



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 1 OF 2018**

**KMH.....APPLICANT**

**VERSUS**

**AAA.....RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 15.1.18 in which KMH, the Applicant herein seeks stay of proceedings in Kadhi's Court Case No. 167 of 2017 ("the Kadhi's Case") between himself and AAA the Respondent herein, pending the hearing and determination of the appeal herein.

2. The following is what I deemed relevant from the hard to follow Application and affidavit of the Applicant sworn on 16.1.18. The parties are married and have 2 children. The Respondent filed the Kadhi's Case seeking *inter alia* dissolution of their marriage. The drafting of both their pleadings was done by a lady at [particulars withheld] office referred to them by one S. The Applicant states that the Respondent's claim combined matrimonial property dispute and children's matter which may not be litigated together. The Applicant further claims that the pleadings filed by the Respondent were unsigned making the proceedings null and void *ab initio*. He further states that there was external influence in the matter through the Chief Kadhi, a relative of the Respondent who had warned him to grant the Respondent the divorce, which explains the speed at which the proceedings are being driven. It is against this backdrop the Applicant states, that he filed an application dated 22.9.17 seeking amendment of his statement of defence. By its ruling of 5.1.18, the Court dismissed the Application. It is this ruling that is the subject of the appeal herein.

3. In her Replying Affidavit sworn on 5.2.18, the Respondent avers that the Application is frivolous and full of falsehood. Following gross cruelty and mistreatments by the Applicant, she filed the suit in the Kadhi's Court of Mombasa seeking the dissolution of their marriage and other reliefs. The case proceeded well and both parties testified and closed their cases. The Applicant then ambushed her and the Hon. Court by filing an application under certificate of urgency on 25.9.17 seeking amendment of his statement of defense and admission of his preliminary objection. To her, the Application, the undated amended statement of defense, the undated lists of documents and witness statements and his entire appeal herein are all frivolous and only intended to delay the expeditious hearing of the suit at the Kadhi's Court. She denied that her pleadings were drafted by some lady stating that she was assisted by the Council of Imams and Preachers of Kenya. The Applicant ought to have engaged the services of a lawyer to draft his pleadings. The Respondent denied that the Chief Kadhi is related to her and in any event the matter was not before him. The Applicant ought to have filed an application for stay in the Kadhi's Court. She prayed that the Application be dismissed.

4. Parties filed their written submissions as directed by the Court which the Court has considered. The power of the Court to grant or refuse an application for a stay of proceedings is a discretionary power to be exercised judiciously and in the interest of justice. In Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR, Githua, J while citing Ringera, J. (as he then was) in the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000, stated as follows: -

***To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;***

***a) Whether the applicant has established that he/she has a prima facie arguable case.***

***b) Whether the application was filed expeditiously and***

***c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.***

5. I will adopt the foregoing principles in considering the matter herein. The issue of whether the Hon. Kadhi erred in disallowing the

application to amend the statement of defence is in my view not frivolous but *prima facie* arguable. On whether the Application was filed expeditiously, the Court notes that the ruling was delivered in 5.1.18 and the Application was filed on 19.1.18 just 14 days after. Without a doubt therefore the application was filed expeditiously and without undue delay. In order for the Court to determine whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought, it is necessary to consider the prejudice that may be suffered by the Applicant if the orders sought are not granted. The Applicant complains that he was denied an opportunity to amend his statement of defense. The Court is of the view that if the proceedings continue before the question of the alleged error of the Hon. Kadhi is settled, the appeal herein will be rendered nugatory and thereby causing the Applicant to suffer prejudice.

6. In the result, I am satisfied that the application dated 15.1.18 is merited and is consequently allowed. I direct that the record of appeal be filed within 30 days from the date hereof. In default, the stay granted herein shall lapse. Each party shall bear its own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 15<sup>th</sup> day of February 2019**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**