REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 154 OF 2019

JKM.....APPELLANT/APPLICANT

VERSUS

MAC.....RESPONDENT

RULING

The Application

This Notice of Motion is brought under Sections 1A, 1B and 3A of the Civil Procedure Act Cap. 21 of the Laws of Kenya; Order 42 Rule 6(1), (2) and Order 51 Rule 1 of the Civil Procedure Rules (2010) and Article 50 of the Constitution of Kenya 2010 and all other enabling provisions of the law. It seeks stay of execution of the Judgment and/or decree and/or decree nisi given on 6th December 2019 pending the hearing and determination of the Appeal herein. The grounds in support of the application are found on the face of it and in the supporting affidavit sworn by the Applicant on 20th January 2020.

In brief the Applicant states that an appeal is a constitutional right of the aggrieved party; that the lower court file went missing immediately after judgment was pronounced and has not been found to date and therefore he was not able to make an application for stay before the lower court; that he is dissatisfied with the whole judgment in the lower court and has preferred this appeal which he has filed in High Court as Civil Appeal No. 154 of 2019; that the appeal has overwhelming chances of success and that the appeal will be rendered nugatory if stay of the orders of the trial court is not granted.

In his Supporting Affidavit, the Applicant deposes that on 6th December 2019 the lower court declared his marriage void *ab initio*; that he was dissatisfied with the whole of the judgment of the lower court and that he will suffer irreparable harm, loss and damage if the judgment and decree in the lower court in Divorce Cause No. 463 of 2018 is enforced because it will lead to cancellation of the Applicant's United States of America citizenship, freezing of his bank accounts and deprivation of his properties in the United States of America. He deposes further that he was not able to file this application in the lower court because the lower court file went missing after the judgment was pronounced. He states that it is in the interest of justice that this application be allowed.

The Respondent, through Bashir, Noor & Company Advocates filed Notice of Preliminary Objection dated 6th February 2020 in which she states that the Applicant is seeking stay of negative orders issued by the lower court on 6th December 2019 and that the application is bad in law, is fatally defective and an abuse of the court process. The Respondent asks the court to dismiss the application with costs to her.

On 6th February 2020 this court directed that the Application for stay and the Preliminary Objection be heard together by way of written submissions. The Applicant filed his written submissions on 17th February 2020 and the Respondent filed hers on 25th February 2020.

Applicant's submissions

In his written submissions, the Applicant argues that the Preliminary Objection raised by the Respondent does not specifically invoke any provision of the law upon which it is being raised. He submits that the Preliminary Objection is general and does not raise a pure point of law and therefore should be disallowed. The Applicant cited **Application No. 50 of 2014 Aviation & Allied Workers Union Kenya v. Kenya Airways Limited and Others** where the Supreme Court held, inter alia, that:

> **"a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit……"**

He argues that the lower court file went missing immediately after the judgement was delivered and his efforts to have the file traced were

not successful and therefore he was unable to file an application for stay of execution in the lower court. He argues that this court is clothed with jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules to entertain this application.

The Applicant argues that he has an arguable appeal and that if an order for stay is not granted his intended appeal will be rendered nugatory. He cited the grounds of appeal as contained in the Memorandum of Appeal as demonstration that his appeal is arguable and not frivolous. He argues that the appeal regards question of error of law and fact by the trial magistrate. He cited the following cases to support the point he is making in this application that a party seeking stay of execution pending an intended appeal must demonstrate that his appeal is not frivolous but is arguable and that if stay is not granted his appeal will be rendered nugatory:

(i) Githinji v. Amrit & Another [2004] eKLR

(ii) Ishmael Kagunyi Thande v. Housing Finance Company of Kenya [2006] eKLR (Civil Application No. NAI 157 of 2006

(iii) Civil Application No. 8 of 1979 Butt v. Rent Restriction Tribunal

Respondent's Submissions

In opposing the this application, the Respondent has raised a Preliminary Objection in which she states that:

(a) the Applicant is seeking stay of negative orders issued by the magistrate's court on 6th December 2019.

(b) the Application is bad in law, fatally defective and an abuse of court's process.

The Respondent has identified the following four issues for determination by this court and has advanced arguments in support of each issue:

Whether this court should allow the applicant's application seeking to stay negative orders issued in form of a declaration by the trial court.

