



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CIVIL CASE NO 87 OF 2020

GMB.....APPLICANT

VERSUS

RWG....RESPONDENT

RULING

1. Before me is a Notice of Motion dated 18/9/2020 expressed to be brought under Section 3, 3A, 63E and 79G of the Civil Procedure Act and Order 51 Rule 1 and under Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The significant orders sought are:

- a. Stay of execution pending appeal, and**
- b. Memo of appeal filed be deemed to be duly filed; and**
- c. Costs of the application.**

2. The application is based on grounds set out in the application and the supporting affidavit. In a nutshell the applicant argued:

- a. That the judgment was a nullity having been adjudicated upon in his absence.
- b. That time to file appeal be enlarged in the interest of justice.
- c. That the Respondent has already commenced execution which is causing loss to him as his salary is being deducted a sum of Kshs.17000/ (80% of his net pay).
- d. That he only learnt of the Kadhi case No. 53 of 2019 when his salary was deducted in August 2020.
- e. That his appeal has high chances of success.

3. The Respondent opposed the application through her replying affidavit. She stated that the applicant went to slumber upon receipt of pleadings and only woke up when judgment was entered. He should not therefore be allowed time to appeal. She further states that she was never served with pleadings as alleged as she was in hospital at the time of the alleged service due to a fracture she suffered on her leg. She accused the applicant of lackluster attitude which is evident throughout these proceedings whose aim is to delay justice in this case. She took the view that the intended appeal has no chances of success. According to her, the applicant has not come to court with clean hands, for despite knowledge of proceedings and order, he has persisted in disobedience. She however proposes that the applicant be ordered to deposit all due sum and to continue with payment of future sums due on the decree as a condition of stay.

ANALYSIS AND DETERMINATION

4. I am to determine whether to order stay of execution, and or enlarge time for filing of appeal. I will invert the order.

Enlargement of time to appeal

5. The predominant considerations in an application for enlargement of time are;

- a. Amount of delay;
- b. Reasons for the delay; and
- c. Prejudice to the Respondent

6. The applicant stated that he was completely unaware of the case in the Kadhis court and the judgment thereto. From the judgement of the Kadhi, specifically at paragraph 2, the applicant was served with pleadings through his WhatsApp number. It seems the Kadhi examined messages which transmitted the pleadings to the Applicant. I do not doubt his finding.

7. Nonetheless, despite service, should I enlarge time to file appeal?

8. The delay herein is not so contumelious as to amount to *laches*. Accordingly, in deference to his right of appeal as enshrined in the Constitution, I allow the applicant to file appeal in 14 days.

Stay of execution

9. Stay of execution pending appeal is aimed at preventing substantial loss from occurring upon the applicant. See what substantial loss entails in the case of **Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005** (High Court of Uganda at Kampala) where it was stated that: -

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal”.

10. According to the applicant, his appeal has high chances of success. And unless stay is granted, he will suffer irreparable damage for the deductions herein amount to 80% of his net salary. I have granted him leave to appeal. But, I do note that this case involves inter alia, maintenance of children. The Constitution is the ultimate yardstick here; it commands in article 53(2) that;

(2) A child’s best interest are paramount in cases involving the child.

11. The child’s best interest in every case is determined by looking at the rights of the child which require protection in the proceedings. Under the Constitution, every child has a right, inter alia, to basic education, nutrition, shelter, health care, and parental care and protection. The applicant is under an obligation to provide for the children in accordance with these rights. And, I do not think a sum of Kshs. 15,000 for maintenance of the children in this age and time is unconscionable demand upon the applicant as to amount to substantial loss occurring upon him in the sense of the law. In saying this, I am aware of shared parental responsibility by both parents. He will therefore continue to pay Kshs. 15,000 towards maintenance of the children as condition of stay of execution of the original decree. Now, a sum of Kshs. 15,000 will be deducted from his salary every month. It is so ordered.

12. No orders as to costs.

Dated and signed at Narok this 23rd day of November 2020

F. GIKONYO

JUDGE

Dated, signed and delivered at Meru this 16th day of December, 2020

T. W. CHERERE

JUDGE