



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 36 OF 2018**

**SKC.....APPELLANT**

**VERSUS**

**FKK.....RESPONDENT**

**THE RULING OF THE COURT**

**(payment of maintenance pending hearing and determination of the primary suit-stay of execution orders- Article 159(2) of the constitution-Alternative disputes resolutions-contempt of court order)**

**BACKGROUND**

1. The Notice of Motion Application before me is dated 2<sup>nd</sup> August, 2018. It was brought in terms of **order 42 rule 6 (1) and (2)** of the Civil Procedure Rules, **Section 1A, 1B, 3A and 63** of the Civil Procedure Act and all enabling provisions of the law.
2. The Applicant is seeking order of stay of proceedings and execution of the ruling of the subordinate court delivered on the 24<sup>th</sup> July, 2018 in Chief Magistrate's Court Matrimonial Cause No. 11 of 2018 at Malindi pending hearing and determination of the application. Costs of the application be provided for.
3. The grounds upon which the instant Notice of Motion Application hinges are that: the appellant has filed an appeal against the ruling of the subordinate court delivered on the 24<sup>th</sup> July, 2018; the said appeal is arguable and has high chances of success; the instant application has been filed without undue delay and that, in the interest of justice, the orders sought herein be granted.

**The Appellant's Case**

4. The Notice of Motion application herein is supported by a supporting affidavit sworn by **SKC** on 2<sup>nd</sup> of August 2018. I have also perused his further affidavit dated 15<sup>th</sup> March 2018. It is indicated that the Respondent initiated proceedings in the subordinate court vide a notice of motion dated 11<sup>th</sup> April, 2018. In that case, the Respondent sought among other orders, an order that the Appellant be compelled to pay her maintenance pending the determination of the primary suit.
5. The said Application was argued through written submission as per the direction of the court made on the 21<sup>st</sup> May, 2018. A ruling was issued on the 24<sup>th</sup> of July, 2018 by Hon. S.R. Wewa which allowed the application as prayed. Having been aggrieved by the ruling of the lower court, the Appellant through his advocates, Lewa & Co. Advocates filed an appeal against the said ruling.
6. It is indicated that the Respondent is on the verge of facing execution proceedings being taken out against him for enforcement of the orders of the court. Of concern to him is the order requiring him to pay the Respondent maintenance pending the hearing and determination of the primary suit. According to the Appellant, he stands to suffer irreparable loss if the orders sought in the instant application are not granted.
7. It is further asserted that the application herein meets the conditions precedent for the grant of the Orders sought. He urged the court to grant the Orders as prayed.

**The Respondent's Case**

8. The Respondent filed a replying affidavit dated 4<sup>th</sup> February, 2018 in opposition of the instant notice of motion application together with the supporting affidavit of the Appellant. It is indicated therein that the Respondent is the legal wife of the Appellant and their marriage has

not been dissolved by court.

9. She averred that she got married to the Respondent on 16<sup>th</sup> August 2003. It is indicated that the Respondent abandoned her at their matrimonial home in Mtwapa and started cohabiting with another woman since 2015. That he stopped providing for her since then.

10. The Respondent stated that the court found it fit for her to be given alimony pendente lite to the tune Kshs. 48, 000/= per month. That the court also ordered that the parties herein go for mediation at the Methodist Church in Mombasa. This came into being after the Appellant had refused to maintain the Respondent. He has also refused to avail himself for reconciliation at Wesley Methodist Church in Mombasa claiming that the High Court reversed the said orders.

11. She averred that she is now living like a destitute relying on handouts from friends and relatives and yet my husband is a man of means who earns a decent salary. She further stated that she suffers from stress, high blood pressure and her health has generally deteriorated since these proceedings began in court.

12. She rejected the Respondent's argument that he will suffer irreparable loss if he were to maintain her monthly. She also stated that she is well aware the law imposes a duty on the Respondent to pay for her maintenance during the entire time that he has neglected her. Further that the Respondent has willfully disobeyed court orders from the trial court and therefore he should not be allowed audience in this honourable court.

