



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 2 OF 2016

(From the original Civil Suit No. 41 of 2016 from Wajir Kadhi's Court – Mohamed Sizi Kadhi II).

MOHAMED MUHUMED OMAR.....APPELLANT/APPLICANT

V E R S U S

FATUMA AHMED HASSAN.....RESPONDENT

RULING

Before me is an application brought by way of Notice of Motion dated 18th May 2016 filed by Mohamed Muhumed Omar against Fatuma Ahmed Hassan. The application was brought under Section 1(A), 1(B), and 3(A) of the Civil Procedure Act (Cap. 21) and Order 42 Rule 4 of the Civil Procedure Rules. There are 3 prayers to the application, but prayer 1 has been spent as follows:-

1. (spent)
2. That the honourable court be pleased to grant an order staying execution of the decree of the lower court the subject of the intended appeal pending hearing and determination of the appeal.
3. That costs be provided for.

The application has grounds on the face of the Notice of Motion. It was also filed with a supporting affidavit sworn by the applicant on 18th May 2016. According to the affidavit, the appeal has overwhelming chances of success and thus it would be rendered nugatory if stay is not granted the respondent enforced the decree in court. The applicant also stated in the affidavit that he would provide security if ordered by the court.

The application was argued between the applicant and the respondent. The applicant tendered long oral submissions regarding his complaints on his marriage to the respondent, their disagreements and the way the Kadhis court treated him and ended up delivering the judgment.

He stated that they were married with the respondent and wedded on 18th July 2013 but only lived together for a few months before the respondent ran away.

He further stated that the two had a daughter born in 2014, and complained that the Kadhi did not give him time to defend himself during the proceedings.

He stated that in the course of his relationship with the respondent, he had lost millions of shillings. He

said also that his Constitutional rights were violated by the Kadhi, whom he believed had been given money to make a decision against him. He denied being a mad person and said that he was an Imam.

The respondent submitted that the applicant was a mad man, and that he was cruel and had assaulted her. She stated that she was married to the applicant without her consent as she was a poor girl who was forced to marry him by her father who had now died. She stated also that she wanted the applicant to pay for the upkeep of the child. She opposed the request for stay of execution of decree.

This is an application for stay of execution of the orders granted by the Kadhi's court. I have seen a petition of appeal in the file herein, filed by the applicant.

This court has powers to grant stay of execution of a decree in its appellate jurisdiction, even if no such order of stay was sought before the trial court.

The considerations to be taken by the court in determine an application for stay of the execution of decree pending appeal are stated under Order 46 rule 6(2) of the Civil Procedure Rules. The rule provides as follows:-

6(2) "No order for stay of execution shall be made under sub rule (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 performance of such decree or order as may ultimately be binding on him has been given by the applicant."

I have perused the record of the Kadhi's court and also the judgment. In the Judgment the Kadhi dissolved the marriage. He also granted a period of 3 months for Idda. He ordered payment by the applicant of dowry. He also ordered transfer of the thatched house to the respondent. He also ordered that the applicant pays Kshs 3,000/= as maintenance for the child.

The Judgment of the Kadhi was not dated, but appears to have been delivered on 6th April 2016. Divorce certificate was to be issued on 7th July 2016.

The applicant has now come to this court asking for stay of execution of the decree. Having considered this matter, I find

that the application herein has been brought without unreasonable delay.

The judgment contains a number of orders and it is not clear to me whether all these orders were asked for by the respondent in her pleadings. I am of the view that from the memorandum of appeal filed, the applicant has an arguable appeal. I find however that the applicant will not be adversely affected by some of the orders issued by the Kadhi in the judgment. He will therefore not suffer substantial loss if some of the orders are not stayed.

In my view if divorce certificate is issued at this stage as ordered by the Kadhi, the applicant will suffer substantial loss. If he is forced to pay dowry of a camel of 4 years, then he will also suffer substantial loss. If he transfers a thatched grass house to the respondent, he will suffer substantial loss. The other orders issued by the Kadhis court will not cause substantial loss to the applicant if not stayed.

The applicant has said that he is willing to provide security as will be ordered by the court. He has thus satisfied the three requirements for grant of stay of execution.

I thus find merits in the application and stay execution of the decree of the Kadhi's court with regard to

the issuance of divorce certificate, the payment of dowry of a camel of 4 years within 90 days, and with regard to the transfer of a grass thatched house. Execution

of the above orders by the Kadhi's court are hereby stayed pending the hearing and determination of the appeal of the applicant. The other orders of the Kadhi's court are not stayed. The interim orders granted by this court against travel out of Kenya by the respondent and child, are hereby vacated.

The costs of this application will follow the determination of the appeal.

Dated and delivered at Garissa this 13th day of July 2016.

GEORGE DULU

JUDGE