The Respondent argues that case law is part of the law and therefore the Preliminary Objection she has raised is based on a point of law. She argues that through precedents, courts have established another ground for stay of execution to the effect that for stay of execution to lie, there must be positive requirement therein which would be capable of execution. The Respondent contents that the order of the trial court is a negative order and such an order cannot be executed. She has cited **Kanwal Sarjit Sing Dhiman v. Keshavji Jivraj Shah [2008] eKLR; Catherine Njeri Maranga v Serah Chege & Another [2017] eKLR; Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015]** and **Katiba Institute v Attorney General & 9 others [2018] eKLR,** all to emphasize the position that a negative order is incapable of execution save in respect of costs. The Respondent holds the view that the declaration order of the trial court is a negative order incapable of execution and that there is no positive order made in favour of the Applicant capable of execution and therefore there can be no stay of execution of such an order.

Whether the Applicant has demonstrated that he will suffer substantial loss if the Application for stay is denied

The Respondent argues that the Applicant bears the burden of proof to show that he stands to suffer substantial loss if the order for stay is not granted by this court. She argues that the Applicant has not attached evidence to prove that he owns bank accounts and other property in the United States of America and that these properties will be frozen as a result of which he will suffer substantial loss if the order of stay he is seeking is not granted. The Respondent has cited the case of **Congress Rental South Africa v Kenyatta International Convention Centre; Cooperative Bank of Kenya Limited & another (Garnishee) [2019] eKLR** which cited with approval the case of **Silverstein v Chesoni [2002] 1 KLR 867 at Paragraph 31** where the Court held that:

> **"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 a loss would render the appeal nugatory". 32. The above position was further reinstated in the case of Shell ltd -vs- Kibiru & Another, Civil Appeal No. 97 of 1986, Nairobi where it was stated that:**
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> **"The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money."**

The Respondent asked this court to find the intended appeal would not be rendered nugatory by declining the Application for stay and that there is no basis to hold that the Respondent should be denied the right to enjoy the fruits of the judgment. The Respondent asserts that the Applicant will not suffer any prejudice at all.

Whether there was inordinate delay in making the application

The Respondent submits that the Applicant inordinately delayed in making an application for stay; that he did not make such an application informally before the trial court immediately the judgment was pronounced and that he did not make a formal application for stay immediately after delivery of judgment notwithstanding that the file went missing as he claims. She submits that the Applicant brought this application as an afterthought to frustrate the Respondent and make it impossible for her to enjoy the fruits of the judgment and that the Applicant has not offered proper explanation for the inordinate delay in making this application. The Respondent urges that this court makes such finding.

Whether there is sufficient cause for the application to be granted

The Respondent submits that the Applicant in seeking stay of the orders declaring the marriage between the Applicant and the Respondent a nullity will amount to determining the matter with finality at the preliminary stage and that he is seeking the assistance of the court to perpetuate an illegality. She cited the case of **Maina Wanjigi & another v Bank of Africa Kenya Ltd & 2 others [2015] eKLR** on this point.

The Respondent argues further that the Applicant claims to have an arguable appeal but he has introduced new facts in his Memorandum of Appeal which facts were not presented nor canvassed before the trial court; that the Applicant raises issues on jurisdiction which issues were determined by the court to the effect that this Court has jurisdiction to hear and determine the divorce cause. The Respondent prays that this court finds the Applicant's application is incompetent, fatally defective and an abuse of the court process and that the Applicant is acting in bad faith by trying to forum shop in a bid to block the Respondent from enjoying the fruits of the judgment. She asked this court to dismiss the application with costs to the Respondent.

Determination

Before me are the Preliminary Objection filed by the Respondent on 6th February 2020 and the Notice of Motion dated 20th January 2020 and filed on the same date. The two are to be considered together in compliance with the directions of this court (Muchelule J.) given on 6th February 2020. It makes legal sense to determine the Preliminary Objection first.

A Preliminary Objection has been defined in the case of **Mukisa Biscuits Manufacturing Company Limited -vs West End Distributors (1969) EA 696,** in the following terms: -

> **"…… a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

Hon. Mr. Justice Ojwang, J (as he then was) in the case of **Oraro vs- Mbaja (2005) KLR 141** cited with approval the case of **Mukisa Biscuits case** (supra) in the following manner: -

> **A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point.... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....**

The Preliminary Objection filed herein must be subjected to the above criteria.

