



REPUBLIC OF KENYA



**BHM v IKH (Family Appeal E022 of 2023)
[2023] KEHC 23758 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E022 OF 2023**

G MUTAI, J

OCTOBER 18, 2023

BETWEEN

BHM APPELLANT

AND

IKH RESPONDENT

RULING

1. There are ongoing proceedings between the parties hereto before the Kadhi's Court at Mombasa. In the said proceedings, the appellant/applicant sought the dissolution of her marriage to the respondent and the issuance of a divorce certificate.
2. The said proceedings have been acrimonious. *Vide* an application dated March 8, 2023, the appellant/applicant sought to have the proceedings of the hearing conducted on January 23, 2023 expunged from the Court record and the hearing to start afresh. The said application was opposed. After hearing the parties, the Hon Habib Salim Vumbi, Principal Kadhi, dismissed the application with no orders at costs on the 13th day of July 2023.
3. The appellant/applicant was aggrieved by the said decision and filed the appeal that is now pending determination before this Court. *Vide* a Notice of Motion dated July 27, 2023, she sought stay of execution of the said ruling and orders issued by the learned Principal Kadhi pending hearing interpartes and also pending hearing and determination of the appeal. The said application was denied. It was upon refusal by the said court to accede to her prayers that the appellant/applicant filed the instant application *vide* which she sought similar orders as those she had applied for before the hon Principal Kadhi.
4. The said application is dated September 26, 2023. In my view, it is prudent, for the reasons that shall become clear, that I set out the orders that were sought. These are that:-

1. Spent;



2. There be issued an interim stay of proceeding and stay of execution of the ruling and orders issued by hon Habib Vumbi (Principal Kadhi) delivered on July 13, 2023 pending interpartes hearing and determination of this application;
3. There be issued a stay of proceedings and stay of execution of the ruling and orders issued by hon Habib Vumbi (Principal Kadhi) delivered on July 13, 2023 pending hearing and determination of the High Court Family Appeal No E022 of 2023 (Mombasa).”
5. The application is based on the grounds that being aggrieved by the decision of the Principal Kadhi, the appellant/applicant filed an appeal. The appeal is arguable, with high chances of success. She urged that unless a stay of execution is granted the appeal would be rendered nugatory.
6. In her supporting Affidavit, the Appellant/Applicant deposed that the respondent would not be prejudiced in any way if the application was allowed. She also stated that allowing this application would be in the best interests of justice. She exhibited a copy of the ruling of the application she filed before the Court below.
7. The application is opposed. The respondent, through her advocates, Madzayo, Mrima & Jadi Advocates, filed Grounds of Opposition dated October 9, 2023. In the said Grounds, they adverted that the application has no merit and is frivolous and vexatious as there is nothing to execute arising from the orders and ruling delivered on July 13, 2023. He accused the appellant/applicant of acting in bad faith and averred that the application was meant to delay the judgment set to be delivered on October 19, 2023.
8. The respondent also filed a Replying Affidavit sworn on October 12, 2023. The affidavit deposed to facts similar to those referred to in the Grounds of Opposition. I see no reason to rehash the same here.
9. The application came for hearing interparty on October 12, 2023. On the said date, I directed the parties to file Written Submissions, which submissions were highlighted before me on October 16, 2023.
10. The appellant/applicant, through her counsel, Mr Mwawasa, identified two issues as coming up for determination: -
 1. Whether the appeal is arguable with high chances of success; and
 2. Whether the appeal would be rendered nugatory unless a stay was granted.
11. Regarding the first issue, the appellant/applicant averred that the appeal is arguable. She averred that the respondent was allowed by the hon Principal Kadhi to file documents in support of her when he had already closed his case. The appellant/applicant referred me to the case of *Kenya Medical Lab Technicians and Technologist Boards versus Prime Communication Ltd*; Civil Application No 56 of 2013 (UR 36/2013), where the Court held as follows: -

“in considering whether an arguable appeal has been made out, it is not a requirement that the appeal will necessarily succeed. It is sufficient that the appeal appears one that will be fully argued before the court... and besides, an appeal is considered arguable even if it raises a single *bona fide* point...”
12. On the second issue, the appeal/applicant argued that unless a stay is granted, “the Kadhi will issue a judgment premised on a flawed judicial process which is the subject of appeal”.
13. On the basis of the forgoing she prayed that I allow the application.



