



CA v AKM (Petition 28 of 2022) [2023] KEHC 20437 (KLR) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20437 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION 28 OF 2022

RN NYAKUNDI, J

JULY 17, 2023

IN THE MATTER OF ARTICLE 45(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT, 2013

AND

IN THE MATTER OF SECTION 13 OF THE MARRIAGE ACT, 2014

AND

**IN THE MATTER OF ORDER 40 RULE 2 OF THE CIVIL PROCEDURE
RULES AND SECTION 63 (E) OF THE CIVIL PROCEDURE ACT**

AND

IN THE MATTER OF SECTION 1A, 1B, 3 AND 3A OF THE CIVIL PROCEDURE ACT

BETWEEN

CA PLAINTIFF

AND

AKM DEFENDANT

RULING

1. By a notice of motion dated 2/5/2023, the Applicant seeks the following orders:
 1. Spent.
 2. That there be interim orders of stay of execution of the judgment delivered on 18/4/2023 and or further execution of the decree together with all consequential orders thereto pending the hearing and determination of this application inter-parties.



3. That there be interim orders of stay of execution of the judgment delivered on 18/4/2023 and or further execution of the decree together with all consequential orders thereto pending the hearing and determination of the intended appeal to the Court of Appeal.
2. The application is premised on the grounds therein and it is further supported by the affidavit sworn by AKM, on 2/5/2023.

The Applicant's Case

3. The Applicant deposed that on 18/4/2023, the Court herein delivered a judgment wherein it dismissed both the Notice of Preliminary Objection dated December 14, 2022 and the Originating Summons dated November 18, 2022. Aggrieved by the said judgment the Applicant herein intends to file an appeal at the Court of Appeal.
4. According to the Applicant, the Court herein misdirected itself as the matter at hand required it in the first instance to determine whether it lacked jurisdiction to hear and determine the Originating Summons dated November 18, 2022 as it was pleaded that there was no decree nisi and decree absolute between the parties herein thus offending the provisions of Section 7 and 17 of the Matrimonial Property Act, 2013. The Applicant maintains that Preliminary Objection herein was a pure point of law hence would have disposed of the Originating Summons dated November 18, 2022. The Applicant contends that a ruling and not a final judgment would have been appropriate in the circumstance as the parties had not been granted the opportunity to be heard as per the provisions of the Constitution of Kenya, 2010.
5. The Applicant further deposed that the Court herein should have determined the merits and demerits of the Notice of Preliminary Objection first and if the same was upheld or dismissed deliver a ruling before allowing the parties to tender their evidence on the Originating Summons dated November 18, 2022.
6. The Applicant further maintains that jurisdiction is everything and the Court herein had to first determine the issue of jurisdiction prior to determining the Originating Summons dated November 18, 2022 which was determined without giving the parties an opportunity to heard.
7. The Applicant further deposed that no directions were ever given in this matter as regards to how the Originating Summons dated 18/1//2022, were to proceed that is either vide viva voce evidence or written submissions. Further that the Court herein misdirected itself when it observed that the Notice of Preliminary Objection herein was a response and or reply to the said Originating Summons.
8. The Applicant added that parties herein were only submitting of the Notice of Preliminary Objection and not the Originating Summons.
9. The Applicant further deposed that the Court herein also misdirected itself when it presumed that parties herein have children in their marriage without first establishing whether there was a marriage in the first place.
10. The Applicant also contends that the Court herein also misdirected itself all throughout these proceedings when it presumed that the parties herein had optimally acquired assets during the subsistence of the contested marriage without first determining if there was a marriage between the two. The Applicant maintains that the issue of whether there was a marriage between the parties is yet to be determined on the divorce cause file at the subordinate Court in Eldoret CMC Divorce Cause No E114 of 2022. The Applicant further maintains that the judgment herein further prejudices the outcome of the divorce cause filed at the subordinate Court. The Applicant further contends that



unless temporary orders of stay of execution of the judgment herein are issued then the outcome of the divorce cause is likely to be influenced to his detriment. The Applicant further deposed that he has since lodged a Notice of Appeal to the Court of Appeal and has also done a letter of Deputy Registrar High Court requesting for typed proceedings in the matter herein. According to the Applicant the intended appeal has a high likelihood of success and the judgment herein is not a pecuniary one requiring the provision of security for due performance of the decree. The Applicant further deposed that the application herein has been made promptly and in good faith.

11. At the hearing learned counsel Mr Isiji for the Applicant canvassed the application by way of written submissions and urged the court to rule that it will be just and convenient to make the order for a stay of execution of the ruling pending the hearing and determination of the intended appeal in order to prevent undue prejudice to the applicant. In addition, it was learned counsels contention that the 'application has been filed without unreasonable delay and the Appeal itself has a realistic prospect of success. Learned counsel further submitted that the court exercises its jurisdiction and discretion to grant the orders as premised in the application. Learned counsel relied on the cases of: *Mukisa Biscuit Manufactures Limited v West end Distributors Limited* [1969] EA 696 , *SM vs HE* [2019] eKLR, *RWW vs EKW* [2019] eKLR, *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR
12. According to the Applicant, no prejudice or injustice would befall the Respondent herein if the orders sought are granted.

