



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 28 OF 2018

NK.....APPELLANT

VERSUS

AL.....RESPONDENT

RULING

1. NK the Applicant herein has filed a Notice of Motion dated 9.7.18 seeking the following orders reproduced below:

1. Spent.

2. Spent.

3. This Honourable Court be pleased to order a stay of execution of the entire judgement dated the 13^h June, 2018 and delivered 14th June, 2018, except the divorce order in Kadhi Civil Suit No.206 OF 2016,- NK vs AL (MOMBASA) pending the hearing and determination of this appeal.

4. Spent.

5. THAT a temporary injunction do issue restraining the Respondent his servants and/or agents from evicting the Applicant from the FLAT NO 18A ON PLOTS NOS. 455 XXVI KIZINGO AND 456 XXVI KIZINGO and/or interfering with the applicants possession of the said property pending hearing and determination of this appeal.

6. THAT a temporary injunction do issue restraining the immigration department from deporting the Applicant from the jurisdiction of this Honourable Court pending hearing and determination of this application inter parties and this order be served upon the immigration department.

7. THAT a temporary injunction do issue restraining the immigration department from deporting the Applicant from the jurisdiction of this Honourable Court pending hearing and determination of this appeal and this order be served upon the immigration department.

8. The costs of this application be provide for.

2. The Applicant filed the Kadhi's Case seeking dissolution of her marriage to the Respondent, custody, care and control of their 3 children and that the Respondent be ordered to pay maintenance for the children. According to the Applicant, the Hon. Kadhi in the judgment, dissolved the marriage and made the following other orders:

i) that the applicant do observe one month Edda away from the Respondent's house with effect from 12th July, 2018;

ii) that the applicant is not entitled to any Edda and monetary(Mata'a) compensation;

iii) that the Applicant must give back to her the Respondent his dowry of US\$500/- and 75% of the expenses incurred by the Respondent in their wedding;

iv) that the Applicant must also give back gifts given to her by the Respondent;

v) that the Applicant do return to the Respondent the Gold ornaments in her possessions belonging to their daughters and the Defendants sister;

vi) that costs be borne by the Applicant.

3. The Application is premised on the grounds on the face of it and those contained in the affidavit sworn by the Applicant on 9.7.18 and her further affidavit sworn on 11.2.19. The Respondent has opposed the Application vide his replying affidavit sworn on 26.9.18.

4. The application was argued by way of written submissions. I have considered the pleadings and the written submissions filed by both parties.

5. On the face of the Application, prayers 6 and 7 cannot be granted on account of the fact that the immigration department is not a party to this suit and orders affecting the department cannot not be issued without affording it an opportunity to be heard.

6. Grant of stay of execution of an order pending appeal is discretionary. In considering an application for stay of execution the Applicant must satisfy the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules namely:

a) The application is brought without undue delay

b) Substantial loss will result

c) Provision for security for costs

7. The judgment in respect of which the appeal has been lodged was delivered on 13.6.18. The memorandum of appeal was filed on 4.7.18 while this Application was filed on 10.7.18. The Applicant has therefore met the first principle by filing the Application timeously.

8. The second principle is substantial loss. The Applicant is apprehensive that following the divorce and being jobless she is at risk of being evicted from her matrimonial home. She also fears being separated from their children who are of tender years. The Applicant further avers that she faces the risk of being committed to civil jail for failing to comply with the unconstitutional and baseless decree issued by the Hon. Kadhi since she now has no source of income. She alludes to the risk of being deported to Uganda upon expiry of three months despite being a Kenyan citizen by birth and is awaiting the signing of documents to regain her citizenship. If this happens she will not be able to prosecute pending criminal cases of assault and forgery, matrimonial property and children cases against the Respondent in various courts and investigations with the police. She states that he orders now issued and the subsequent actions by the immigration department are meant to frustrate the prosecution of the cases. If the orders sought are not granted, the Applicant and her young children are highly likely to and shall suffer irreparable loss and damage and her constitutionally guaranteed rights will be infringed. She has an arguable appeal with overwhelming chances of success and deserves the right to ventilate her appeal.

9. The Respondent avers that the Applicant having initiated the divorce proceedings cannot now term the said decree from the Hon. Kadhi's court as unconstitutional and baseless. The Hon. Kadhi correctly exercised his mandate under the Constitution and the Kadhi's Court Act in the application of the Law. The amount set by the Hon. Chief Kadhi remains a civil debt that cannot be waived as it is based on Islamic Law. He denies that their children will suffer any irreparable loss of damage as the Applicant has never been there for them. She has always abused the children and subjected them to inhuman treatment.

10. It is trite law that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant as the appeal would be rendered nugatory if there is no stay. The apprehension of the Applicant in my view is not unfounded. The averments by the Respondent appear to confirm the Applicant's apprehension. My view is that if stay of execution is not granted, the Applicant will suffer irreparable loss and the Appeal will be rendered nugatory.

11. On the injunctive orders sought, the Respondent averred that he is aware of the interim High Court orders restraining eviction of the Applicant from Flat No. xx Meer Apartments, Mombasa and he will abide by the same until the Court cases are fully determined.

12. In the end, I find that the Application dated 9.7.18 is merited and the same is allowed on terms that the record of appeal shall be filed within the next 30 days. In default the stay herein shall lapse. Mention on 12.6.19 to confirm compliance. The costs of the application shall abide the outcome of the Appeal.

DATED, SIGNED and DELIVERED in MOMBASA this 10th day of May 2019

M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

.....for the Respondent

..... Court Assistant