



UAM v MOA (Civil Case 1 of 2020) [2021] KEKC 21 (KLR) (5 February 2021) (Ruling)

UAM v MOA [2021] eKLR

Neutral citation: [2021] KEKC 21 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT BUSIA
CIVIL CASE 1 OF 2020
IN NYABOGA, SRK
FEBRUARY 5, 2021**

BETWEEN

UAM PETITIONER

AND

MOA RESPONDENT

RULING

1. This ruling which is an upshot of an application by way of ex-parte chamber summons dated 11th of June, 2021, by UAM and also is related to the judgment delivered by this court on the 23rd day of February, 2021 in divorce case no.1 of 2020.
2. The applicant in her application through her counsel prays for orders:
 1. That, the application be certified as urgent in the first instance
 2. That, the Honorable Court give leave to file an appeal after the lapse of the stipulated timelines and as provided under section 79G of the Civil procedure Act cap 21
 3. That, the leave to be granted (above) to operate as a stay of execution of the divorce case no.1 of 2020 judgment (mentioned above) delivered by this Honorable Court.
 4. That, the cost of the application be in the course.
3. In support of her application, the applicant stated that she was aggrieved by the judgment and as a result, she intends to file an appeal against it. She states that while preparing to file an appeal, she discovered that she was not in possession of key requirements to lodge an appeal.
4. She further states that by the time the appeal documents could be obtained from the court, the applicant who is a teacher was engaged in the preparation, supervising, and marking of the



K.C.P.E 2020 examinations and therefore she was not available to guide and instruct on the key issues to be appealed.

3. The applicant further states that around that period, her counsel was taken down by Covid-19 and thus causing a further delay.
4. The applicant further states that the reasons given above are valid for the court to certify the application as urgent. The applicant also states that she has a strong appeal with high chances of success and that there is no inordinate delay in bringing this application.
5. Attached to the application were a copy of a supporting affidavit sworn by the applicant and a drafted copy of an unsigned memorandum of intended appeal.

Determination

6. I have examined the application both written and oral, the prayers sought, the supporting affidavit and draft memorandum of the intended appeal.
7. The applicant prays that she be granted leave to appeal outside the provide period for the reasons mentioned above. Cap 21 of the Civil Procedure Act has provided statutory provisions with respect to appeals from judgments or decrees of subordinate courts to High Courts.
8. Section 79G of the Act provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellants of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

9. There is doubt that the stipulated period of filing an appeal from that case ended several months ago and the decision was ready from the date it was delivered.
10. The Act has provided that an appeal maybe admitted after the stipulated period has ended provided that the court has been provided with good and sufficient reasons that the delay is not inordinate.
11. The applicant has given several reasons behind the delay and among them is that during that period she was engaged in preparing for the supervision and marking of the K.C.P.E. examinations for the year 2020 and thus was not available to instruct her counsel on main issues in her intended appeal.
12. Her counsel also stated that during the same period, he was put down by Covid-19 thus causing a further delay in appealing.
13. No document from the any educational nor health facility was produced to support the reasons given in support of the application.
14. The applicant states that she has a strong case with high chances of success thus prays that she be allowed to file her intended appeal after the lapse of the provided period for the reasons mentioned before.
15. Section 79B Civil Procedure Act state:

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering



with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”

16. An appeal to the high court is not going to skip the examination and consideration of a high court judge just because a subordinate court decided that the matter has sufficient grounds or not as the high court is not bound by the decision of subordinate court. From that, any party aggrieved by a decision of a subordinate court has the right to appeal and the appellate court will decide whether to allow or disallow.
17. I find that the properly constituted court to place this application before is the High Court.
18. Secondly, the applicant prays that the leave to file an appeal after the stipulated period has lapsed if granted, to also act as a stay of execution of the orders of the divorce case no.1 of 2020.
19. Order 42 rule 6(2) of the Civil Procedure Rules provides that:
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; 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.
20. In the Kenya Power & lighting Company LTD vs Rose Anyango and another [2020] e KLR it is stated:
Order 42 rule 6 of the Civil Procedure Rules grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal.”
21. There is no doubt that this court has jurisdiction on questions relating to stay of execution, but the applicant was silent in that regard and has not supported her prayer by showing any substantial loss she will suffer if not granted stay. To sum up, the applicant has failed to meet the threshold provided under Order 42 rule 6(2) of the Civil Procedure Rules.
The application is hereby dismissed with no cost.
22. The applicant has leave to appeal against this ruling within a period of 30 days from the time the ruling was delivered.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 5TH DAY OF FEBRUARY, 2021

IDRIS N. NYABOGA

SENIOR RESIDENT KADHI

IN the presence of:

Applicant’s Counsel

Mohamed/court assistant

