REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 31 OF 2020

AAL.....APPELLANT

VERSUS

HSA.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated 21/4/2020 brought under ***Order 42 Rule 6 of the Civil Procedure Rules,*** the appellant sought the stay of execution of the judgment and decree in **Isiolo Kadhis Court Divorce Cause No.1 of 2020** pending the hearing and determination of the appeal.

2. The application was supported by his affidavit sworn on 21/4/2020. He averred that the respondent was threatening to execute the judgment against him which will render the appeal nugatory. That he was not given a chance to present his case before the trial Court, hence he was condemned unheard.

3. The application was opposed vide the replying affidavit of the respondent sworn on 12/5/2020. She averred that the appellant had been given a hearing before the trial Court. That if the stay sough is granted, the six children of the appellant will be exposed to danger and suffering. That paying for sustenance, school fees and accommodation of the children will not render the appeal herein nugatory.

4. The parties filed their respective written submissions which the Court has considered. The appellant submitted that the divorce cause ought to have been determined first before the division of matrimonial property. That the respondent had not sought a declaration of her right in any of the matrimonial properties as required under ***section 17 of the Matrimonial Property Act, 2013*****.** That the award is a money decree and there is a likelihood of the appeal being rendered nugatory.

5. On her part, the respondent submitted that the appellant had not satisfied the conditions set out under ***Order 42 Rule 6 of the Civil Procedure Rules*** *for* the grant of the orders. That if the stay is granted, their children will be exposed to danger and suffering. That the same will also go against the best interest of the child as provided for in ***Article 53 of the Constitution***. The cases of **JKT VS PJ [2020] eKLR, ZMO vs EIM [2013] eKLR, JMM vs PM [2018] Eklr** and **MMM vs JKK [2018] Eklr**, were relied on in support of those submissions.

6. ***Order 42 Rule 6 (2) of the Civil Procedure Rules, 201*0** provides the condition precedent for the grant of a stay of execution. In **Tassam Logistics Ltd v David Macharia & another [2018] Eklr,** the court held that the three (3) prerequisite conditions set out in the said ***Order 42 Rule 6 of the Civil Procedure Rules, 2010*** cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously.

7. These conditions are; that the application must be made timeously, the applicant must demonstrate that he will suffer substantial loss if the stay is not granted and he must give security for the due performance of the order that might ultimately be binding on him.

8. In the present case, the decision appealed against was made on 9/4/2020. The current application was lodged on 22/4/2020. That is a period of 13 days. The first condition has been met in that, the application was filed timeously.

9. The second issue is substantial loss. In **Co-operative Bank of Kenya v Pius Kimaiyo Langat [2015] Eklr**, the Court held: -

> ***"However, the Defendant failed to show what loss he would suffer if the application herein was not granted. In fact, he did not address the same in his affidavit. The Defendant emphasised how he had an arguable appeal and how his appeal would be rendered nugatory if the current application was not granted.***
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> ***This had no relation to the issue of whether or not the Defendant would suffer substantial loss. Indeed, it is worthy to note that this court is not concerned with whether or not the Defendant has an arguable appeal. That is within the jurisdiction of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules. … However, the court was alive to the fact that the superior court***

could have been wrong and that there was need to give parties time to ventilate their issues before the Court of Appeal".

10. In **Butt v Rent Restriction Tribunal [1982] KLR 417** at page 419 Madan JA (as he was then) held: -

> ***"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 459:***
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> ***"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."***

11. In **Kenya Shell Limited v Benjamin Karuga Kibiru & anorther [1986] eKLR Hancox JA** held as follows;

> ***"As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."***

12. It is clear from the foregoing that substantial loss is the cornerstone for an order for stay under ***Order 42 Rule 6.*** If an applicant does not demonstrate satisfactorily that substantial loss will result if a stay is not granted, no stay can issue even if the other two conditions are met. This is so because, in dealing with an application for stay, the court is always called upon to weigh between two competing interest; the appellant's undoubted right to be heard on appeal and the respondent's right not to be kept away from the fruits of his judgment.

13. In the present case, the applicant did not demonstrate how he stands to suffer substantial loss if a stay is not granted. Nowhere in his supporting affidavit did he make any positive allegation to that fact. It is not in the province of this Court to speculate on the nature and manner of loss to be suffered by a party. That lies with an applicant. In this case, he failed to discharge that burden.

14. The applicant was pre-occupied with showing how his appeal has chances of succeeding. That however, is not a condition for the grant of stay under ***Order 42 Rule 6.*** It is under ***Rule 5 (2) (b) of the Court of Appeal Rules*** but not before this Court.

15. What is required under ***Order 42 Rule 6*** is for an applicant to positively state that he will suffer substantial loss if the stay is not granted. The applicant should go further and demonstrate how he will suffer such substantial loss, in other words the nature of the alleged substantial loss on the part of the applicant.

16. In this case, part of the decree sought to be stayed is the decision for the maintenance of the children of the couple. There is also a decision that ascertained the respondent's interest in the matrimonial property which was assessed at Kshs.2,000,000/-. ***Article 53 of the Constitution*** enjoins the Court to always act in the best interest of the child. With that in mind, it will be fool hardy to urge that that part of the decree be stayed when there is no evidence that it will lead to any substantial loss.

17. In **Z M O v E I M [2013] Eklr,** the court held: -

> ***"I note that the payment ordered by the court related to parental duty. The payments are meant for the monthly upkeep of the child. The appellant, as a parent, cannot run way from them. He cannot argue that parental responsibility is unconscionable. To my mind the issue of substantial loss so far as parental duty is concerned does not arise. Needless to say that the issue here appears to turn on the quotation of the maintenance ordered by the court. Is the amount fair or reasonable? These are issues that I cannot address at this stage as they form the substratum of the appeal. In any event, the appellant has not even stated what he considers reasonable nor even made an effort to pay monthly maintenance at a rate that he considers reasonable and sustainable …".***

18. As regards the division of the matrimonial property, the trial court assessed the respondent's share of the matrimonial property at Kshs. 2 million. The applicant did not demonstrate that if he paid the amount assessed, he would suffer substantial loss.

19. As if the foregoing is not enough, the applicant did not offer any form of security for the due performance of the decree that might ultimately be found to be binding on him.

20. The foregoing being the case, I find the application to be without merit and the same is dismissed with costs.

DATED and DELIVERED at Meru this 18th day of June, 2020.

A. MABEYA

JUDGE