



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 23 OF 2020

ASS.....APPELLANT

VERSUS

YRN.....RESPONDENT

RULING

1. The application subject of this ruling is a Notice of motion brought pursuant to the provision of the Constitution of Kenya 2010, **Section 1A, 3A and 6(2)** of the **Civil Procedure Act**.

2. It seeks:

a. Stay of execution of the judgment and/or decree of the Kadhi in Matrimonial No. 189 of 2019 ASS vs YRN pending hearing and determination of an appeal.

b. Such further orders as the court deems fair and just in the interest of the minors.

3. The application is predicated on grounds that the judgment is an error on the face of the record; the judgment failed to consider the provisions of Section 73 of the Childrens' Act, there is pending an application for contempt; and the judgment is adverse to the Respondent.

4. The Applicant swore an affidavit dated 16th April 2020 in support of the application wherein he questioned the Kadhi's court jurisdiction in handling issue of custody and maintenance, he expressed the view that the said judgment being erroneous and a stay pending determination of the appeal.

5. On her part the Respondent opposed the application by way of a replying affidavit dated 28th April 2020 wherein she contends that the application is baseless, mischievous; an abuse of court process and is meant to deprive her of the benefits of a judgment already in her favour. Further the memorandum of appeal was filed outside the stipulated period and with no leave of court; the application would not be in the interest of the two minors who are in the custody of the respondent with no assistance from the applicant and the appeal is not meritorious.

6. The matter was canvassed by way of submissions. The court's interaction with parties was virtual.

The appellant's submissions dated 14th of May, 2020 dealt more with issues raised in the memorandum of appeal. This court is not clothed with the necessary tools for now to deal with the appeal; as it were the record of appeal is yet to be filed.

7. In her submissions the Respondent acting in person reiterated the fact that she has a judgment in her favour; the applicant has failed to comply with a maintenance order in favour of the two issues of the marriage and a stay will not be in the best interest of the children.

8. As stated earlier this court was moved for stay orders which were granted on interim basis pending hearing *inter partes*. The court is not for now concerned with the appeal.

9. Filing of an appeal is not an automatic ticket for a stay.

Order 42 Rule 6(2) gives necessary conditions to be met before a stay pending appeal can be granted;

a) The court must be satisfied that substantial loss is likely to be occasioned.

b) The application was made without undue delay.

c) Security for costs is offered for the due performance.

10. Notable is that judgment of the Kadhi was issued 6th of December, 2019 and this court moved on the 2nd day of April 2020. The time for filing an appeal lapsed on the 28th of January 2020 and therefore leave needed to have been obtained which means technically there is no valid appeal before court. Secondly the application for stay was brought after an ordinate delay.

11. The above notwithstanding, the applicant failed to show the loss he is likely to suffer should the stay not be granted. Further, maintenance if stopped, in the circumstances of this case and at this point will not be in the best interest of the minors.

12. Consequently, for the reasons above the application is hereby dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 24TH DAY OF SEPTEMBER, 2020.

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ALI-ARONI

JUDGE