



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. E035 OF 2021

DRA .....APPELLANT

VERSUS

EM.....RESPONDENT

RULING

1. By a Notice of Motion dated 28.4.21 DRA, the Appellant seeks stay of execution of the orders of 13.4.21 by Chief Magistrate's Court in Divorce Cause No. E81 of 2021 pending the hearing of the Appellant's appeal herein. The application is supported by the grounds on its face, the supporting affidavit of the Appellant and annexures thereto. The Respondent, EM opposed the application through a replying affidavit sworn on 12.5.21.

2. The Appellant is aggrieved by the ruling of the lower Court and has filed an appeal against the said decision. The impugned ruling arises from the Appellant's application dated 15.2.21 to set aside *ex parte* orders issued by the trial Magistrate on 29.1.21 directing him to pay to the Respondent alimony *pendent lite* in the monthly sum of Kshs. 450,000/=. In the said ruling, the trial Magistrate dismissed the Appellant's application

3. It is the Appellant's case that the parties were never married to warrant the grant of alimony *pendent lite*; that he is a retiree on a monthly pension of US\$ 5,000; that he is 75 years old and in need of constant medical attention requiring him to travel abroad frequently; that he will suffer irreparable loss if execution is undertaken as he will be left with no money to sustain himself. He further contends that the Appeal is arguable and will be rendered nugatory if stay is not granted. On the other hand, the Respondent will suffer no prejudice as the Appellant deposited all his life savings of Kshs. 9,000,000/= in her account. He asserted that the appeal, which he believes is meritorious, was filed timeously and without delay and unless stay is granted, the appeal will be rendered nugatory.

4. The Respondent contended that the parties were married under Nandi customary law and that the Appellant paid dowry of Kshs. 1,000,000/=; that she filed the divorce cause against the Appellant which is still pending; that the Appellant provided for her before marriage and continued to provide for her after marriage; that the Kshs. 9,000,000/= was given to her to renovate her parent's house ahead of the Appellant's visit to ask for her hand in marriage; that prior to his retirement, the Appellant held the position of Chairman of [particulars withheld] and is therefore a man of sufficient means. The Respondent urged the Court to dismiss the Application which is she said was devoid of merit, frivolous and vexatious and does not meet the conditions for stay pending appeal.

5. The factors to consider in an application for stay pending appeal are stipulated in Order 42 rule 6 (2) of the Civil Procedure Rules 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 Appellant 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 Appellant.**

6. The ruling appealed against was delivered on 13.4.21, while the Application is dated 28.4.21. The Application has therefore been made without unreasonable delay thereby satisfying the first principle for grant of stay pending appeal.

7. On whether substantial loss may result to the Appellant unless the order is granted, the Appellant submitted that as a 75 year old pensioner earning US\$ 5,000 per month and in constant need of medical care and will be unable to take care of himself if the orders sought are not granted. His health may suffer irreversibly. He contended that his appeal is arguable and ought to be ventilated. The Respondent on the other hand will not suffer as she is currently holding Kshs. 9,000,000/= given to her by the Appellant. On her part, the Respondent argued that the Appellant is a man of means who was able to give her substantial sums of money. To the Respondent therefore the Appellant will not suffer any known prejudice by complying with the orders.

8. The Appellant faults the learned Magistrate for granting alimony *pendent lite* to the Respondent yet his position is that there is no marriage between the parties. This is a matter that is yet to be determined by the lower Court and is indeed a ground of appeal.

9. It is trite law that grant of stay of execution of an order pending appeal is discretionary. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how this discretion ought to be exercised 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 principle 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 Appellant 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.**

10. In the present case, I find no overwhelming hindrance to decline the stay. Further the special circumstances of this case are that the learned Magistrate granted alimony *pendent lite* yet the existence of the marriage between the parties is in question. The orders granted were anchored on an issue that is yet to be determined. Without preempting the proceedings in the lower Court or the appeal, my finding is that in order not to render the appeal a mere academic exercise, it is important that stay orders be granted. The circumstances of the case are such that if at the conclusion of the appeal this Court were to reverse the learned Magistrate's decision, the appeal would be rendered nugatory. In order to protect the interest of the Respondent however, the stay to be granted must be conditional.

11. Accordingly, I allow the Application dated 28.4.21 on the following terms:

i. Conditional stay of execution of the orders of 13.4.21 is hereby granted to the Appellant on terms that the Appellant shall file and serve the record of appeal within 14 days.

ii. In default, the stay granted herein shall automatically lapse.

iii. No order as to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2<sup>ND</sup> DAY OF JULY 2021**

**M. THANDE**

**JUDGE**

In the presence of: -

..... for the Appellant

.....for the Respondent

.....Court

**Assistant**