The Respondent's Case

13. The application is opposed by the Respondent vide her Replying affidavit sworn on 15/5/2023. The Respondent contends that the application herein is frivolous, vexatious and an abuse of court process and ought to be dismissed with costs. The Respondent further contends that this instant application has not met the prerequisites to warrant the granting of stay of execution orders. On the part of the respondent's counsel M/s Bornes she submitted that the appeal arising in interlocutory ruling has no prospects of succeeding as the orders of the court were of interim nature to preserve the rights of the parties pending the determination of the substantive orders before the trial court. M/s Bornes next submitted that the Applicant has not demonstrated that he would suffer substantial loss not remedied in damages. She placed reliance on the case law as elucidated in: *James Wangalwa & Another v Agnes Naliaka Cheseto* (12) eKLR , *RWW V EKW* [2019] eKLR & Bungoma High Court Misc Application No 42 of 2011.
14. As delved into elsewhere in this ruling the application was primarily canvassed by way of brief written submissions from both counsels ceased of the matter.

Analysis and Determination

15. I have considered the application for stay, grounds thereof and the supporting affidavit. I have also considered the Replying affidavit and submissions together with case law cited by both Counsel for their respective clients. At this juncture, the merits or demerits of the appeal are not factors for consideration. The general approach adopted by courts on applications of this nature in stay of execution as outlined in several decisions is that any successive litigant is entitled to the fruits of the interim orders, injunctions, conservatory or any other firm directions given by the court unless compelling reasons exist or are advanced for depriving him or her the essence of those fruits awaiting further orders of the same court. It must also be emphasised the stay of proceedings or interlocutory orders which do not emanate from a full trial on the merits should be sparingly granted unless the circumstances of the case are such that the applicant is likely to suffer a risk of injustice, prejudice, or substantial loss.



16. 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 may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by 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."

17. A party seeking stay of execution pending appeal must demonstrate that: -

- a. Substantial loss may result to the applicant unless the order was made;
- b. The application was made without unreasonable delay; and
- c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant."

18. In the case of [Kenya Women Microfinance Ltd v Martha Wangari Kamau](#) [2020] eKLR the Court cited the case of [Samvir Trustee Limited v Guardian Bank Limited Nairobi](#) (Milimani) HCCC 795 of 1997 where the Court held that;

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of



substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

19. Being guided by the abovementioned principles. The first consideration is whether the application was filed timeously. The impugned judgement was delivered on 18/4/2023. The Applicant brought this present application on 2/5/2022. I find that the application has been filed timeously.
20. It is the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In the instant case, the Applicant submitted that he stands to suffer substantial loss if the orders of stay herein are not granted as the Court in determining the dispute at hand misdirected itself in presuming that he and the Respondent were married and had children in their marriage a matter this still pending at the subordinate Court thus prejudicing the proceedings therein. The Applicant further contended that the parties were not given a chance to be heard on the core issue of existence of a marriage between them which is matter pending at the subordinate Court where there is an ongoing divorce cause. The Applicant is apprehensive that the judgment herein will influence the proceedings in the divorce cause to his detriment.
21. The Applicant further submitted that he likely to suffer substantial loss as the Court herein has condemned him to look for alternative shelter for the Respondent and her children and also basic provisions yet he wasn't given an opportunity to give evidence with respect to the same. The Applicant contends that the Respondent's children have their own fathers who having taking care of them to date and further that the Respondent resides and works for gain in Kisumu.
22. Applying the above principles, the substratum of the ruling was conditioned in the affidavits in support and the rejoinder by the respondent to this instant application. There are many issues being adverted to by the applicant's counsel which to him will render intended appeal nugatory and that some of the issues being contested might have an influence on the justiciable issues before the Lower Court. It is in those bald statements he thinks the lower court trial should not be allowed to proceed until the intended appeal has been determined. How that plays out in the superior court is a matter for that jurisdiction. The injunctive orders being complained of have not been even complied with by the applicant nor any explanation given as to non compliance. The intended appeal has kind of deprived this court from exacting its jurisdiction on the interlocutory matters which was to preserve the status quo to determine the trial on the merits on the various matters on the marital union. This being a borderline case as to the irreparable harm or substantial loss likely to be suffered the application can only benefit from the factorial of a balance of convenience and on assumption the intended appeal so set to be canvassed would not be rendered nugatory.
23. The next issue for consideration is the issue of security. It is true that under Order 42 Rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. However, the decree herein is not a monetary decree thus no need for security for the due performance.



24. In the end, it my finding that Applicants' application dated 2/5/2023 is meritorious. Consequently, I allow it in the following terms: -
- a. That stay of execution against the judgement of delivered on 18/4/2023 is hereby granted.
 - b. That the Applicant shall file and serve a record of appeal within thirty (30) days of this ruling;
 - c. Costs shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH JULY 2023

.....

R. NYAKUNDI
JUDGE