13. It is indicated that the Respondent has not demonstrated how the court orders from the trial court would prejudice him and therefore the instant application ought to be dismissed with costs. She also relied on **section 77** of the Marriage Act 2014, which provides for payment of maintenance to a spouse or former spouse.

### Submissions

14. The Counsel for Appellant filed submission dated 6<sup>th</sup> March 2019, in support of the Notice of Motion Application. Learned Counsel relied on the grounds on the face of the notice of motion, the supporting affidavit, the further affidavit and the annexures to the said affidavits.

15. It is the Appellant's contention that the application made by the Respondent in the lower court sought an order that the appellant be compelled to pay unspecified amount of money as maintenance pending hearing and determination of the suit before the subordinate court.

16. Learned Counsel argued that the contents of the replying affidavit sworn by the Respondent in response to the motion herein have not disturbed the Appellant's application. He cited the case of **Amal Hauliers Limited v Abdulnasir Abukar Hassan (2017) eKLR**, the Court of Appeal in **Butt v Rent Restriction Tribunal (1982) KLR 417** which gave guidance to the Court on how discretion should be exercised in an application for stay of execution. They also capture the applicable principles which the court should consider in deciding stay of execution cases.

17. The Appellant rejected the Respondent's argument that the court of Appeal decisions are inapplicable to applications for stay of execution pending appeal before the High Court. Learned Counsel argued that the principle applied when considering applications for stay whether in the High Court or Court of Appeal are the same. Counsel placed reliance on the Court of Appeal Case of **National Industrial Credit Bank Limited (supra)** as followed by the High Court in **Stanley Karanja Wainaina (supra)** as well as the provisions of **Order 42 rule 6(1) and (2)** of the Civil Procedure Rules, 2010.

18. Learned Counsel for the Appellant submitted therefore that the Appellant has met the requirements for the grant of the orders of stay that he is seeking in the instant notice of motion. Further that the Respondent's averments in Para 7 and 8 of her replying Affidavit are clear pointers or an admission that the Respondent will not be able to refund any monies paid to her by the Appellant as maintenance if the Appellant's appeal against the orders made in the subordinate court on 24<sup>th</sup> July, 2018, is successful.

19. He reiterated that the application herein was filed without delay whatsoever. Learned Counsel therefore urged the court in the interest of justice, to allow the instant notice of motion.

20. In opposition of the instant application, the Respondent through its Counsel filed submission dated 28<sup>th</sup> March 2019. The counsel for the Respondent states that the issue for determination herein is whether the Applicant/Appellant has arguable chances of success at the appeal or whether the Applicant/Appellant has demonstrated that he will suffer irreparable damages should he obey the court order dated 24<sup>th</sup> July, 2018.

21. It is argued that the appeal by the applicant has no chances of success. According to Counsel, this is because the orders issued by the lower court were lawful and were granted as per the law.

22. Further, Learned Counsel asserts that the Appellant failed to demonstrate that he will suffer prejudice or irreparable loss if he attends a conciliation meeting at the Wesley Methodist Church in Mombasa, pays maintenance and keeps and keeps off from conducting another marriage as his marriage to the Respondent is still subsisting.

23. The Counsel for the Respondent cited **section 64** of the Marriage Act, 2014 which provides that the parties to a marriage celebrated under Part III may seek the services of any reconciliation bodies established for that purpose that may exist in the public place of worship where the marriage was celebrated. The Respondent averred that she has invited the Appellant on several occasions between 25<sup>th</sup> July 2018 and 25<sup>th</sup> July 2019 to avail himself for reconciliation meeting at Wesley Methodist Church in Mombasa but he has refused to attend such meetings.

24. Learned Counsel told the court that the Respondent was barely out of her teenage as at the time of marriage and she has always been a housewife, being provided for by the Appellant until sometime in 2015 when he stopped providing for her. It was further averred that the Appellant is a man of means and is capable of providing for her maintenance. Counsel also placed reliance on **section 77** of the marriage act (supra).

