



REPUBLIC OF KENYA



KENYA LAW
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**YN v MMK (Civil Appeal E085 of 2022)
[2023] KEHC 3919 (KLR) (Family) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E085 OF 2022
MA ODERO, J
MARCH 24, 2023**

BETWEEN

YN APPELLANT

AND

MMK RESPONDENT

(Being an Appeal from the Ruling and Order of the Kadhi's Court delivered on 28th July, 2022 in Kadhi's Court Divorce Cause No. E010 of 2021 at Nairobi by the Senior Principal Kadhi Hon. A.H. ATHMAN)

RULING

1. Before this Court is the Notice of Motion Application dated September 22, 2022 by which the Applicant YN seeks the following orders:-
 1. Spent.
 2. Spent.
 3. Spent
 4. That the Honourable Court be please to order stay of execution of the Ruling and Order of the kadhi's Court delivered on July 28, 2022 in Kadhi's Court Divorce Cause No E010 of 2021 at Nairobi by the Senior Principal Kadhi Hon AH Athman pending the hearing and the determination of the Appeal.
 5. That this Honourable Court be pleased to lift the warrants of the Arrest Directive dated July 28, 2022.
 6. Spent



7. That the costs of the incidental to this application be provided.
 8. That the Honourable Court be pleased to issue such further orders it deems just and convenient in the circumstances of this case.
2. The Application which was premised upon Sections 1A, 1B, 3A and 63(e), 79 B, 79 G of the Civil Procedure Act Cap 21, Laws of Kenya. Order 42 Rules 6 and 9 of the Civil Procedure Rules 2010 and Article 165 (6) and (7) of the Constitution of Kenya 2010 was supported by the Affidavit of even date sworn by the Applicant.
 3. The Respondent MMK opposed the application through her Replying Affidavit dated September 20, 2022. The application was canvassed by way of written submissions. The Applicants filed the Written submissions dated December 19, 2022 whilst the Respondent relied upon her submissions also dated December 19, 2022.

Background

4. The genesis of this Application is the Ruling which was delivered on September 30, 2021 in Kadhi Case No 010 of 2021. The Hon Kadhi in that ruling directed that the parties herein open a joint account into which the rental income from Flat No 6 on LR 209/3271/28 [Particulars Withheld] was to be deposited.
5. The Respondent alleged that despite numerous reminders the Applicant failed and /or refused to avail himself in order to facilitate the opening of the joint account as directed by the Hon Kadhi.
6. The Respondent then filed in the Kadhi Court an Application dated June 3, 2021 seeking to have the Applicant cited for contempt and punished accordingly. That application was heard and on July 28, 2022 Hon Senior Principal Kadhi Abdulhalim H Athman delivered a ruling in which he made the following orders:-
 1. That the Petitioner/Respondent be and is hereby found to be in contempt for willful disobedience of valid court orders dated September 30, 2021.
 2. That accordingly, he is hereby committed to four months jail for contempt under the provisions of Article 10 of the Constitution of Kenya(2010), Section 3 of the Magistrates Court Act (No 26 of 2015), Section 8 of the Kadhi's Court Act, Cap 11 Laws of Kenya, Rule 120 of the Kadhi's Court Procedure and Practice Rules (2020) and Section 6 of the Contempt of Court Act (No 46 of 2016)
 3. That warrant of arrest be and is hereby issued against the Petitioner/Respondent.
 4. That the Petitioner or his agents are hereby restrained from collecting rent of Flat A6/209/3272/28 located at [particulars withheld], Nairobi.
 5. That proceeds of the suit property be and are hereby directed to be deposited in the Respondent Counsel's account for the same upon determination of the matter.”
7. Being aggrieved by the ruling the Applicant filed the memorandum of Appeal dated August 26, 2022. The Applicant also filed the instant application seeking to have the orders made by the Hon Kadhi stayed pending the hearing and determination of his appeal.
8. As stated earlier the Application was opposed by the Respondent who insisted that court orders are sacrosanct and must be obeyed.



Analysis and Determination

9. I have considered the Application filed before this court, the Affidavit filed in reply thereto as well as the written submissions filed by both parties.
10. Order 42 Rule 6 (2) of the Civil Procedure Rules provides for guiding principles that one must satisfy before the court can grant a stay of execution, and provides as follows:-
 - “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.”
11. It is appreciated that stay of execution is a discretionary power however the court in setting out the guidelines for granting a stay, stated in the case of Butt - vs - Restriction Tribunal [1979] eKLR as follows:-
 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.” (own emphasis
12. In the case of Loice Khachendi Onyango – vs Alex Inyangi & another [2017] eKLR it was stated:-

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly 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. In this case the impugned ruling was delivered on July 28, 2022. This Application for stay was filed on September 22, 2022 roughly two (2) months after the Ruling in question. I am satisfied that the application was filed in a timely manner.
14. The Applicant submits that he stands to suffer substantial loss if the orders for stay are not granted. The Hon Kadhi issued warrants of Arrest against the Applicant and committed the Applicant to serve four (4) months in Civil jail for contempt of Court. Without a doubt execution will cause the Applicant



substantial loss, as he will be arrested and will be deprived of his personal liberty. For this reason I am persuaded that a stay of execution ought to be granted pending the hearing and determination of the Appeal.

15. In conclusion I do merit in this application for stay. Accordingly this court makes the following orders:-

1. A stay be and is hereby granted of the Ruling and orders of the Hon Kadhi delivered on July 28, 2022 in Kadhi Court Divorce cause No 610 of 2022 by Senior Principal Kadhi Hon Ah Athman pending the hearing and determination of the Appeal.

Subject To

2. The Applicant within fourteen (14) days of the date of this Ruling availing himself to facilitate the opening of the joint account ordered by the Hon Kadhi in the Ruling delivered on September 30, 2021.

3. Failure to comply with (2) above means that the stay will automatically lapse with no further reference to the Applicant.

4. The Applicant shall pay the costs for this application.

DATED IN NAIROBI THIS 24TH DAY OF MARCH, 2023.

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MAUREEN A. ODERO

JUDGE

