



WAM v AON (Family Appeal E024 of 2024) [2024] KEHC 7178 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 7178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E024 OF 2024**

G MUTAI, J

MAY 24, 2024

BETWEEN

WAM APPLICANT

AND

AON RESPONDENT

RULING

1. In a decision delivered on the 4th day of January 2024, the Hon Omar K. Swaleh, Senior Resident Kadhi, ordered as follows: -
 1. The Respondent/Defendant be and is hereby ordered to pay monthly maintenance of the parties' minor child (O W) of Kes.15,000.00, together with school fees, medical expenses, clothing, and any other basic needs if the need arises;
 2. The Respondent/Defendant be and is hereby appointed to pay the Applicant/Plaintiff's M (consolatory gift) of Kes.400,000.00;
 3. The Respondent/Defendant be and is hereby ordered to pay Kes.150,000.00 for the dowry and remaining furniture items having given the bed to the Applicant/Plaintiff;
 4. The Applicant/Plaintiff is entitled to one self-contained house where she presently resides as her share of the matrimonial property;
 5. The Respondent/defendant be and is hereby ordered to remove his items in the room of the said self-contained house (so) as to give vacant possession to the Applicant/Plaintiff with immediate effect;
 6. The prayer for past maintenance is declined as it was not pleaded in the main suit; and
 7. This being a family matter, no orders as to costs".



2. The Appellant/Applicant was aggrieved by the decision and intends to appeal against the same out of time. *Vide* an application dated 15th April 2024 he sought the following orders: -
 1. Spent;
 2. The Honourable Court do grant leave to the Applicant to file an appeal against the Respondent AON out of time;
 3. The filed Memorandum of Appeal dated 8th April 2024 be deemed as duly filed;
 4. Pending interpartes hearing of the application herein there be a temporary stay of execution of ruling and/or decree arising from the Kadhi Divorce cause No. E197 of 2022 (Mombasa) between AON and WAM;
 5. Pending hearing of the intended appeal, there be a stay of execution of ruling and or decree arising from the Kadhi Divorce cause No E197 of 2022 (Mombasa) between AONi and WAM; and
 6. Costs of this application be provided.”
3. The application is based on the grounds that the decision of the Court below was delivered without notice and that the Appellant/Applicant became aware of the same only after he was served with a Notice to Show Cause on 2nd March 2024. He averred that he has an arguable appeal and would suffer great prejudice, irreparable loss and damage unless a stay is granted. The application was supported by an affidavit of the Appellant/Applicant sworn on 15th April 2024, to which was annexed various exhibits, including the ruling of the Court below.
4. The application was opposed by the Respondent. The Respondent filed a Replying Affidavit sworn on 2nd April 2024. *Vide* the said Replying Affidavit, the Respondent deposed that the application had been filed “more than two months after the lapse of the appeal period.” She stated that the Appellant/Applicant knew about the ruling date and was present during the delivery of the ruling. She urged that the Appellant/Applicant had not provided sufficient cause to warrant the issuance of orders of stay of the ruling of the Court below and that the application was a ploy to deny her the fruits of the ruling. In the circumstances, she urged that the application be dismissed with costs.
5. The application was canvassed in open Court on 6th May 2024. Both the Applicant and the Respondent were present.
6. The Appellant/Applicant prayed that he be allowed to file the appeal out of time and that the proceedings in the Court below be stayed until the appeal is heard and determined. He submitted that there was a warrant of arrest against him which he prayed ought to be lifted.
7. The Respondent accused the Appellant/Applicant of having been violent towards her and the children. She further accused him of telling their children that they were not legitimate and of refusing to undergo a DNA test to resolve the paternity question. In her submissions, the Respondent urged that he had been present throughout the hearing and that he lacked a proper explanation for the delay. I was urged not to issue a stay as the Respondent was in need of the dowry and other payments specified in the ruling. She submitted that she was entitled to her rights.
8. I have considered the application and the response thereto. I must consider whether a case for a stay of execution has been made, if the proceedings before the Court below ought to be stayed, and whether I should grant leave to appeal out of time.



9. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides that: -

“No order for stay of execution shall be made under subrule (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; and
- (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.”

10. It would appear to me that the onus on the part of the Appellant/Applicant is to show that he would suffer substantial loss if the stay is not granted by, for example, demonstrating that the appeal is arguable and also that the Respondent wouldn't be able to reimburse the amounts paid to her if the appeal is ultimately successful. He must also show that the application was filed without undue delay. Lastly, he must provide security for the due performance of any orders that may be ultimately binding upon him.

11. What amounts to substantial loss was discussed by the High Court in the often cited case of [James Wangalwa & another versus Agnes Naliak Cheselo](#) [2012]eKLR. In the said case the Court stated that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the [CPR](#) and Rule 5(2) (b) of the [Court of Appeal Rules](#), respectively, emphasized the centrality of substantial loss thus:“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. The Appellant/Applicant did not demonstrate how he would suffer a substantial loss. He made no attempt to demonstrate that his appeal is arguable or to show that if the Respondent was paid, she would not be able to repay if the appeal was successful. In the circumstances, I am unable to make that determination in his favour.

13. The Senior Resident Kadhi delivered his ruling on 4th January 2024. The Respondent averred that the ruling date was given in the presence of both parties and that the ruling was delivered in the presence of both parties. In my view, this assertion on the part of the Respondent called for a rebuttal by way of a Further Affidavit. As no Further Affidavit was filed, I am inclined to believe that the Appellant/Applicant failed to act with due diligence and was only motivated to file the instant application once the execution process commenced.

14. In my view, the delay in filing the application, being of more than 2 months, was inordinate. No proper, believable explanation was given for the failure.



15. I see no reason to consider whether or not the Appellant/Applicant ought to provide security in view of my foregoing finding. In the circumstances, I dismiss the application for stay pending appeal. The Respondent is at liberty to execute and to benefit from the fruits of a judgment in her favour.
16. The Appellant/Applicant intends to challenge the decision of the Court below and seeks leave to appeal. This Court is not going to be an impediment to his wish. Leave to appeal is, therefore, granted. However, the Record of Appeal must be filed within 45 days of the date hereof, failing which the leave granted herein will lapse.
17. The appeal arises out of proceedings between spouses. In my view, costs are not appropriate. Therefore, I make no orders as to costs.
18. Orders accordingly.

DATED AND SIGNED THIS 24TH DAY OF MAY 2024 AT MOMBASA. RULING DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

No appearance for the Appellant/Applicant;

No appearance for the Respondent; and

Arthur – Court Assistant.

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