



**AEE v ACKE (Civil Appeal E009 of 2023) [2024] KEHC 9099 (KLR) (Civ) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9099 (KLR)

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

**CIVIL**

**CIVIL APPEAL E009 OF 2023**

**MA ODERO, J**

**JULY 19, 2024**

**BETWEEN**

**AEE ..... APPELLANT**

**AND**

**ACKE ..... RESPONDENT**

**RULING**

1. Before this court for determination is the Chamber Summons dated 24<sup>th</sup> January 2023 by which the Applicant AOE seeks the following orders:-
  - “1. Spent
  2. Spent
  3. That pending the hearing and determination of the Appeal filed herein, this Honourable Court be pleased to grant a stay of execution of the Judgement delivered on 9<sup>th</sup> December, 2022 by the Honourable M. W. Murage Senior Resident Magistrate in Divorce Case No. CMDC Exxx of 2022, ACKE v AOE.
  4. That this Honourable Court be pleased to grant any such further directions and orders for the best interest of the sanctity of the marriage institution.
  5. That the costs of this application be provided for.”
2. The application which was premised upon Orders 42 Rule 6, Order 50 Rule 1, Order 40 Rule and Order 51 Rule 1 of the *Civil Procedure Rules* 2010 and Section 3A of the *Civil Procedure Act* and all other enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.



3. The Respondent ACKE opposed the application through the Replying Affidavit dated 6<sup>th</sup> February, 2023.
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 30<sup>th</sup> March, 2023, whilst the Respondent filed the submission dated 10<sup>th</sup> March, 2023.

### **Background**

5. The Applicant and the Respondent were a couple who got married to each other on 27<sup>th</sup> August, 2014 at the Registrars Office.  
Thereafter the two conducted a religious wedding ceremony at Christ the Teacher Catholic Church on 21<sup>st</sup> November, 2014.
5. The couple cohabited as man and wife in Nairobi and in Kilifi County until sometime in June 2021, when the Respondent left the matrimonial home with the couples young daughter.
5. Whilst the Applicant was hopeful that the parties would resolve their differences this did not happen and in March, 2022 the Respondent filed Divorce Cause No. xxx of 2022 seeking dissolution of the marriage.
5. The Divorce cause was heard interpartes and vide a judgment delivered on 9<sup>th</sup> December, 2023 Hon. M. W. Murage Senior Resident Magistrate allowed the Petition and dissolved the marriage. A Decree Nisi was issued.
6. Being aggrieved by the decision of the court the Appellant filed a Memorandum of Appeal dated 24<sup>th</sup> January, 2023. The Applicant also filed this present application seeking to stay the decision of the lower court pending the hearing and determination of his Appeal.
10. As stated earlier the application was opposed.

### **Analysis And Determination**

11. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties.
12. Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* provides as follows:
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, 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 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."

13. It is not the duty of the court at this point to determine the merits or otherwise of the intended appeal.
14. I note that the impugned judgment was delivered on 9<sup>th</sup> December, 2022. This application for stay of execution was made on 24<sup>th</sup> January, 2023 about one and a half months after delivery of the judgment. Taking into account the intervening holiday period (Christmas and New Year) I find that the application for stay was filed in a timely manner.
15. 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 loss he stands to suffer if the stay is not granted.
16. From his own Affidavit the applicant indicated that the Respondent had already left the matrimonial home and the two were no longer cohabiting.
17. The Applicant takes issue with the decision of the trial court to dissolve his marriage arguing that the ground of cruelty was not been sufficiently proved. That is a matter which can only be determined in the main appeal.
18. 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.
19. 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 18<sup>th</sup> January, 2023 (see Annexure 'AKCI' to the Replying Affidavit). 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.
20. 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.
21. 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.
22. In conclusion I find no merit in this application for stay. The chamber summons dated 24<sup>th</sup> January, 2023 is hereby dismissed in its entirety.
23. Each party will bear their own costs.

**DATED IN NYERI THIS 19<sup>TH</sup> DAY OF JULY, 2024.**

.....

**MAUREEN A. ODERO**

**JUDGE**

