



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 85 OF 2017

Z-U-DG.....APPELLANT

VERSUS

SJK-U.....RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated **11th August 2020** by which the Applicant **SJK-U-R** seeks the following orders:-

“1. Spent.

2. THAT this honourable court be pleased to fine Z-U-DG a fine not exceeding Two Hundred Thousand Shillings or to commit him to civil jail for a period of not less than six (6) months for being in contempt of court orders which this honorable court made on the 27th day of May 2020.

3. That in alternative this Honourable Court be pleased to order the Appellant file an affidavit containing his financial status to pay mut’ah to the respondent from the date of judgment forthwith and give directions on how much mut’ah shall be paid.

4. That in the alternative, the appellant be summoned to show cause as to why he should not be committed to civil jail.

5. Any other order this court deems just, fair and in the interest of justice to provide.

6. Costs.”

2. The Application was premised upon **section 3,4,5,27 (b) & 28(1)** of the **Contempt of Court Act No 46 of 2016**, **sections 1B** and **3A of the Civil Procedure Rules, Order 51 Rules 1** of the **Civil Procedure Rules** and all other enabling provision of Law and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **Z-U-DG** opposed the application through his Replying Affidavit dated **11th August 2021**. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated **6th September 2021** whilst the Respondent relied upon his written submissions dated **16th September 2021**.

BACKGROUND

4. The parties herein were involved in **Civil Suit No 46 of 2017** before the **Kadhi Court** in **Nairobi** by which the applicant had sought orders of custody of the couples **three (3)** children as well as orders that the Respondent/Appellant pay maintenance towards the upkeep of said children. Vide prayers **(e)** of her suit the Applicant sought orders for-

“(e) A reasonable amount as mut’ah as the court may deem fit to grant”

5. On **6th November 2017** the **Hon Kadhi** delivered a Ruling in favour of the Applicant. In said Ruling the **Kadhi** made *inter alia* the following orders.

“5. That the Petitioner is entitled to mut’ah (consolatory gift). The quantity of such payment shall be ordered upon the assessment of the respondents (Appellants) financial status.”

6. Being dissatisfied with the decision of the **Hon Kadhi** the Respondent filed in the High Court a memorandum of Appeal dated **16th November 2017**. The Appeal was heard by **Hon Lady Justice Ali-Aroni** who vide her judgment dated **27th May 2020** dismissed the Appeal. In the judgment the **Hon Judge** concurred with the findings of the **Hon Kadhi** that **mut’ah** was payable stating that the Applicant was entitled to –

“payment of mut’ah based on the assessment of the Respondents financial status”

7. In the judgment of **27th May 2020** the court ordered the Applicant to file an Affidavit of means regarding his financial status within the **14 days** of the date of the judgment. The said Affidavit was to be used to guide the court on the amount of **mut’ah** payable to the Applicant. The Respondent did not file an Affidavit of means as directed hence the present application.

8. The Respondent being dissatisfied with the dismissal of his appeal by the High Court filed a further appeal before the Court of Appeal being **Civil Appeal No E6228 of 2020** which is still pending. In opposing this application, the Respondent contends that the **Hon Kadhi** on **12th May 2021** issued a stay of execution of the judgment of **6th November 2017**.

9. The Respondent claims that he filed an application dated **11th March 2021** seeking stay of execution of the judgment delivered by the **Hon Kadhi** pending the hearing and final determination of his Appeal by the Court of Appeal. That the **Hon Kadhi** vide a ruling delivered on **12th May 2021** allowed the application for stay of execution. The Respondents position therefore is that he cannot be deemed to be in contempt of an order which has been stayed.

10. The Respondent also challenged the present application on grounds that the same was fatally defective for reason that the Affidavit in support thereto was not commissioned. The Respondent also accuses the Applicant of introducing evidence through his written submissions. He urges this court to dismiss this application with costs.

ANALYSIS AND DETERMINATION

11. I have carefully considered the application, the Affidavit in Reply as well as the written submissions filed by both parties. The Applicant seeks to have the Respondent held in contempt of the orders made by the court directing him to file an Affidavit of means to enable the court assess the amount payable to her as **mut’ah**.

12. On his part the Respondent asserts that the said orders were stayed by the **Hon Kadhi** and that he cannot be held to be in contempt of orders which have been stayed by the court.

13. The courts discretion to stay execution of a Ruling or judgment is provided for by **Order 42 Rule 6** of the **Civil Procedure Rules** where it is stated: -

“No order for stay of execution shall be made under subrule (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.”

14. The issue in contention here is whether the orders directing the Respondent to file in court an Affidavit of means have been stayed or not. It is common ground that the appeal filed against the decision of the **Hon Kadhi** was dismissed by the **High Court** vide the judgment of **27th May 2017**. I have also seen the **Memorandum of Appeal** dated **20th July 2020** by which the Respondent filed a further appeal to the **Court of Appeal**.

