



SD v EFW (Civil Appeal E225 of 2023) [2024] KEHC 49 (KLR) (10 January 2024) (Ruling)

Neutral citation: [2024] KEHC 49 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E225 OF 2023
EM MURIITHI, J
JANUARY 10, 2024**

BETWEEN

SD APPELLANT

AND

EFW RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 19/12/2023 brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, and all the enabling provisions of the law, the appellant seeks that:
 1. Spent
 2. Spent
 3. This honourable court be pleased to order stay of execution of the judgment of Hon. Gavana A. Mohamed, Senior Resident Kadhi at Isiolo in Divorce Cause No. E016 of 2023 delivered on the 30th November, 2023 and all other consequential orders emanating there from pending the hearing and determination of the appeal.
 4. Costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of SD, the appellant herein, sworn on even date. On 30/11/2023, the learned Kadhi rendered a judgment which he was dissatisfied with and he has lodged an appeal. His appeal, which has high chances of success, will be rendered nugatory, unless this court intervenes to halt the imminent execution. The application has been brought without undue delay and he is willing to abide by the orders and directions of the court.



3. The respondent has opposed the application vide her replying affidavit sworn on 22/12/2023. She avers that the learned Kadhi's decision was well-reasoned and the instant application has been brought intentionally to deny her the fruits of her rightfully obtained judgment.

Determination

4. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of order 42 rule 6 of the [Civil Procedure Rules](#), as follows: -
 - “6(1). No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
 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.
 - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
5. This court notes that the application was filed timeously on 19/12/2023 while the decision sought to be appealed against was made on 30/11/2023.
6. Whereas the appellant contends that his appeal, which has high chances of success, will be rendered nugatory if execution proceeds, the respondent is interested in enjoyment of the fruits of her judgment.
7. While the grounds of appeal as raised in the appellant's memorandum of appeal challenging jurisdiction of the Kadhi's Court, payment of post- divorce maintenance, payment of dowry and special damages of Ksh. 400,000 cannot be termed as frivolous, it is not lost to this court that this matter involves minors whose paramount interests must be safeguarded in accordance with the provision of article 53 (2) of [the Constitution](#) that “A child's best interests are of paramount importance in every matter concerning the child.”
8. It is this court's finding that the appellant remits a monthly sum of Ksh.36,000 for the maintenance and accommodation of the minors, pending the hearing and determination of the appeal.

Orders

9. Accordingly, for the reasons set out above, this court allows the appellant's application dated 19/12/2023 on the following terms:



1. An order for stay of execution of the Judgment of Hon. Gavana A. Mohamed, Senior Resident Kadhi at Isiolo in Divorce Cause No. E016 of 2023 delivered on the 30th November, 2023 is hereby issued pending the hearing and determination of this appeal.
2. The appellant shall by the 5th day of every month pay to the respondent a monthly sum of Ksh.36,000 for maintenance and accommodation of the minors, pending the hearing and determination of the appeal.
3. The Record of Appeal to be filed within 60 days from the date hereof, in default of which the stay of execution shall lapse and be of no effect.
4. This appeal shall be heard on priority basis on a date to be fixed in consultation with counsel.
5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 10TH DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Ng'entu for the applicant.

Ms. Zainab Juma for the Respondent.

