he must give security for the performance of the order that might ultimately be binding on him.”

21. She further submitted that under **section 177 of the Evidence Act** it is clear on the burden of proof that he who alleges must prove and that prove was not met and on that alone, this application is suitable for dismissal.

22. On whether there is arguable appeal, she submitted that it is not one of the threshold under **order 42 rule 6**; that it is not a legal ingredient under the provision; further that the orders granted were negative and are not capable of being stayed.

23. She submitted that it is not disputed that the affidavit was filed out of time and without leave of Court and the Court was persuaded and proceeded to strike it out; that directions had been issued and complied by the 1st respondent and he submitted that the further affidavit would occasion injustice.

24. Counsel for the 1st respondent further submitted that the prayer for alimony *pendente lite* of kshs 200,000 has not been allowed as the ruling is scheduled for 22nd October 2021; and no prejudice would be occasioned as replying affidavit had been filed and that it would be unfair to stay the ruling. She urged this Court to find this application premature and dismiss it.

25. Counsel referred to the case of **John Kinoti T/A Mwigo Enterprises Vs Parkway Investment Limited & Another [2018] eKLR** where the Court held that a litigant should have one firm of Advocates on record but can be joined by others in terms of **Rule 7(1) of the Advocates (practice) Rules** and directed the defendant's Advocates to discuss with their clients to determine which of them should be leading counsel on record. She submitted that the trial magistrate applied administrative discretion judiciously but both counsels disregarded the trial magistrate's directions.

26. As captured in averments, counsel for the 1st respondent submitted that a new party has been introduced in this appeal; that the 2nd respondent was not a party in the trial court.

27. In a rejoinder, counsel for the applicant submitted that the 2nd respondent is the same person in the trial court and secondly she has never participated in this proceedings; that it is not in dispute that she was sued in the lower court.

28. Counsel further submitted that the applicant is seeking stay of proceedings and not stay of judgment but authority 1 & 4 relate to stay of judgment.

29. He submitted that they wish to converse the appeal including whether the right to legal representation was restricted and counsel for the 1st respondent has conceded that the appeal has been filed in time but loss need not be financial; injustice is great loss. He urged this court to allow the application.

ANALYSIS AND DETERMINATION

30. I have considered averments and submissions herein and what I consider to be in issue is whether the applicant has met the threshold for grant of orders for stay of execution pending appeal. **Order 42 rule 6(1) and (2) of the Civil Procedure Rules** provides principles for grant of stay orders pending appeal as hereunder: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 an application being made, to consider such application and to make such order thereon as may to it seems 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 sub rule (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.”

31. From the above provision, the Court has to satisfy itself that the application has been filed timeously, that substantial loss will be occasioned to the applicant if stay is not granted and Court may order deposit of security for performance of the decree or order if it shall remain binding on the applicant.

32. There is no dispute that the application has been filed timeously. What is in issue is whether substantial loss will be occasioned if proceedings before the trial court are not stayed.

33. The applicant has filed appeal on ground that the further affidavit he filed out of time was struck out. It is not disputed that the further affidavit was filed out of time without the leave of the court. The applicants counsel argued that one of the two lawyers representing the applicant in the lower court was not granted opportunity to address the court and if he had been given the opportunity, he would have given explanation for filing of the further affidavit without leave and importance of its averments in the applicant’s case.

34. Counsel for the 1st respondent argued that the two lawyers were give opportunity to choose who was to be the lead lawyer but they failed to comply with court directions. From my reading of the averments it seems there was no consensus by the two law firms on how they were to approach the court. This is however an issue which will be addressed in the appeal and I do not wish to delved into it right now.

35. I wish to consider whether the applicant stand to suffer substantial loss if the proceedings are not stayed. The applicant indicated that the 1st respondent raised new issues in the supplementary affidavit which needed to be addressed by the further affidavit.

36. The applicant argued that he lacked the opportunity to place before the court facts which would have assisted in making full determination of dispute between the parties in the matter before the trial court. In my view, there is need for the appellate court to determine whether the trial court erred in striking out the further affidavit and if stay is not granted, the proceedings will go on minus the averments in the affidavit thus rendering the appeal nugatory; in the event he succeeds in the appeal, the trial court will have made determination on dispute between parties without consideration of facts raised in the further affidavit struck out.

37. From the foregoing I find that the applicant has demonstrated that he stands to suffer substantial loss if the proceedings in the trial court are not stayed to await appeal herein.

38. FINAL ORDERS

1) Stay of proceedings in NAKURU SEPARATION CAUSE NO. E28 OF 2021 (NWM Vs SKM & Another) do issue pending hearing and determination of appeal herein.

2) Costs in the cause.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 21ST DAY OF OCTOBER 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Ms. Kinuthia holding brief for Mr. Murithi for the Applicant

Mrs. Mukira counsel for Respondent