



**RAK v SMAK (Miscellaneous Application E197 of 2022)
[2023] KEHC 18131 (KLR) (Family) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18131 (KLR)

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

MISCELLANEOUS APPLICATION E197 OF 2022

MA ODERO, J

MAY 19, 2023

BETWEEN

RAK APPLICANT

AND

SMAK RESPONDENT

JUDGMENT

1. Before this court for determination is the Notice of Motion dated September 22, 2022 by which the Applicant RAK seeks the following orders:-

- “1. Spent.
2. That the proposed Appellant be granted leave to appeal out of time against the ruling of February 9, 2022 by the Hon Principal Kadhi AI Hussein In Nairobi Kadhi’s Court Divorce Cause No 44 of 2018.
3. That pursuant to the granting prayer (1) above the applicant be allowed to file and lodge the annexed Memorandum of Appeal out of time.
4. Spent.
5. That a stay of execution of all proceedings relating to the minor’s maintenance, custody, care and control in the Kadhi’s be granted pending the hearing and determination of the intended Appeal.
6. That an order be issued allowing the appellant herein access to the minors pending the hearing and determination of this application and appeal.



7. That the costs of this application be provided for.
2. The Application was premised upon Article 48, 53 & 159 (2) of the Constitution of Kenya 2010, Sections 1A, 1B, 3A 79G and Section 95 of the Civil Procedure Act, Section 3, 6, 22, 23, 82, 83, 92 and 93 of the Children's Act No 8 of 2001 and Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules and was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent SMAK opposed the Application through the Replying Affidavit dated November 9, 2022. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated November 28, 2022 whilst the Respondent relied upon his written submissions dated December 6, 2022.

Background

4. The Respondent herein filed in the Kadhi Court, Divorce Cause No 44 of 2018 in which the Applicant herein was named as the Respondent. Thereafter the Applicant filed a Notice of Preliminary Objection challenging the jurisdiction of the Hon Kadhi to hear and determine the issue of custody of the minors who were the children of the parties.
5. On February 9, 2022 Hon AI Hussein, Principal Kadhi dismissed the Preliminary Objection. Being aggrieved by the decision of the Hon. Kadhi the Applicant filed the present application seeking leave to appeal out of time, stay execution of the proceedings in the Hon Kadhi Court pending the determination of said Appeal and for orders allowing the Applicant access to the minors pending determination of the appeal.
6. The Applicant averred that he was not made aware of the Ruling of the Hon Kadhi dismissing his Preliminary Objection. That he instructed his advocate to file Nairobi Children Case No E748 of 2022 to deal with the question of access to the minors. That it was only after filing the case in the Children Court that the Applicant became aware of the ruling of February 9, 2022 delivered by the Hon Kadhi.
7. The Applicant states that the parties had been engaging in negotiations in an attempt to settle the matter. He states that he does not object to the Hon Kadhi determining the divorce case but he does not wish to submit to the jurisdiction of the Kadhi Court in matters relating to the welfare of the minors. For that reason the Applicant has filed an appeal to challenge the Hon Kadhi's dismissal of his Preliminary Objection.
8. The Applicant prays that a stay of the proceedings in the Hon. Kadhi Court be granted to enable him ventilate his appeal. That if no stay is granted he will be forced to submit to the jurisdiction of the Kadhi against his will. The Applicant states that a stay of execution will not be prejudicial to the Respondent as the children are already in her custody.
9. As stated earlier the application was opposed by the Respondent who in her Replying Affidavit denies the allegation that the Applicant was not made aware of the Ruling delivered by the Hon Kadhi on February 9, 2022.
10. The Respondent confirms that parties did commence negotiations in an attempt to settle the matter. The Respondent complains that the Applicant has not made any contribution at all towards the welfare of the minors and states that this application is nothing but a ploy by the Applicant to evade his responsibility for the maintenance of the minors.



11. The Respondent alleges that the Applicant has been engaged in forum shopping in an attempt to evade maintaining the minors and the appeal is to be filed furtherance of his attempt to frustrate the Respondent by delaying/prolonging the matter. She urges the court to dismiss this application.

Analysis and Determination

12. I have carefully considered the application before this court the Reply filed thereto, as well as the submissions filed by both parties. The issues that arise for determination are:-
 - (1) Whether enlargement of the time to file appeal ought to be granted.
 - (2) Whether stay of proceedings ought to be granted.
 - (3) Access to the minors.

