



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY MISCELLANEOUS NO. E005 OF 2021

ASMAPPLICANT

VERSUS

FBC.....RESPONDENT

RULING

1 The application before me seeking determination is a Notice of Motion dated 9th February, 2021 and filed on 10th February, 2021 seeking orders as follows;

- i. That the application be certified urgent and service be dispensed with in the first instance.**
- ii. That a stay of execution of the judgment dated 6th October, 2020 and any resultant order and direction by the court in Kwale Divorce Cause No. 7 of 2019 be granted pending the hearing and determination of this application.**
- iii. That the court be pleased to grant leave to the applicant /judgment debtor to appeal out of time against the judgment made by the Hon Salim J Mwaito in the above stated cause.**
- iv. That once leave has been granted, a stay of execution of the judgment dated 6th October, 2020 and any resultant order and direction by the court in Kwale divorce cause No 7 of 2019 be granted pending the hearing and determination of the appeal.**
- v. The costs of this application be in the cause.**
- vi. Any other orders that meets the ends of justice.**

2 The application is anchored on grounds stated on the face of it and averments contained in the affidavit in support sworn on 19th February, 2021 by ASM who averred that; he was the defendant in Kwale divorce case No 7/2019 whose judgment was delivered on 6th October 2020, without his knowledge nor thereof his counsel and that notice of delivery of judgment was not served then as earlier on promised by the Hon. Kadhi. That he was shocked on 3rd February 2012 when he was served with notice to show cause why execution could not issue in lieu of payment of a sum of kshs 384,000 plus kshs12,000 as upkeep monthly.

3 He further stated that he was likely to suffer substantial loss by being committed to civil jail if the stay orders were not granted. That his appeal has high chances of success as evidenced from the annexed draft memorandum of appeal.

4 Despite service of the application herein and the hearing notice, the respondent did not file any response. The application was therefore argued ex parte with Mr Ngugi relying on the averments contained in the affidavit in support. He simply urged the court to allow the application as it was not opposed.

5 The applicant is seeking two separate orders; firstly, leave to appeal out of time. According to the applicant, the impugned judgment was delivered on 6th October, 2020. He claimed that the trial court had promised to deliver its ruling on email which particulars they supplied but no communication was made.

6 That failure to file an appeal out of time was not deliberate but occasioned by lack of knowledge that judgment had been delivered.

7 He therefore pleaded lack of knowledge hence a good ground to file the intended appeal. In the absence of any contrary explanation, I will

take the excuse given as reasonable explanation for the appeal to be filed out of time.

8 As to the second payer for stay of execution, the applicant pleaded that he was likely to suffer substantial loss if he was to be committed to civil jail for non-payment of the decretal sum.

9 Although the application is not opposed, the applicant is duty bound to establish a prima facie case that he deserves the orders sought. The fact that an application is not opposed is no guarantee that the orders sought shall automatically issue. See **Gideon Sitelu Konchellah Vs Julius Lekakeny Sunkuli & 2 others eKLR**

10 For the court to exercise its discretion in the applicant's favour must prove salient elements under order 42 rule 6 (2) of the Civil Procedure Rules which provides;

- a. That he is likely to suffer substantial loss if the orders are not granted.**
- b. That the application is filed without unreasonable time**
- c. A deposit of security in satisfaction of the due performance of the decree has been made; or**
- d. There is sufficient cause to warrant such orders**

This principles were succinctly captured in the case of **Vishram Ravji Halai Vs Thornton and Turpin Civil application No Nai 15 of 190 (1990) KLR 365**

11 However, the power to issue or not to issue a stay order is within the discretion of the presiding court which power must be exercised judicially. This position was espoused in the case of **Suleiman Vs Amboseli Resort Limited (2004) 2KLR 589** where the court observed that in exercising its discretion, the court must be guided by the principles of proportionality and equality aimed at putting parties before the court to equal footing and in exercise of its discretion the court must opt for the lower risk than the higher risk of injustice.

12 The applicant is opposed to the award of maintenance at a monthly payment of kshs12,000, kshs 45000 being Eddah payment for three months & Muta at kshs 300,000 all of which he claims the respondent was not entitled.

13 The applicant claimed that if the execution is not stayed, he will be committed to civil jail for non-payment. He however did not plead his source/s of income nor did he submit that the respondent is a person of straw who will not be able to refund the decretal sum if the appeal succeeds. In the circumstances of this case, it is my finding that the applicant has not established that he will suffer substantial loss that will not be compensated in monetary terms.

14 However, since the respondent did not oppose the application to prove that the applicant is a person of means, I will direct that the principle amount totaling kshs380, 000 be deposited in court as security. This will ensure that no party is disadvantaged and that there is a level playing ground without also compromising the applicants' right of appeal. See **Forcin matorcycle Co. Ltd vs ANnn Wambui Wangui & another (2018) e KLR** where the court held that;

“...my view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security to deposit...”

15 Concerning the sum of Kshs 12,000 monthly maintenance, the same can be recovered if the appeal succeeds. The applicant has not proved that the respondent is a person of straw that will not be able to refund the said amount should the appeal succeed. See **Gatirau Peter Munya v Dickson Mwenda Githinji and two others (2014) e KLR**. Accordingly, the prayer to stay its payment is declined.

16 In a nut shell, it's my finding that the appellant has partly established his case and therefore make orders as follows;

- (a) That leave is hereby granted to the appellant to file his appeal out of time.**
- (b) That the appellant shall file his memorandum of appeal within 21 days from the date of delivery of this ruling.**
- (c) That stay of execution is granted in respect of a decretal sum of Ksh 380,000 on condition that the applicant deposits the full amount in court within 30 days.**
- (d) That the payment of kshs 12,000 monthly as maintenance expenses shall continue until the appeal is heard and determined.**
- (e) Each party to bear own costs.**

Dated, signed and delivered virtually at Mombasa this 15th day of June, 2021.

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J. N. ONYIEGO

JUDGE