14. The respondent submitted that I should not issue the orders sought. Ms Jadi, for the respondent, identified three issues for my determination to wit:-

1. Whether there should be a stay of proceedings;
2. Whether there is anything to stay in the ruling of the honourable Principal Kadhi delivered on July 13, 2023; and
3. Whether the appeal will be rendered nugatory if the proceedings are not stayed.

15. The respondent argued that the appellant/applicant had not identified the particular proceedings that was intended to be stopped. He adverted that the appellant/applicant hadn't filed the proceedings in good time and failed to disclose the reasons for the delay. It was urged that a stay of proceedings is an exceptional remedy which is granted only in the most exceptional of circumstances. In support of the said submissions, I was referred to the decision of Ringera, J (as he then was) in *Re Global Tours & Travels Ltd*; Nairobi High Court Winding Cause No 43 of 2000, where the Court identified, among other factors to be considered when deciding whether or not to grant a stay of proceedings, the need for expeditious disposal of cases. It was urged that the appellant/applicant filed the instant application to delay the delivery of the judgment. I was referred to the decision of the Court in *Turbo Highway Eldoret Limited versus Munio*; Civil Application No E040 of 2021 where the Court said:-

“the rule is more exacting for a party requesting a stay of proceedings. In particular, an applicant must demonstrate that there are exceptional circumstances which make stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up in a single appeal”.

16. On whether that ruling could be stayed the respondent argued that what the hon Principal Kadhi did was to dismiss an application. There is therefore, nothing to stay. I was referred to the case of *Raymond M Omboga versus Augustine Ayam Maranga* Kisii HCCA No 15 of 2010, where it was stated:

“the order dismissing the application is in the nature of a negative order, and it is incapable of execution... where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order”.

The respondent thus urged that this prayer be dismissed.

17. The respondent submitted that the appellant/applicant had not demonstrated that her appeal would be rendered nugatory.

18. I have considered the parties' submissions, their pleadings and exhibits attached to their respective affidavits. I agree with the parties that the issues I am called upon to determine are the following: -

1. Whether a stay of proceedings should be issued?
2. Whether the court should stay execution of the ruling and orders of July 13, 2023? and
3. Whether the appeal will be rendered nugatory.

19. On the first issue, it is trite, that stay of proceedings is an exceptional remedy that should be granted sparingly in the most exceptional cases. Gikonyo, J in the *Kenya Wildlife Service versus James Mutembei* [2019]eKLR stated that:-

“stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to



conduct his litigation. It impinges on the right to access justice, right to be heard without delay and overall, right to a fair trial. Therefore the test for stay is high and stringent”

I am in agreement with the above decision.

20. I note that the matter before the hon Principal Kadhi is at an advanced stage, and is now pending judgment slated for October 19, 2023. The appellant/applicant actively participated in the hearing before the said court. I do not think that stay of proceedings at this time would serve the interests of justice. To the contrary, it would delay justice and thus ran contrary to the principle stated in article 159 (2) (b) of the *Constitution of Kenya 2010* that justice should not be delayed.
21. Should the ruling of July 13, 2023 be stayed? I have read the said ruling carefully. I have not found anything in it that is capable of being stayed. What the learned Principal Kadhi did was to dismiss the Notice of Motion dated March 8, 2023. The Court of Appeal in *Mbarak said Ali & another versus Sultan Palace Development Ltd* [2021]eKLR quoted with the approval the decision of Makhandia J (as he then was) in *Raymond M. Ombongi versus Austine Ryan Maranga*; HCCA No 15 of 2010, and stated that:-

“ given that the applicants are seeking to stay a negative order, we have come to the conclusion that the two limbs for consideration in rule 5(2)(b) application have not both been satisfied. The motion dated November 16, 2020 is hereby dismissed with costs”.
22. Would the appeal be rendered nugatory? I do not think that that would be the case. If the Kadhi Court delivers its judgment as scheduled, the appellant/applicant will have an opportunity to file an appeal against the said decision. If that happened, judicial time would be best utilized as the clear and present risk of countless interlocutory appeals would be avoided.
23. It is thus my opinion that the application dated September 26, 2023 has no merit. I dismiss the same. Each party shall, however, bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 18TH DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Mwawasa for the Appellant/Applicant;

Ms. Jadi for the Respondent; and

Arthur - Court Assistant

