



REPUBLIC OF KENYA



KENYA LAW
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**Oguk v Wasike (Civil Appeal E206 of 2024)
[2025] KEHC 1556 (KLR) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E206 OF 2024
RN NYAKUNDI, J
FEBRUARY 14, 2025**

BETWEEN

CHARLES OCHIENG OGUK APPLICANT

AND

JANET NAKHUNGU WASIKE RESPONDENT

RULING

1. What is pending before me for determination is a Notice of Motion Application dated 4th October 2024 premised under Article 159(2)(d) of *the Constitution* of Kenya 2010, sections 1A & 1B of the *Civil Procedure Act* and Order 22 Rule 25 of the Civil Procedure Rules 2010 where the Applicant is seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this application and the substantive appeal, the Honourable Court be please to issue orders of stay of execution of the Judgement dated 6th September 2024, orders and the decree arising therefrom.
 - d. That the costs of this application be provided for
2. The Application is based on the grounds on the face of it among others:
 - a. The Magistrate Court at Eldoret delivered a Judgement on the 6th Of September 2024 unjustly adjudging and condemning the applicant herein as liable for matrimonial offense of cruelty, consequently issued orders and decree nisi dissolving the impugned marriage whose validity is in dispute.



- b. The Applicant has instituted an appeal against the whole judgement seeking annulment instead of dissolution of the impugned marriage.
 - c. There will be metamorphosis of the decree Nisi dated 19th September 2024 into decree absolute by 6th October 2024 with significant prejudice, injustice and harm to the Applicant as issued.
 - d. The Applicant herein has an arguable appeal with high chances of success as the Learned Magistrate issued the decree Nisi against the law, pronounced judgement against the weight of the evidence, misinterpreted and misapplied the *Marriage Act* of 2014, Judicial Discretion, misapplied the doctrine of “Balance of Probability, disregarded the Doctrine of Res Judicata and was manifestly partial during hearing.
 - e. If this Honourable court does not grant the orders prayed herein, there will be metamorphosis of the decree nisi dated 19th September 2024 into decree absolute with the effects of potentially rendering the appeal nugatory if successful, causing the applicant irreparable harm, adjudging the applicant violent despite acquittal unjustly conferring matrimonial property rights on the Defendant at significant detriment to the Applicant, subjecting the applicant to reputational harm and severe disciplinary action at his place of work.
 - f. While all the applicant’s sufferings aforementioned cannot be compensated by way of costs, the highly likely successful appeal will not in any way affect the Defendant, since the parties are non-cohabitants with no intent of future cohabitation.
 - g. The Applicant herein is ready and willing to fully comply with court’s conditions and terms as to security or otherwise.
3. The Application is supported by the annexed affidavit dated 4th October 2024 sworn by Charles Ochieng Oguk the Applicant herein where he reiterates the grounds of the application and further avers as follows: That I have filed an appeal against the whole judgement on the grounds that the learned adjudicator erred in law, since he interalia;
- a. Issued the decree Nisi against the law, such a decree should only stem from a valid marriage as per statutory provisions.
 - b. Totally disregarded and/or failed to consider the applicant’s evidence, thus pronouncing judgement against the weight of the evidence before him.
 - c. Erred in law in Misinterpretation and Misapplication of the *Marriage Act* of 2014 on: proving a valid marriage, and the legal implications of unregistered, short intermittent cohabitations on presumption of marriage.
 - d. Erred in law and fact by abuse of Judicial Discretion in giving undue weight to evidence not produced by the Appellant while ignoring critical and relevant evidence of defendant’s sworn statements which depict lack of valid marriage.
 - e. Erred in law and fact in issuing Judgement granting divorce decree nisi contrary to the weight of evidence which did not prove prior subsistence of a valid customary marriage capable of dissolution.
 - f. Erred in law in preferring only the doctrine of doctrine of “Balance of probability” solely in determining subsistence of a marriage, ironically ignoring express statutory provisions on proving a valid marriage in Kenya.