15. The Respondent filed in the **Kadhi Court** an application dated **11th March 2021** seeking a stay of execution of the judgement of the **Hon Kadhi** pending hearing and determination of his appeal in the Court of Appeal.

16. I have carefully perused the Ruling of the Kadhi which was delivered on **12th May 2021**. The **Hon Kadhi** allowed the Respondents application and in doing so stated as follows-

“In the premises, I find that the application dated 26th March 2021 is meritorious and I hereby allow the same as prayed with no orders as to costs.” (own emphasis)

17. It is clear to me that reference by the **Hon Kadhi** in his final orders of application dated **26th March 2021** was an error on the face of the record. In the opening statement of the Ruling dated **12th March 2021** the **Kadhi** clearly indicated that what was before him was an application dated **11th March 2021** seeking orders of stay of execution of the judgment dated **6th November 2017** pending the hearing and determination of the Appeal from the judgment dated **27th May 2020** delivered by the High Court.

18. The ruling of the **Hon Kadhi** was clear and unambiguous. The Application for stay of execution was allowed as prayed. Thus execution of any of the orders granted by the **Hon Kadhi** including the order for payment of **mut'ah** have been stayed pending determination of the appeal filed before the Court of Appeal. It would be illogical for this court to pursue execution of an order which already been stayed and it stands to reason that the Respondent cannot be found to have breached orders which have lawfully been stayed.

19. In **BERLINDER INDUSTRIE-BANK AKJIENGELLSHACFT VS JOST [1971] ALL ER** it was held-

“Where a stay is granted pending the hearing of an appeal, it is assumed that nothing can be done by the successful plaintiff to enforce the judgment until the appeal has been heard.”

20. Closer home on the case of **MICHAEL SISTU MWAURA KAMAU – VS – OPP & 4 OTHERS [2018] eKLR**, the **Court of Appeal** noted that: -

“For now the applicant has filed a notice of appeal and the issue is live before this court. Prudence demands that we should not pre-empt the issue which is pending for determination by the court. It would be remiss, if for example, after hearing the appeal this court finds that the judgment did not stop prosecution of the applicant and yet in the meantime the respondents had been committed for contempt of court,”

21. Likewise in the case of **ABDIAZIZ SHEIKH MAAD & 3 OTHERS VS GOVERNOR MANDERA COUNTY & 2 OTHERS [2002]eKLR Hon Justice Makau** in a case in all fours with the present case where a party sought contempt proceedings in face of a stay of proceeding pending hearing and determination of a **Court of Appeal** matter the **Hon Judge** stated as follows:-

“In my view, the option of stay of the proceedings hearing is the proper order because if the Court of Appeal declines to grant stay, the petitioners will be at liberty to revisit the contempt proceedings even before the appeal is heard and determined. However, continuing with the contempt proceedings in disregard of the Court of Appeal proceedings would be an untidy situation and likely to end in some embarrassing decision.” (own emphasis)

22. I am in agreement with the above decision. To pursue contempt proceedings in the face of stay of execution orders granted by the **Hon Kadhi** would not only be untidy but would also amount to a misuse of the courts stretched resources. I find that execution of the judgment delivered by the **Hon Kadhi** on **6th November 2017** cannot be pursued until the appeal filed by the Respondent is determined by the Court of Appeal.

23. Finally, it is my finding that the Respondent cannot be held to be in contempt of an order which has been stayed and for this reason the application dated **11th August 2020** must fail.

24. The Respondent also took issue with the fact that the supporting Affidavit dated **11th August 2020** was not commissioned as required by law. It is submitted that the same is therefore fatally defective. I have perused the said supporting Affidavit and note that although it has been signed by the Applicant the Affidavit has not been commissioned.

25. The making of Affidavits is governed by the **Oaths and Statutory Declarations Act Cap 15 Laws of Kenya. Section 5** of said Act provides that-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

26. An Affidavit is a statement made on oath. It is the jurat which elevates a written statement to the status of an Affidavit. Without a jurat and in absence of commissioning by a Commissioner of Oaths, a Magistrate or a Notary public the statement remains a mere unsown written document and does not have the legal value of an Affidavit.

27. In the case of **GIDEON SITLU KONCHELLA – VS – JULIUS LEKAKENY OLE SUNKULI & 2 OTHERS [2018] eKLR** the **Supreme Court of Kenya** held as follows: -

“Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a commissioner for oaths.

[8] we have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and date. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.”

28. Due to the omission to have the supporting Affidavit commissioned it is deemed that there is no supporting Affidavit on record. This renders the application defective as there is no **‘evidence’** to support the prayers being sought in the application.

29. Finally and in conclusion, I dismiss in its entirety the Notice of Motion dated **11th August 2020**. Each party shall bear its own costs.

DATED IN NAIROBI THIS 26TH DAY OF NOVEMBER 2021.

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MAUREEN A. ODERO

JUDGE