



**REPUBLIC OF KENYA..**

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

**HIGH COURT CIVIL APPEAL NO. 1 OF 2015**

**From the original Civil Suit No. 246 of 2014 at Kadhi Court at Garissa.**

**A M.....APPELLANT/APPLICANT**

**V E R S U S**

**Z M..... RESPONDENT**

**RULING**

On 13<sup>th</sup> February 2015, a Notice of Motion was filed by the applicant A O M, who is also the appellant. In addition a memorandum of appeal was filed. This ruling relates to the Notice of Motion.

The Notice of Motion was filed under Section 1(A) (B) 3(A) of the Civil Procedure Act (Cap 21) and Order 42 Rule 4 of the Civil Procedure Rules. The prayers are four, 2 of which have already been spent. They prayers are as follows:-

**1. (spent)**

**2. (spent)**

**3. *There be a stay of execution of the judgment and decree of the subordinate court in Kadhi's Court Garissa Civil Case No. 246 of 2014 – Z S M -vs- A O M.***

**4. *That the costs of this application be in the appeal.***

The application has grounds on the face of the Notice of Motion. The grounds are that the appeal against the judgment of the Kadhi's court delivered on 15th December 2014 had been lodged. That substantial and irreparable loss would be occasioned to the applicant unless execution of the judgment and decree was stayed by this court. That the appeal would be rendered nugatory unless the execution of the said judgments and decree was stayed by this court. That the appellant was willing to abide by the terms and conditions set by this court in granting stay of execution. Lastly that the application had been made without undue delay.

The application was filed with an affidavit sworn by the applicant on 13th February 2015. It was deponed in the said affidavit, inter alia, that in the judgment delivered on 15th December 2014 the applicant was ordered to pay the respondent but the applicant's Co-operative Society would not pay him immediately because of Christmas vacation. That the applicant had now filed an appeal which had overwhelming chances of success. That if stay of execution was not granted, he would suffer substantial and irreparable

loss. That the applicant had already been issued with a Notice to Show Cause why warrant of arrest should not be issued against him. That the respondent did not have any known means and that the applicant would not be able to recover the decretal amount from the respondent.

The application is opposed . A replying affidavit sworn by the respondent Z S M was filed on 8th April 2015. It was deposed that the applicant was her husband and that they were married about 14 years ago under Islamic law for a dowry of 4 heifers which had not been paid to date. That they had cohabited as husband and wife and had 4 children. That the applicant neglected her and the children and the matter was reported to the children's office and resulted in Kadhi's Court Civil Case No. 246 of 2014 wherein the applicant was ordered to pay Shs 60,000/- as principal amount for 6 months. That the applicants had not paid a single cent as security for his appeal. That the applicant had not been paying school fees for the minor children as evidenced from a letter from [particulars withheld] Junior Academy. That the applicant would not suffer any damage if he paid the principal amount since the matter touched on the welfare of the minors who would require his care.

When the application came up for hearing, both parties appeared in person. The applicant submitted that he was married to the respondent in 2000 and that they had 4 children. That in May 2014 however, he came back from night duty only to find that his properties had been moved to the homestead of the father of the respondent. On enquiring, he was told by his father in law that the movement had occurred because the respondent had been threatened at the home of the applicant. That the applicant's parents later went to his in laws to try and address the problem, but the respondent did not come back home. He was later sued in the Kadhi's court and he was not given a chance to be heard. That the Kadhi's court merely agreed with what the respondent had said. He also stated that he was not happy about his children living away from him.

In response, the respondent disputed what the applicant stated in submissions. She insisted that she left his house because of problems and that it was infact the applicant who shifted her on 6th June 2014 using a vehicle. That though her brother protested he still insisted on shifting them. She also submitted that from that time on, the applicant did not provide school fees for the children and that was the reason why the respondent went to the children's office and later to the Kadhi's court. According to the respondent, the applicant had abandoned her and the children.

After these submissions, the court fixed a ruling date and granted interim stay of execution orders till the delivery of the ruling.

Under Order 42 rule 6(2) of the Civil Procedure Rules, this court has jurisdiction to grant stay of execution of judgment or decree on such terms and conditions as the court deems appropriate. Though applicant cites Rule 4, in my view that was a mistake of form. Such a mistake does not render the application fatally defective.

The conditions or considerations to be taken into account by the court in determining such applications are clearly stated under rule 6(2). Firstly, the application has to be brought without undue delay. Secondly, an applicant has to show that he or she will suffer substantial loss unless the stay of execution sought is granted. Thirdly, the applicant has to be able to provide such security as will untimely be binding on him, if the appeal does not succeed.

In my view, this application was brought without undue delay. The judgment was delivered on 15th December 2014 and the application was filed on 13th February 2015. The applicant has however explained that the delay in filing the application was because of in ability to raise money through his Co-operative Society quickly. I accept that explanation.

The second important consideration is whether the applicant will suffer substantial loss unless the stay of execution sought is granted. This is a matter that involves a husband and wife. It is also a matter that involves children of the marriage who are school going. There is no dispute about that. The applicant however has not annexed either a decree or a copy of the judgment or order of the Kadhi in his application. He has however annexed a copy of a Notice to Show Cause which requires him to pay 80,000

shillings. The same is dated 10th February 2015. The respondent does not challenge or dispute the document.

In my view, the law provides an obligation for upbringing and providing necessities for children including education, generally on a 50- 50 basis between the parents, especially when they are married to each other. It is noted that the respondent is currently living at her parent's home and not at her matrimonial home. She is also staying there with the children. The situation thus creates a peculiar complexity. The respondent says she and the children have been neglected, but she and the children are not in the matrimonial home. I find that the applicant will suffer substantial loss if the stay of judgment or decree is not granted.

The Constitution and the Children's Act require that where children are involved, the court should act while considering the best interests of the children. As I have said earlier, the parental responsibility is on a 50- 50 basis between father and mother. Since the children are staying with the respondent away from the matrimonial home, I can only make an order regarding school fees. I will thus order that in granting stay, the applicant and the respondent will each be responsible for paying 50% of the children's school fees until the determination of the appeal.

As for security, the applicant did not provide any security. I however do not find provision of security to be of importance in this domestic matter. He claims to be in employment and also claims to have been providing for the children until they moved with the respondent to the respondent's father's homestead.

To conclude, I allow the application, Stay of execution of judgment/decree is granted till determination of the appeal on condition that the applicant will pay 50% of the fees for each of the 4 children. The respondent will do the same as a parent. The cost of the application will be in the appeal. However I will fix a mention date hereafter to monitor the progress of this appeal which I think should be determined quickly, preferably this year.

**Dated and Delivered at Garissa this 9th June 2015.**

**GEORGE DULU**

**JUDGE**