



**TSJ v EG (Divorce Appeal E086 of 2022)
[2024] KEHC 7470 (KLR) (Family) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

DIVORCE APPEAL E086 OF 2022

HK CHEMITEI, J

JUNE 20, 2024

BETWEEN

TSJ APPLICANT

AND

EG RESPONDENT

RULING

1. Vide his application dated 30th August 2022 the Applicant prays for orders that there be stay of proceedings in Milimani Divorce cause No. E1126 of 2021 pending the hearing of this application.
2. The application is based on the grounds thereof and the Applicant’s affidavit sworn on 29th August 2022.
3. The Applicant who was married to the Respondent are domiciled in France. Both of them were married there and blessed with three children. In the cause of time they moved to Kenya on a work related venture. The Respondent filed for divorce at the lower court which was allowed and decree nisi issued.
4. Prior to the judgement of the trial court the Applicant raised a preliminary objection on the grounds that the trial court was not seized of jurisdiction as the marriage was solemnised in France and that the parties were not residence in Kenya
5. It appears that the trial court did not agree with the Applicant and went ahead to determine the matter and dissolved the marriage. A decree nisi was issued. This prompted the Applicant to file the current application.
6. The gist of the application is twofold as can be deduced from the submissions made by both parties which I have gladly perused.



7. The first issue is whether the appeal which was filed two weeks out of time ought to be entertained.
8. It was the Respondent's submissions that the same cannot stand as it was filed without the leave of the court. It was filed after expiry of 30 days and with no plausible reason.
9. The Applicant blames his past advocate who did not exercise diligence as required. Nevertheless, it was his case that considering the nature and circumstances of this case notably that it was a matrimonial matter the two weeks' delay was not intentional nor inordinate.
10. The Applicant urged this court to exercise its unfettered discretion and allow the appeal to proceed.
11. The second issue is on the question of the jurisdiction raised at the trial court. According to him the said court ought to have down its tools for the basic reason that the parties solemnised their marriage in France and were not permanent residence of Kenya.
12. That the Respondent filed divorced only six months after arriving in the country which was not enough to satisfy the domicile requirement.
13. The other issue raised was whether the application satisfied the provisions of Order 40 rule 6 of the [Civil procedure rules](#) and notably whether the appeal will be rendered nugatory should the application not be allowed.
14. The Applicant submitted in the affirmative stating that if the decree absolute is granted then the appeal shall be rendered useless.
15. The Respondent opposed the application vide the submissions dated 23rd March 2023. She submitted that there was no merit in the application as there was no appeal. The appeal filed was filed out of time and without the leave of the court. She therefore prayed that the same be disallowed.
16. In any case, she submitted, the marriage had irretrievably broken down and no chances of resuscitating it and allowing the application will be pre judicial to the respondent. She therefore urged the court to dismiss the same.

Analysis and determination.

17. There are essentially two issues for determination. The first is whether in light of the appeal having been filed out of time the same ought to be dismissed.
18. Looking at the reasons advanced by the applicant I find the explanations reasonable. It appears the counsel on record did not act immediately and once the current advocates were instructed they swiftly filed the memorandum of appeal.
19. The two weeks' delay in the circumstances is not inordinate in my view. Considering the nature of the matter at hand I think it is reasonable to grant the applicant an opportunity to be heard by way of appeal.
20. The issue of whether the trial court had jurisdiction to entertain the matter is a matter which shall be taken up on appeal. I do not think it is relevant to consider it at the moment.
21. I find that if the application is not allowed the appeal shall be rendered nugatory. The trial court will be left with no other option but to grant decree absolute which in this case will not augur well to the applicant in particular should the appeal succeed.
22. I also note that during the pendency of this application the appellant has already filed the record of appeal and the lower court file is already before this court. The appeal is essentially ready for hearing.



23. In the premises the application is allowed as hereunder;

- (a) The appeal though filed out of time is hereby deemed to have been filed within the requisite time.
- (b) There be stay of execution and or proceedings at the trial court pending the hearing and determination of the appeal.
- (c) The appeal is hereby admitted for hearing and the same shall be determined by way of written submissions.
- (d) The appellant shall file and serve his submissions within 30 days from the date herein and the respondent shall file and serve hers 30 days after service.
- (e) Costs of this application shall await the outcome of the appeal.
- (f) Matter be mentioned on 24th September, 2024 for further directions.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 20TH DAY OF JUNE 2024.

H K CHEMITEI

JUDGE

