



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 116 of 2004

AHMED ALI SHAUSHAPPELLANT

VERSUS

TAUHIDA MOHAMED SWALEHRESPONDENT

R U L I N G

Pursuant to order XLI rule 4 of the Civil Procedure rules, Ahmed Ali Shaush the appellant herein, applied for an order of stay of execution of the judgment and order of the Kadhi's court dated 24th June 2004 pending the hearing and determination of this appeal. The appellant swore an affidavit in support of the application. The motion is opposed by Tauhida Mohamed Swaleh, the Respondent herein. In opposition, a replying affidavit sworn by the Respondent and a preliminary objection were filed.

It is the submission of Mr. Odera advocate for the appellant that unless an order for stay of execution is given the appellant is likely to suffer substantial loss in that the matrimonial were in which the appellant and the children of the marriage are residing on is likely to be sold in execution to recovery the decretal sum of Ksh.916,500/- It is further argued that the Respondent will not be prejudiced in any way by the order sought and that the motion was timeously filed. The appellant beseeched this court to be lenient to him when deciding on the form of security because of his financial position. He proposed that he would be able to raise Kshs.500/- per month as security.

Mr. Gichana Advocate for the respondent resisted the motion on the ground that there was no competent appeal that may go for trial because the appeal was filed out of time and without leave of court. It is the learned advocate's submission that matrimonial property is not immune to execution. It is further contended by the respondent that the security offered is not sufficient.

The background of this dispute started before the Kadhi's court. By an amended plaint dated 30th January 2004 Tauhida Mohamed Swaleh, the respondent herein sued Ahmed Ali Shaush, the appellant herein claiming for interalia:

- (a) Dissolution of the marriage
- (b) Maintenance
- (c) Custody of the children
- (d) Cost of the suit

After hearing the dispute the Kadhi's court gave judgment in the following terms:

- (a) *Marriage to be dissolved as of 24.6.2004.*
- (b) *The appellant to pay the past maintenance with effect from December 2003 to June 2004 at a monthly rate of Ksh.3000/-.*
- (c) *The appellant to pay all the debts incurred by the Respondent*
- (d) *Appellant is entitled to collect all her personal belongings.*
- (e) *The custody of 3 children to the appellant and custody of 1 child to the Respondent. The Respondent to be paid a monthly sum of Kshs.4000 for the maintenance of the child.*
- (f) *Each party to have an unlimited access to the children.*
- (g) *Each party to bear their own costs.*

Being dissatisfied with this judgment, Ahmed Ali Shaush filed this appeal pending the hearing and determination of the appeal, the appellant filed the motion dated 28th January 2005 seeking for a stay of execution.

The motion is the subject matter of this ruling.

The law is well settled that before a court grants an order under Order XLI rule 4 of the Civil Procedure rules an applicant must satisfy the following conditions:

- (a) That there is sufficient cause to stay the decree or order.
- (b) That substantial loss is likely to be suffered by the applicant.
- (c) That the application for stay has been made without unreasonable delay.
- (d) That security for the due performance of the decree or order is given by the applicant.

Applying these conditions to the Motion at hand it is clear in my mind that there is sufficient cause as manifested in the Memorandum of appeal. It is not denied that the Respondent has threatened to execute the decree unless halted by a stay order pending appeal.

It is the view of the appellant that he may suffer substantial loss in that he may lose the matrimonial home in the process of execution before the appeal is heard. This averment is not resisted by Mr. Gichana advocate for the Respondent. In fact his argument is that a matrimonial is not immune from execution. I have considered this argument and I am satisfied that the applicant is likely to lose the matrimonial home if execution of the decree is not halted. The applicant has therefore shown that he is likely to suffer substantial loss.

It has been argued that the motion was filed timeously. It is the view of the Respondent that the application was filed after an inordinate delay. Judgment in this matter was delivered on 24th June 2004 and this motion was filed on 3rd February 2005 about 6 months down the line. The applicant has given an explanation to the effect that he pursued for an application for review of the judgment. In the process there was delay in filing both the appeal and motion. I perused the record of appeal and it is clear that the applicant filed a motion dated 6th July 2004 seeking for an order for review. The motion was subsequently dismissed on 6th October 2004. In the intervening period the applicant sought and successfully obtained an order extending time to file appeal out of time. He was also given 30 days stay of execution effective from 4th January 2005. Within the 30 days this motion was filed. It is the

submission of Mr. Gichana advocate for the Respondent that the leave to file appeal out of time given by the Kadhi's court was inconsequential because it was improperly given. According to him there is no appeal so to speak. I have perused the record and it is clear that when the application for leave to appeal out of time and for a temporary order of stay came up for hearing, the parties were present. They both participated in the argument before the Kadhi. A ruling of 4th January 2005 was delivered in the presence of the parties. At this stage it cannot be said that the appeal was filed without leave. There is no evidence that the Respondent has preferred an appeal against the said orders. The view I have is that though there was a delay in filing the motion now before court, the delay is excusable in that there are valid reasons to justify the delay. In short the delay was caused by the course the applicant chose to take while trying to upset the judgment. Consequently I find that in the circumstances of this case the delay is inordinate but excusable.

The applicant has offered to pay a monthly sum of Kshs.500/- as security because he is a pauper and cannot raise anything over and above that figure. The figure is rejected by the Respondent on the basis that it is insufficient. I have carefully considered the offer made by the appellant on security. It is not denied by the Respondent that the appellant has no other source of income apart from what he has shown on affidavit. The issue on security is solely at the discretion of the court. I am convinced that it is sufficient to register a restriction on the title in which the matrimonial home is standing on pending the hearing and determination of the appeal to prevent the appellant from disposing of the same. This is in addition to the monthly payment of Kshs.1000 to be deposited before the Deputy Registrar of this court with effect from the 5th day of October and on the 5th day of each succeeding month failure to which the motion will be treated as having been dismissed.

For the above reasons the motion dated 28th January 2005 is allowed as prayed save that the appellant shall pay costs of the motion to the Respondent in any event within 30 days from the date hereof.

Dated and delivered at Mombasa this 4th day of October 2006.

J.K. SERGON

J U D G E