25. The Counsel for Respondent is of the view that in terms of **section 77** of the Marriage Act, she is merited to be paid alimony pendente lite by the Applicant/Appellant. The preferred lump sum or in monthly installments of Kshs. 48, 150/- basing on the affidavit of needs dated 11<sup>th</sup> April 2018.

26. The Counsel further contends that the marriage between parties herein is still subsisting and it is monogamous having been celebrated under the African Christian Marriage and Divorce Act (now repealed). This fact was confirmed by the parties in their pleadings and that their marriage has not been dissolved by any court of law.

27. Counsel further cited **section 9** of the marriage act 2014, and **section 171** of the Penal Code, Cap 63 both of which provisions do not allow married person from contracting another marriage and the same is made an offence attracting five years imprisonment.

### **The Law**

28. An application for stay of execution pending hearing and determination of an appeal is made by way of Notice of Motion under **Order 42 rule 6** of the Civil Procedure Rules, 2010. This is an application that invokes the discretionary powers of the court. Further, discretionary powers must be exercised judiciously. A grant for stay must meet various requirements. It states that:

**“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.”**

29. In light of the foregoing, the Court of Appeal in **Kiambu Transporters v Kenya Breweries [2000] eKLR** outlined the conditions to be satisfied before the Court can grant a stay.

**1. The Application has been made without unreasonable delay**

**2. That substantial loss will result to the Applicant unless such order is made**

**3. Security for due performance of the decree has been given by the Applicant.**

30. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

**“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

31. An applicant seeking a stay of execution must also demonstrate that unless the application is allowed the intended appeal, or appeal, if successful would be rendered nugatory. This test is subjective to the circumstances of each case as was stated in **Reliance Bank Limited v Norlake Investments Ltd [2002]1 EA 227**. Along with this, the Court must also be satisfied that the application for stay of execution must not be frivolous meaning that it is arguable.

32. Further, an application for stay of execution should not be seen to defeat the ends of justice. This was buttressed in **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** where the Court held;

**“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order”**

33. The court cannot grant an order for stay of execution the application of which is only meant to delay the trial process in the suit filed in the lower court. (*Alfred Wekesa Kizito V Nick Wafula Walela (2007) eKLR*).

#### **Discussion and Analysis**

34. In respect of the condition of filing the application without undue delay, this court is satisfied that the Respondent had filed the same timeously on 2<sup>nd</sup> August, 2018 and the judgement having been delivered by Hon. Wewa, on 24<sup>th</sup> July, 2018.

35. In regards to the first condition of proving substantial loss, the law required an applicant to demonstrate that it would suffer substantial loss if order for stay was not granted. The applicant must bring to the attention of the Court some factors which show that execution will result in irreparable damage.

36. I refer to **paragraph 9** of the Respondent’s affidavit dated 2<sup>nd</sup> August, 2018. It is indicated that he stands to suffer irreparable loss if the orders he sought are not granted. In this regard, in **paragraph 12** of the Appellant’s submissions, he contends that the order made by the lower court directed the appellant was ordered to pay an unspecified amount of money as maintenance to the respondent pending the hearing and determination of the suit in the subordinate court.

37. Thus, it is not stayed pending the hearing and determination of the appeal herein. On the other hand, the Respondent claims the court granted her *alimony pendente lite* to the tune of Kshs. 48,000/= per month. The Respondent rejected the Appellant’s claim that he will suffer irreparable loss if he is to maintain her monthly. The Respondent is a house who got married to the Appellant when she was still a teen which is uncontroverted by the appellant’s affidavit evidence.

38. In light of the foregoing contestation by the parties herein, I refer to the ruling delivered by Hon. Wewa on the 24<sup>rd</sup> of July, 2018. One of the orders encapsulated therein directs the Appellant to pay maintenance to the Respondent pending herein and determination of the lower court proceedings. The amount to be paid to the Respondent was not quantified in the said ruling. In my view, with all due respect, the Learned Magistrate ought to have specified the amount the Appellant is liable to pay to the Respondent.