- g. Erred in law for disregarding the Doctrine of Res Judicata in relying solely on filing of criminal case No MCCC/E681 of 2022 to prove cruelty against the Appellant, despite prior acquittal without any appeal by prosecution or the respondent.
 - h. Erred in law and fact by presiding over a kind of hearing devoid of principle of judicial impartiality; being biased in favour of the Respondent, ignoring inconsistencies in the testimonies under Oath and Sworn Affidavits, but forcibly relying on documents not produced by the Appellant hence occasioning him prejudice.
4. The Application is opposed by the Replying Affidavit dated 5th November 2024 sworn by JANET NAKHUNGU WASIKE, the Respondent herein who avers as follows:
- a. That I am legally informed by my Advocate on record which information I verily believe to be true that the Notice of Motion is premised on wrong provisions of the law and/or civil procedure Rules.
 - b. That the Appellant is seeking stay of execution of the judgement delivered on 6th September, 2024 by the subordinate court pending appeal which orders I am legally informed by my Advocate on record should be brought under Order 42 rule 6(1 and 2) of the Civil Procedure Rules.
 - c. That I am further informed that where Divorce proceedings have been heard and determined and Decree Nisi and Decree Absolute issued the stay of execution sought is futile, inept, non-starter as nothing has been demonstrated on what is to be stayed pending appeal.
 - d. That my Advocate informs me that stay of execution is premised under Order 42 Rule 6(1&2) where the Applicant should demonstrate the following:
 - a. The substantial loss has resulted to the Applicant
 - b. The Application has been made without delay
 - c. Such security for due performance of such decree
 - d. Whether the Appeal has overwhelming chance of success
 - e. That this being a Divorce decree, the Applicant has not demonstrated the kind of loss he stands to suffer if the orders sought are not granted. Further the Applicant has not shown whether the process of execution has been put in motion or it is likely to be put in motion to amount to substantial loss.
 - f. That I am told that the Applicant must show and meet the condition of payment of security for due performance of the decree as a party who seeks the right of appeal from any decree of lower court for an order of stay must satisfy this condition on security.
 - g. That the Applicant's Appeal does not raise any triable issues capable of seeing the light at the end of the tunnel.
 - h. That the Appellant in his own pleadings conceded to have celebrated the marriage with Respondent under the dholuo customary marriage and he had paid dowry.
 - i. That I urge this court to dismiss the Application and/or in the alternative if the court is inclined to allow the application for stay there be a conditional stay on furnishing security or deposit of kshs. 200,000/= in court for due performance of the decree pending the intended appeal.



Analysis and Determination

5. I have given due consideration to the Application and the Reply made in favor of, and in opposition to, herein.
6. Order 42 Rule 6 of the Civil Procedure Rules, pursuant to which the application has been brought, provides that:

“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 is preferred may apply to the appellate Court to have such order set aside...”

7. Thus, the conditions an Applicant for a stay of execution of decree or order needs to satisfy, as set out in Rule 6 (2) of Order 42 aforementioned, are:
 - a. That substantial loss may result to the applicant unless the order is made;
 - b. That the application has been made without unreasonable delay.
 - c. That such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
8. The rationale for the conditions aforementioned was aptly given in *Machira T/A Machira & Co. Advocates Vs East African Standard (No. 2)* [2002] KLR 63, thus:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

9. The Court, in *RWW Vs EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”



10. It is not the duty of the court at this point to determine the merits or otherwise of the intended appeal. I note that the impugned judgment was delivered on 6th September 2024. This application for stay of execution was made on 4th October 2024, about 28 days after delivery of the judgment. I find that the application for stay was filed in a timely manner.
11. In order to merit an order of stay the Applicant must demonstrate that he is likely to suffer substantial loss if the stay is not granted. The Applicant has not shown what substantial loss he stands to suffer if the stay is not granted.
12. The Applicant takes issue with the decision of the trial court to dissolve his marriage. He further stated that, if this Honourable court does not grant the orders prayed herein, there will be metamorphosis of the decree nisi dated 19th September 2024 into decree absolute with the effects of potentially rendering the appeal nugatory if successful, causing the applicant irreparable harm, adjudging the applicant violent despite acquittal unjustly conferring matrimonial property rights on the Defendant at significant detriment to the Applicant, subjecting the applicant to reputational harm and severe disciplinary action at his place of work. In my own view, that is a matter which can only be determined in the main appeal.
13. The Appellant also submits that if the stay is not granted his appeal will be rendered nugatory as he will be denied a chance to salvage the marriage.
14. The decision to dissolve a marriage is not one which in my view lends itself to a stay of execution. The Decree Nisi was issued immediately the order for dissolution is made. Further this is a case in which the Decree absolute was issued on 7th October 2024. As such the marriage now stands dissolved. There is therefore nothing to stay. The only way to reverse such orders would be by way of Appeal.
15. Whilst it is commendable that the Appellant wishes to save his marriage he cannot compel the Respondent to remain in a union with him against her will. This court cannot by way of a stay compel the Respondent to remain tied to a marriage, which she clearly wanted to leave. This would go against the rights of the Respondent.
16. In conclusion I find no merit in this application for stay. The Notice of Motion Application dated 4th October 2024 is hereby dismissed in its entirety.
17. Each party will bear their own costs.
18. It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF FEBRUARY, 2025

R. NYAKUNDI

JUDGE

