



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 20 OF 2020

HGE.....APPELLANT

VERSUS

SM.....RESPONDENT

RULING

1. The application that I am tasked with determining is a Motion, dated 22nd April 2010. It seeks stay of execution of the decree passed in Vihiga Kadhi's Court Matrimonial Cause No. 2 of 2019, pending hearing and determination of the instant appeal.

2. The appellant swore an affidavit on 22nd April 2020, where he states that he was aggrieved by the said decree on several grounds. One, he feels that the certificate of marriage relied upon was fraudulently obtained, as no independent evidence was presented of the celebration of the marriage, while there was overwhelming evidence that the respondent was married to another person. Secondly, he feels that the directive that he cohabits with the respondent violated his right to freedom of association as guaranteed by Article 36(1)(2) of the Constitution, 2010. Thirdly, he argues that the Kadhi's Court lacks jurisdiction to divide matrimonial property.

3. The respondent swore an affidavit, on 15th May 2020, in reply. She asserts that the matter before the Kadhi's court turned on the question of her personal status and marriage, and, therefore, the Kadhi's court had jurisdiction under Article 170(5) of the Constitution. She avers that the appellant did not serve her with a notice of appeal as required by law, and without the notice of appeal the stay orders sought would have no anchor without the jurisdiction of the appellate court being invoked. She pleads that she is destitute as she has no home, having been evicted from her matrimonial home. She avers further that she is suffering and would continue to suffer should the orders be allowed. She asserts her right to equal treatment in law. She further argues that the appellant has not offered to deposit security for costs, and has not demonstrated that he would suffer prejudice should the orders be allowed. She further states that a certified copy of the proceedings has not been exhibited, to demonstrate the genuineness of the grounds listed in the memorandum of appeal, which leaves the court imagining what transpired before the trial court.

4. Directions were taken on the 21st May 2020, for disposal of the application by way of written submissions. Both sides have complied with the directions, by filing their respective written submissions. I have read through them and noted the arguments made in the said written submissions.

5. The appellant submits that he has filed an appeal against the decree of the Kadhi's court, and that should the orders sought not be granted, the appeal would be rendered nugatory. He further submits that the decree in Vihiga Kadhi's Court Matrimonial Cause No. 2 of 2019, compels him to co-habit with the respondent, which he deems, if allowed, to be a gross violation of his freedom of association, as envisaged under Article 36 (1)(2) of the Constitution. He also submits that the decree had distributed half of his properties to the respondent, and that should the same not be stayed he will sustain loss. He cited the decisions in *Re Global Tour Travels Ltd* Nairobi HCWUC No. 43 of 2000 (unreported), *Protus Mutiva vs. Ebby Omina Ameyo* [2014] eKLR and *Suleiman vs. Amboseli Resort Ltd* (2004) eKLR.

6. The respondent, on her part, opposed the application. She submitted that the application was not tenable as the appellant had not filed a notice of appeal, and that he had not demonstrated that he would suffer substantial loss should the orders not be granted. She submitted that the stay sought would cause her prolonged suffering as the *status quo* will render her homeless. She urged court to weigh her interests vis-a-vis that of the appellant and deny the application. She relied on *Macharia & Co Advocates vs. East African Standard* (2002) KLR 63 and *Samir Trustee Limited vs. Guardian Bank Limited* Nairobi HCCC 795 of 1997 (unreported).

7. There is really only one issue for determination, and that is whether the order of stay of execution should be granted.

8. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except

appeal case of 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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

9. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye vs. African Virtual University* [2015] eKLR.

10. In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge’s discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

11. As to what substantial loss is, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. In the instant case it is the appellant’s case that his right to freedom of association has been violated as the decree ordered that he stays with the respondent in his home at [Particulars Withheld]Plot 12, and that he was asked to divide his estate in half with the respondent. The respondent, on her part, states that she will be rendered homeless should the orders prayed be granted as the appellant had sent her out of their matrimonial home.

13. The court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

14. The court is called upon to look at the interests of both parties. From the records annexed in the application, it is clear that the parties herein are to dispute as to the existence of a marriage relationship between them. The same is subject to appeal. It should also be noted that the respondent in her pleadings stated that she was thrown out of her home in the year 2018, that she has been putting up with her relatives.

The application and the pleadings reveal a strain in their relationship, and the fact that the respondent is not staying in the matrimonial home. Despite stating that she will be rendered homeless, the respondent has not shown how she has been coping since 2018. The appellant, on his part, states that the execution of the decree will violate his rights if the stay is not granted. If the appeal succeeds and the marriage held to be a nullity, then it will be impossible for the appellant to be reimbursed for the time he will have stayed with the respondent. It would be in the interest of justice for the order of stay sought to be granted on the basis that the appellant has demonstrated that he will suffer substantial loss if the same is not granted.

15. With regard to security for costs, the court in *Absalom Dova vs. Tarbo Transporters [2013] eKLR*, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

16. In *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR*, it was said:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

17. In *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR*, the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.

18. In *Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR*, the court stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor..... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

19. While in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another [2018] eKLR*, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. 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 but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

20. In *RWW vs. EKW (supra)*, the court said.

“The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances of this cause and it being a matrimonial cause, the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders. As to whether the application was made without, unreasonable delay, I find in the affirmative.”

21. From the above decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Looking at the circumstances of the case and the fact that the parties herein are both of advanced ages, it would be in the interest of justice that security is not be imposed on the appellant.

22. The respondent has made a lot of play about notice of appeal, that the appellant did not file one. It should be clear, from Order 6 Rule 4 of the Civil Procedure Rules, that a notice of appeal is not required for the purpose of an appeal to the High Court from the subordinate courts and tribunals. It is only required for appeals to the Court of Appeal from the High Court. The failure by the appellant to file and serve one is, therefore, a matter of little consequence.

23. In the upshot, I find that the application, dated 22nd April 2020, is meritorious, and I hereby allow the same as prayed, with no orders as to costs. Let the Deputy Registrar call for the original trial record from the lower court, to pave way for directions on the disposal of the appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 3rd DAY OF July 2020

W MUSYOKA

JUDGE