39. Further, I also hold the view that the rationale for ordering the Appellant to pay maintenance is that the Court in the same ruling gave custody care and control of the parties’ child to the Respondent. Thus, the Respondent cannot be able to argue that he will suffer irreparable damage for taking re-assuming his responsibilities which he had abdicated for some time now. I would know how one may suffer substantial loss by taking care of their wife and child. I also don’t know how one may suffer irreparable damage for paying maintenance which value has not been specified in the order of the court.

40. It is also argued by the Counsel for the Appellant that that the allegations made in **paragraphs 7 and 8** of the replying affidavit are a clear pointer, indication or admission that the Respondent will not be able to refund any monies paid to her by the Appellant pursuant to the orders made in the subordinate court on 24<sup>th</sup> July, 2018 is successful.

41. My view of the above position by the Counsel for Respondent is that his contention adversely affects his contention on substantial loss. I note that the marriage between the Appellant and the Respondent is still in subsistence. Therefore, the fact that the Respondent’s incapability to refund monies paid to her by the Appellant in accordance of the orders of the lower court would show how bad the Respondent’s situation as a wife and a mother to the Respondent child.

42. My considered view of the foregoing is that a father cannot be said to have suffered substantial loss in the process in the process of taking care of his wife and children. The children Act envisages the best interest of a child principle in terms of **section 4**. As such, the Appellant’s contention fails to hold water.

43. A perusal of the orders issued by the Learned Magistrate shows that the court referred the Respondent and Appellant to attend reconciliation meetings at Wesley Methodist Church in Mombasa. The Respondent has averred that she has made efforts to secure the Appellant’s audience but he has refused to attend the same.

44. In terms of **159(c)**, it is envisaged that courts and tribunal ought to exercise judicial authority within the guidance of inter alia, alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Relevant to this case is reconciliation.

45. The marriage Act 2014, in terms of **section 64** reiterates the foregoing article. It states that the parties to a marriage under Part III may seek the services of any reconciliation bodies established for that purpose that may exist in the public place of worship where the marriage was celebrated.

46. Therefore, it was within ambit of the trial court to issue an order directing the parties herein to attend reconciliation meeting. Such an order must be taken serious as disobedience of it carries the same sanctions just like any other orders. To uphold the duty of law, **Article 3** of the constitution of Kenya envisages that every person has an obligation to respect, uphold and defend the Constitution. Thus, the law does not tolerate an attempt by any part to defy orders of the court and neither will the courts tolerate the same.

47. In addition, I have noted that even the impugned order issued by the Learned Magistrate incorporates a warning which says that:

**“anybody who is served with this order and disobeys it shall be cited for contempt of court which is punishment under law.”**

48. Therefore, the Appellant is luck to have escaped sanctioned by this court for having disobeyed the order made by the Learned Magistrate by refusing to avail himself for purposes of reconciliation. Its only that no leave has been sought for such orders to be issued herein and a repeat of the same would culminate into the issuance of the same.

49. Further, the Appellant ought to abide by the lower court on reconciliation and non-compliance will be sanctioned.

**Conclusion**

50. In the premises, it is my considered view that the notice of motion application dated 2<sup>nd</sup> August, 2018 is not meritorious. I have taken into account the fact that the marriage between the Appellant and the Respondent is still subsisting and that the Appellant has indeed abdicated his responsibilities. I have also taken into account that Respondent has custody care and control of their child and that the Appellant has not demonstrated how he would suffer irreparable damage for catering for his family.

51. Thus, the Appellant has not met the condition precedence set out **order 42 rule 6(1) and (2)** and the instant application is hereby dismissed.

52. However, owing to the fact that the Honorable Magistrate Court in its ruling dated 24<sup>th</sup> July, 2018, did not quantify the maintenance to be paid by the Appellant to the Respondent, I hear by remit the file to the Honourable Magistrate Court for quantification of the same.

53. Costs be borne by each party.

**It is so ordered**

**Dated, signed and delivered at Malindi this 30<sup>th</sup> day of May, 2019.**

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**REUBEN NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Lewa for the applicant present

Aoko for the respondent present