



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. CIVIL APPLICATION NO. 36 OF 2013**

A A B..... APPLICANT

VERSUS

B M M.....RESPONDENT

**RULING**

The applicant **A A B** filed this notice of motion dated 19<sup>th</sup> September, 2013 seeking *inter alia* the following orders

**“(b) THAT there be a stay of execution of the judgment and decree made on 22<sup>nd</sup> April, 2013 and on 10<sup>th</sup> September, 2013 or other consequential orders in KCC No. 5 of 2013 pending hearing and determination of the appeal or further orders of this Honourable court.**

**(c) THAT there be enlargement of time to file an appeal out of time and the annexed draft appeal be deemed duly filed and served upon payment of the requisite court fee.**

**(d) THAT the court do grant any other relief(s) it deems expedient to meet the ends of justice.**

**(e) THAT costs of the application be provided for.”**

The application was supported by the affidavit of **W Z M** on behalf of the applicant (who was at the time in civil jail). The application arises from Kadhi Court Case No. 5 of 2013 where the respondent had sued the applicant seeking an order for divorce and for maintenance. The couple had contracted a marriage under Islamic Sharia Law. Barely one month later the respondent (wife) filed for divorce. She alleged that the marriage produced one child. In his judgment delivered on 22<sup>nd</sup> April, 2014 the Hon. Kadhi whilst granting to the respondent a certificate of divorce also made the following awards

- “Hagi” payment of Kshs. 5,000/=
- “Eddat” maintenance at Kshs. 4,500/= per month for eight (8) moths totaling Kshs. 36,000/=
- Payment of delivery expenses (for the child) at Kshs. 2,400/=
- Child maintenance from the date of delivery at Kshs. 55,000/=
- Payment of 150/= per day

- Costs of the suit.

Following that judgment the respondent extracted a decree for a sum of Kshs. 303,400/= which they proceeded to execute resulting in the applicant's committal to civil jail. This court did first hear the matter under certificate of urgency on 20<sup>th</sup> September, 2013 and did allow prayer (c) for enlargement of time to file an appeal. The prayer for stay of execution was deferred for an inter-parties hearing. On 7<sup>th</sup> November, 2013 the court was told that the applicant had already lodged an appeal No. 35 of 2013 against the Kadhi's decision. I then did direct in order not to prejudice the applicant should his appeal eventually succeed, that the execution by way of committal to civil jail be stayed pending the delivery of this ruling. As such the applicant was ordered to be released pending further orders of the court.

The application was opposed by way of a replying affidavit dated 24<sup>th</sup> September, 2014. The parties filed their written submissions. At this point I am not required to determine the appeal against the Kadhi's decision. All that I am being asked to do at this stage is to determine whether the applicant's prayer for a stay of execution pending determination of the appeal is merited.

In determining this application the following issues have arisen

1. The replying affidavit was sworn by one 'W Z M' a step-mother of the applicant who purports to have been appointed by the applicant. The respondent challenges this affidavit on the basis that the deponent has not shown to court any letter of appointment from the said applicant. The respondent submits that both affidavits sworn by this 'W Z M' should be struck off. In his submissions the applicant explained that at the time this notice of motion was being filed he was in civil jail. The deponent 'W Z' swore to matters which were within her knowledge and information whose sources were clearly stated. She did not purport to act for the applicant. The applicant had an advocate on record. The failure to produce any letter of authority was due to the incarceration of the applicant. His relatives were seeking to have him released from custody by way of a stay of execution. I find that the two affidavits of 'W Z' were properly deponed and are properly on record. I decline to strike them out.
2. **Jurisdiction** – Challenge is made to the decision of the applicant to file the notice at the High Court in Mombasa. The respondent submits that the matter ought to have been filed at the High Court in Malindi given that the parties both reside in Lamu and given the fact also that the decision being challenged is that of the Hon. Kadhi sitting at Lamu. The short answer to this is that the High Court has unlimited original jurisdiction. The High Court in Mombasa is vested with the requisite jurisdiction to determine the matter. The reason given for the filing in Mombasa was the fact that the High Court in Malindi was busy with Election Petitions at the time. The appeal may therefore be transferred to Malindi High Court for hearing and determination.
3. **Constitutionality** - The applicant submits that his committal into civil jail on the basis of a debt is unconstitutional. He cites several authorities in this regard. It is quite true that courts have been slow to commit civil debtors into civil jail. Such an act is likely to be in vain. In this case the reason for the applicant's committal into civil jail is not quite clear. What steps if any were taken to realize the decretal sum before the option of civil jail was considered?

Based on the foregoing and in view of the fact that an appeal has already been filed, I would be inclined to uphold the applicant's constitutional right to personal freedom. He would suffer great prejudice if he served jail time only to have his appeal eventually succeed. I therefore allow the prayer for stay of execution pending hearing and determination of the appeal as per prayer (b) of the notice of motion dated 19<sup>th</sup> September, 2013. Each party to meet its own costs.

**Dated and delivered in Mombasa this 15<sup>th</sup> day of August, 2014.**

**M.ODERO**

**JUDGE**

In the presence of:

Mr. Gichana for Applicant

Mr. Mutugi h/b Mr. Mabea for Respondent

Court Clerk Mutisya