(1) Enlargement of time to file an Appeal

13. Section 79G of the *Civil Procedure Act* provides that an appeal from the subordinate court to the High Court must be filed within thirty (30) days of the date of the decree or order being appealed against.
14. The decision in this matter was delivered on February 9, 2022. The Applicant had until March 9, 2022 or there about to file an appeal. He took no action until September 2022 when this application seeking enlargement of the time was filed.
15. For an application seeking extension of time to be merited the applicant must give sufficient justification for his/her failure to file an appeal within the statutory period. The principles which a court ought to consider while exercising its discretion to enlarge the time for filing an appeal were set out in the case of *Velji Shahmad v Shamji Bros and Popatlal Karman & Co* [1957] EA 438 as follows:-
 - (i) The explanation advanced by the Applicant for the delay in filing the appeal.
 - (ii) The nature of the case.
 - (iii) The conduct of the Applicant before and during the application.
 - (iv) Whether the Respondents can be adequately compensated in costs for any prejudice suffered.
16. In this matter the Applicant apparently went to sleep after the lower court delivered its judgement. He took a full Seven (7) months to think about filing an appeal. The Applicant explains that he was not aware that a Ruling had been delivered and states that he held off on filing an appeal as the parties were negotiating.
17. In *DIM v FWM* [2018] eKLR the court whilst acknowledging that the courts discretion to file an appeal was unfettered, observed that it was only in extreme cases where the Applicant had failed to exercise diligence in filing the appeal within the prescribed time that an application for enlargement of time should be denied. Otherwise the Applicant ought to be allowed the opportunity any exhaust the legal redress available to him.
18. The explanations given by the Appellant though weak the court will not deny him an opportunity to pursue an appeal. The prayer for enlargement of time within which to file appeal is allowed.
19. The intended appeal to be served within fourteen (14) days of this ruling failing which the leave so granted will automatically lapse.



(ii) Stay of Execution

20. The Applicant has prayed to have the judgment delivered by the Kadhi Court stayed pending the hearing and determination of his appeal.

21. 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, it 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.”

22. 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)

23. In the case of [Loice Khachendi Onyango v 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.....”

24. This court is mindful of the fact that this a matter which concerns the welfare of a child. It is trite law that in all matters concerning the welfare of children, courts have an obligation to give priority to the best interest of the child.



25. The *Constitution* of Kenya 2010 provides at Article 53 (2) as follows:-
- “(2) A child's best interest are of paramount importance in every matter concerning the child.” [own emphasis]
26. Section 8(1) of the *Childrens Act* of 2022 provides as follows:-“8(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
- (a) the best interests of the child shall be the primary consideration; (own emphasis)
27. In the case of *Bhutt v Bhutt* Mombasa HCCC No 8 of 2014 the court held as follows:-
- “In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 Rule 6 of the *civil Procedure Rules*, must be complemented by overriding consideration of the best interest of the child in accordance with “Article 53(2) of the *Constitution*.” [Own emphasis]
28. The Applicant submitted that he had challenged the jurisdiction of the Kadhi Court to determine issues relating to the custody and maintenance of children. The Kadhi Court however dismissed his challenge and stated that it had jurisdiction to determine such matters.
29. The Applicant states that he is apprehensive that if the proceedings in the Kadhi Court are not stayed then the Hon. Kadhi may proceed to determine the case to his prejudice.
30. This court was informed that the Applicant has not complied with orders made by the Hon Kadhi to pay Kshs 30,000/= monthly towards the maintenance of the minor. That he is currently in arrears to the tune of Kshs 210,000/=.
31. As stated earlier in all matters concerning children the welfare of the child shall be paramount consideration. Whilst the Applicant has the right to pursue his appeal in court, the child has a greater right to be maintained by his parents. The Applicant cannot be allowed to engage the court in applications and appeals yet he is failing to obey orders to provide for his children.
32. I note that the children are currently in the custody of their mother (the Respondent). I direct that the children remain with their mother pending further orders of this court.
33. I do grant the prayer for stay of proceedings subject to the Applicant clearing within fourteen (14) days all outstanding arrears arising from the Ruling on maintenance made by the Hon Kadhi. Further the Applicant to continue paying maintenance of Kshs 30,000/= per month for the upkeep of the children pending the hearing and determination of his appeal.
34. The Applicant is to be granted reasonable access to the children. Such access to be agreed upon by the respective parties and their advocates.

Conclusion

35. Finally this court makes the following orders:-
- (a) Leave be and is hereby granted to the Applicant to file his appeal out of time. The said Appeal to be filed and served within fourteen (14) days of the date of this Ruling.
- (b) Failure to comply with (i) above means the leave so granted will lapse automatically with no further reference to the Applicant.



- (c) A stay of proceedings of Kadhi Court, Divorce Cause No 44 of 2018 is hereby granted pending hearing and determination of the Appeal.

Subject To

- i. The Applicant clearing within fourteen (14) days all outstanding arrears arising from the ruling by the Hon. Kadhi directing him to pay Kshs 30,000/= per month as maintenance.
- ii. The Applicant continuing to pay this amount of Kshs 30,000/ as maintenance for the children pending the hearing and determination of his appeal.
- (d) Failure to comply with (i) and (ii) above means the stay will automatically lapse with no further reference to the Applicant.
- (e) This being a family matter each side will bear their own costs.

DATED IN NAIROBI THIS 19TH DAY OF MAY 2023.

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MAUREEN A. ODERO

JUDGE

