



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 106 OF 2015

YUSSUF ADAN ABDULLA.....APPELLANT/APPLICANT

VERSUS

AMINA HASSAN AHMEDRESPONDENT

RULING

1. The application dated 28th October 2015 is a Notice of Motion brought Under Order 42 Rule 6 (1) and (2) Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya. The Applicant seeks the following orders;

- i. That the Honourable Court be pleased to grant an order of stay of execution in Kadhi's Orders Civil case no. 143 of 2014, Nairobi pending hearing and determination of this application.
- ii. That the Honourable Court be pleased to grant an order of stay of execution in Kadhis's orders in Civil Case No. 143 of 2014, Nairobi Pending hearing and determination of the appeal herein.
- iii. That this Honourable court do make such further or any other consequential orders as may deem fit or reasonable in the interest of justice.
- iv. That the costs of this application be provided for.

2. The application is supported by the affidavit of Yusuf Adan Abdulla dated the 28th October 2015 together with annexures. 3 There is also the application filed by the respondent dated 20th January 2016. It is on Notice of Motion brought under Sections 1A, 1B, 3, 3A, 75, 78, 79G of the Civil Procedure Act and order 42 rule 6 of the Civil procedure Rules. The applicants seeks the following orders;

- i. The Court be pleased to grant leave to the Respondent/Applicant to file a Cross Appeal out of time against the Appeal filed by the Counsel for the Appellant/Respondent on 28th October 2015 and part of the judgment of the Honourable Deputy Chief Kadhi delivered on 29th September 2015 in Kadhi's Court case No. 143 of 2014, Nairobi.
- ii. The Respondent/Applicant do file her Cross Appeal within such time as the Honourable Court would such direct.
- iii. The costs of this application be provided for.

The application is supported by the affidavit of the Respondent dated 20th January 2016.

4. The Appellant in his affidavit depones that he is the Respondent in the Kadhi's Court suit No. 143 of

2014, Nairobi. That on the 29th September 2015 the deputy Chief Kadhi delivered his judgment and he was aggrieved by the same judgment and thereafter instructed his lawyer to lodge the current appeal. On the 12th October 2015 the Respondent through her advocates wrote a letter threatening to sell his property. He is apprehensive that unless his stay order is granted his appeal will be rendered nugatory.

5. The Respondent in response to this application depones that the appellant has not come to court with clean hands as he has failed to disclose all the material facts necessary for the court to grant a stay of execution of the judgment. That the appellant was ordered to pay fees for the issues of the marriage and *iddat* maintenance of Kshs. 60,000/- entitle to the Respondent after divorce under Islamic law. That the appellant is evading his parental responsibility to pay school fees for his children. In a supplementary affidavit dated the 23rd February 2016 the appellant depones further that he is the sole registered owner plot no. 69 situated in bulla Tawakal in Mandera and the plot is at risk of being sold by the respondent hence he need for a stay of the decree. That he is struggling solely to pay school fees for the children despite the respondent earning drawing a salary of Ninety Eight Thousand from the NGO

6. For the Respondent's application she depones that the appellant filed the application for Stay on the 28th October 2015 and the application was served on her advocate on the 30th October 2015. That upon receipt of the application her advocates contacted her however she had travelled to Mandera and Wajir in the months of November 2015 and December 2015 and was therefore unable to give instruction to her lawyer until the second week of January 2015 due to the fact that she was indisposed and lacked funds to cater for fees for the Cross Appeal which has now been taken care of by her relatives. That she is employed and the time allowed for her to file her cross appeal had run out thereby rendering her application necessary. That the issues she intends to raise in the cross of appeal are arguable and it is in the interest of justice that the cross of appeal be heard and determined on merit. She attached the intended Cross of Appeal.

