



EJM v CKR (Family Appeal E010 of 2022) [2024] KEHC 902 (KLR) (23 January 2024) (Ruling)

Neutral citation: [2024] KEHC 902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E010 OF 2022
SM MOHOCHI, J
JANUARY 23, 2024**

BETWEEN

EJM APPLICANT

AND

CKR RESPONDENT

RULING

Introduction

1. Before me is an Application filed under certificate of urgency filed pursuant to Sections 1A, 1B, 3, 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 Rule 6 & Order 51 Rule (1) of Civil Procedure Rules (2010), whereby EJM the Applicant/Appellant is seeking stay of execution of judgment delivered on the 3rd August, 2022 by Hon. R. Kefa (PM) in Nakuru Chief Magistrate’s Court Divorce Cause No. 103 of 2016.
2. The instant Application seek the following specific reliefs;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the Appellant's intended Appeal against the Judgement of this Honourable Court delivered on 3rd August 2022, a stay of execution of the Judgement of this Honourable Court delivered on 3rd August 2022 together with all other consequential orders be and is hereby issued.
 - d. That cost of this Application be in the cause.
3. The Applicant has anchored her Application on the following grounds:
 - a. That, judgment was delivered on 3rd August, 2022 wherein the Divorce was allowed.



- b. That, the main ground of divorce quoted by the Magistrate was that our marriage had irretrievably broken down
 - c. That, the Court ought to have granted us observatory reconciliation since our marriage could be salvaged.
 - d. That, both parties had stated that reconciliation had been attempted but conclusion not arrived.
 - e. That, the Applicants' appeal has good prospects of success and no prejudice shall be occasioned on the Respondent if the orders sought are granted.
 - f. That, it is only fair and in the interest of Justice that the orders sought herein are granted.
4. This Court had on the 24th March 2023 directed parties to exchange response and/or written submissions which ultimately the Respondent complied with by filing a Replying Affidavit dated 29th September 2023 and both the Applicant and the Respondent never filed written submissions.

Applicant's Case

5. That, the main ground of divorce quoted by the Magistrate was that the marriage had irretrievably broken down and that, Cruelty and Desertion was the main grounds as per the judgment.
6. That, cruelty as a ground of divorce is a factual and needs to be proved to the required standards.
7. That, based on the decision of the Court in the case of DM V TM (2008) 1KLR 5 the Court ought to have examined the evidences on cruelty to the satisfaction of the Court under the set principle of the complainant must show to the satisfaction of the Court, a misconduct by the Respondent which occasion him or her injury which in my case the same was not demonstrated to the said standard.
8. That, the Court ought to have granted the Applicant and the Respondent observatory reconciliation since their marriage could be salvaged, instead of granting a divorce.
9. That, both parties had started reconciliation that was ongoing.
10. That, an appeal has been lodged and that if the orders being sought are not granted it would render the Appeal nugatory.
11. That, the instant application has been made without unreasonable and/or inexcusable delay.
12. That, the instant application ought to be allowed in the interest of equity and justice.
13. That, the appeal has good prospects of success and no prejudice shall be occasioned on the Respondents if the orders sought are granted.
14. The Applicant thus prayed that her Application be allowed as prayed for.

Respondents Case

15. The Respondent opposed the Application by filing a sworn Replying Affidavit dated 28th September 2023 describing it as mischievous, misconceived and devoid of merit and as such ought to be dismissed in the first instance as it is clearly an abuse of the Court Process.
16. That, the Application is an afterthought and a delay tactic by the Appellant meant to frustrate and/or delay the Respondent from enjoying the fruits of his judgment



17. That, Order 42 Rule 6 of the [Civil Procedure Rules](#) outlines principles for grant of stay of execution pending appeal which conditions the Applicant has not demonstrated; for instance, the substantial loss she will suffer given that they have been separated for more than 8 years as of today nor has she offered any security.
18. That, the purpose of stay of execution pending appeal is to preserve the subject matter of appeal/suit. In this case the subject is marriage
19. which leaves the question, how can one preserve a marriage after decree absolute is issued?
20. That, upon issuance of the 'decree absolute' on the 8th day of September 2022 the marriage herein was deemed duly nullified. Further that on the 21st day of November 2022, the marriage registrar who duly received the same on the same day and as such the decree absolute was henceforth deemed duly registered and/or entered into the register. That the only way this can be reversed is if the Parties undertook another marriage ceremony which he is not willing nor interested.
21. That, the orders sought therefore in both the appeal and this instant application are untenable and amount to a great abuse of the Court's time.
22. That, the prayers for observatory reconciliation are untenable as the same has been attempted and further paragraph 7 of the Supporting Affidavit confirms so. Although under the said paragraph, the Appellant indicates that conclusion was not arrived at, what she ought to have indicated is that her preferred outcome was not reached as I was no longer interested in the marriage.
23. That, contrary to the averment at paragraph 11 of the supporting affidavit, I verily believe that the Appellants' appeal is frivolous and with slim to no chances of success particularly on the account of my watertight evidence on how the marriage was irretrievably broken down, element of desertion having been proven by not only myself but also by the Appellant during the hearing where she admitted that she had left our matrimonial home in 2015 which amounted to 7 years at the time of the hearing. The trial Magistrate therefore properly decreed the dissolution of the marriage.
24. That, the Application is made in bad faith and prejudicial to the Respondent if allowed,
25. That, In the case of *N versus M* [2021] eKLR, the Court in disallowing an application for stay pending appeal held that;

“.. I do agree with the Respondent that this Court cannot stay the orders of dissolution of the marriage. Decree nisi having been made absolute.”
26. The Respondent contends that it is in the best interests of justice that this instant application be dismissed with costs to the Respondent.

Analysis and Determination

27. I have given due consideration to the Application and the Reply made in favor of, and in opposition to, herein. 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..."

28. 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.
29. 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.”
30. The Court, in *RWW v 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.”
31. “Decree Absolute” was issued on the 8th day of September 2022 and that on the 21st day of November 2022, the marriage herein was deemed duly nullified and the marriage registrar entered the same on the marriage register. I am persuaded that the substratum of the proceedings were thus resent and that the marriage of the parties no longer subsisted and thus cannot be preserved by an order of stay against execution.
32. This Court is equally unpersuaded of a stay against execution of judgment order sought where the parties have been separated for over seven (7) years.
33. Accordingly, although, the application was filed without undue delay, I am far from convinced that substantial loss will be visited on the Applicant unless the orders sought are given.
34. In the result, I find no merit in the application dated 7th September 2022.



- i. The same is hereby dismissed with no order as to costs.
- ii. The Applicant shall set down the Appeal for admission, directions, and hearing within the next sixty (60) days from the date hereof.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 23RD JANUARY 2024

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MOHOCHI S.M

JUDGE