The orders of the trial court that the Applicant seeks to be stayed are framed in the following manner:

> **(a) That the Respondent had no legal capacity to contract a monogamous marriage on the 29th July, 2010 where he purported to marry the Petitioner herein, as the marriage to Sarah Wairimu Kinyanjui was still subsisting.**
>
> **(b) That the union had between the Petitioner and the Respondent on the 29th July, 2010 at Orange Beach Town in the State of Alabama, Baldwin County within the United States of America is not a marriage and is hereby declared void *ab initio*.**
>
> **(c) That each party bears its own costs.**

As argued by the Respondent through her legal counsel, this is a negative order by way of a declaration. By declaring that the Respondent (Applicant herein) had no legal capacity to contract a monogamous marriage with the Petitioner (Respondent herein) and by declaring the union between the Petitioner and the Respondent void *ab initio*, the trial court placed the Petitioner and the Respondent in the original position they occupied before entering into marriage. It placed them in the position they occupied as though their marriage had not been. None of the two was obligated to perform any act or to refrain from doing anything that requires interference by this court. The trial court found that the Respondent before it had no capacity to marry the Petitioner. It is my considered view that lack of legal capacity to act or perform an activity is a legal point. Lack of legal capacity to act or to perform a certain activity renders any act done in disregard to that fact a nullity and so did the trial court find in this matter.

I will echo the Court of Appeal for East Africa in **Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR** where that Court stated as follows:

> **"But what is there to be executed under the judgment, the subject of the intended appeal. The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties**

to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered"

I also agree with the **Supreme Court in Independent Electoral & Boundaries Commission v. Jane Cheperenger & 2 Others [2015] eKLR** where that Court said that:

"[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes or merit:

Firstly, it serves as a shield for the originator of the objection-against profligate deployment of time and other resources.

And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement."

I have considered the Preliminary Objection and the authorities in respect of this legal issue. I agree with the Respondent that the Applicant is seeking to stay negative orders that are incapable of being executed. The orders sought to be stayed are in the form of a declaration that the marriage between the Applicant and the Respondent is void ab initio. It is my considered view, that this order is not capable of being executed. It does not require any party to do anything or refrain from acting in any manner. It is an order that is incapable of being executed and therefore there is nothing to stay. On that point the Preliminary Objection succeeds.

Now turning on the rest of the issues raised in this application, I turn to Order 42, Rule 6 (1) and (2) of the Civil Procedure Rules that provides 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 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 (emphasis mine**); 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.

The Applicant enjoys the right to approach this court on appeal when he feels aggrieved by the orders of the lower court sitting as the trial court. However, there are certain parameters within which the Applicant must operate. For him to succeed in getting the orders he is seeking he must satisfy the court that he stands to suffer substantial loss unless the order for stay is granted and that the application has been made without unreasonable delay.

The Applicant argues that if not granted stay, he will suffer substantial loss. He cites loss of United States of America citizenship and the freezing of his bank accounts and properties held in the United States of America as the examples of substantial loss he will suffer. Other than a copy of his passport showing that he is a citizen of United States of America, the Applicant has not presented any evidence that he will lose that citizenship if the order for stay is not granted. He has not presented evidence to prove that he owns banks accounts or other properties in the United States of America and that he will lose these or that these properties will be frozen if the orders he is seeking are not granted.

After due consideration of this issue, it is my finding that the Applicant has not provided evidence to prove substantial loss. I have in mind the case of **Congress Rental South Africa v Kenyatta International Convention Centre; Cooperative Bank of Kenya Limited & another (Garnishee) [2019] eKLR** on this issue. It was the duty of the Applicant to prove that he will suffer substantial loss if stay is not granted. He has failed to do.

By dint of Order 42 Rule 6 (1) of the Civil Procedure Rules, an appeal does not operate as a stay of execution unless such an order has been made by the court appealed from. From the pleadings, the Applicant did not move the court appealed from to grant him stay of execution of its orders of 6th December 2019. He chose to move to this court to seek such orders. He is required by the law to show sufficient cause to this court before such an order can be granted. Rule 6 (2) of the Civil Procedure Rules requires him to move to court without unreasonable delay. The Applicant says he could not file the application as soon as possible because the file in the lower court went missing. There was nothing to stop the Applicant from making the application through a miscellaneous file. There was nothing stopping the Applicant from moving to this court soon after the orders of the trial court were issued and make the application. As argued by the Respondent, the Applicant did not move to the court without unreasonable delay. I agree with the Respondent on this point as well.

After carefully considering this application, I find that I am satisfied that the Applicant has not persuaded this court that he deserves the orders he is seeking. It is my finding, and I so order, that the Applicant is seeking stay of negative orders issued by the lower court on 6 th December 2019 which orders are incapable of being executed. I order further that the application is bad in law, is fatally defective and is an abuse of the court's process. I therefore dismiss the same and order that costs be paid to the Respondent. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF DECEMBER 2019.

S.N. Mutuku

Judge