7 .The Respondent /Appellant in response depones that the Respondent/Applicant should have appealed against the judgment within 30 days if she was indeed aggrieved but she is a politician having contested for an electoral position in 2013 general election and is still gearing up for an elective post come the 2017 elections. That her allegation that she is unemployed is a blatant lies as she is running an international NGO as a coordinator for Women for Peace and Development Renamed HAWENKA in which she draws a huge salary and allowance. That the Respondent/Applicant is just raising an issue of impecuniosity in an effort to raise a sufficient ground so as to be allowed to file her cross-appeal out of time while she is a person of means. That the application is misconceived and abuse of the court process and should be dismissed.

8 .Parties submitted orally in court and the respondent filed written submissions in response to the authorities relied on by the appellant/applicant. I have considered the said submissions together with the written submissions and authorities relied on. The appellant's application is for a stay of execution under Order 42 rule 6 (1) (2) of the Civil Procedure Rules and section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya which provides that ;

“6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal preferred may apply to the appellate court to have such orders set aside 2 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 being binding on him has been given by the applicant.

9. The judgment at the lower court was delivered on the 29th September 2015. The application for Stay was filed on the 28th October 2015. The application was filed without unreasonable delay. On whether the application is entitled to a Stay order, he has to satisfy the court that he will suffer substantial loss. The appellant argues that the respondent has sought to effect the judgment as stated in their letter dated 12th October 2015 and that he risks losing their matrimonial house plot No. 69. The applicant has stated that he has been struggling solely to pay the school fees. The Kadhi's orders were specific on his role on paying the school fees. This it appears he has no issue with. The issue is the threat to execute the Kadhi's order to share the Matrimonial home. In arguing this application counsels departed from the main application and submitted on issues that will be considered at the appeal on whether the Kadhi had jurisdiction to make the order on matrimonial property. At this stage all the applicant needs to do is to demonstrate is the substantial loss he will suffer as well as offer security. His explanation on the substantial loss is persuasive however the appellant has a further duty to offer such security as provided in 2 (1) (b) this he has not done though I note that he lives within the matrimonial home with the children of the marriage which therefore binds him to ensure that he does not dispose of the said home. I am persuaded that the appellant is entitled to a stay of execution of the Kadhi's orders only in relation to plot at Bulla Tawakal of Bosnia Manderu their matrimonial home pending the hearing of the appeal. The appellant shall file the requisite records for appeal as provided in law within 30 days. This court has not stayed the orders of the Kadhi as relates to the fees of the children and custody of the two minors and retention of Fathiya in Wamy Academy.

On the respondent's application, **Section 79G** of the Civil Procedure Act provides as follows;

79 G "Every appeal from a subordinate to the High Court shall be filed within a period of 30 days from the date of decree/order appealed against, excluding from such period any time which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time".

10. I have considered the submissions in this application. The law is clear that an appeal shall be filed within a period of 30 days from the date of the decree of order appealed against. The proviso in the said section gives the court the discretion to allow an appeal out of time if the court is satisfied that the appellant had a good and sufficient cause for not filing the appeal in time. The respondent explanation is that her counsel was served with the appeal an application on the 30th of October 2015 and that she was not within the Nairobi in the months of November 2015 and December 2015 as she had travelled to Manderu and Wajir and hence the delay in instructing her lawyers. The appellant reply is that the respondent's action is an afterthought. A party has a right to appeal and a court of justice will definitely look at the reasons advanced by a party in not complying with the law. This court is persuaded that the respondent failed to file a cross petition because she was not around to instruct her lawyer within the period indicated. I therefore exercised my discretion and allow her application as follows;

i. The respondent is granted leave to file a cross appeal out of time against the appeal filed by the counsel for the appellant/respondent on 28th October 2015 and part of the judgment of the Honourable Deputy Chief Kadhi Delivered on 29th September 2015 in Kadhis court case No. 143, Nairobi.

ii. The respondent/applicant shall file her cross of appeal within 30 days from the date of this ruling.

11. On costs each party shall bear its own costs. Orders accordingly.

Dated, Signed and delivered this **27TH** day of **May 2016**

R. E. OUGO

JUDGE

In the presence of :

.....For the Appellant

.....For the Respondent

M/s Charity Court Clerk