



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**MAAA (Suing in his Capacity as the Administrator of the Estate of AMAA (Deceased) v
FSS (Civil Application E043 of 2021) [2021] KECA 206 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 206 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E043 OF 2021
P NYAMWEYA, JW LESSIT & S OLE KANTAI, JJA
NOVEMBER 5, 2021**

BETWEEN

**MAAA (SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE
ESTATE OF AMAA (DECEASED) APPLICANT**

AND

FSS RESPONDENT

*(Being an application for stay of execution of the Judgment of the High Court of
Kenya at Mombasa (Njoki Mwangi, J.) dated 21st May, 2021 in HC. C.A. 48 of 2018)*

RULING

1. In a Judgment delivered by the Senior Resident Kadhi (Hon. Khamis Ramadhan) on 27th March, 2017 it was ordered that the marriage between the late AMAA (here represented by MAAA his capacity as the administrator of the estate of AMAA – deceased) and the respondent, FSS be dissolved; “Edda” maintenance was given for 3 months; past maintenance was granted for a period of 64 months and alimony/”Mut’a” was given for the period the respondent was married to the deceased. The respondent was also given compensation for personal belongings and effects she had left in the matrimonial home.
2. The deceased appealed to the High Court of Kenya at Mombasa (Njoki Mwangi, J.) but in a Judgment delivered on 21st May, 2021 the findings of the lower court were upheld, the High Court stating:

“I uphold the award of Kshs.6,925,000/= made to the respondent by the Kadhi’s Court I award costs of the lower court case and this appeal to the respondent. Interest is also awarded to the respondent at court rates. It is so ordered.”

The Judge in the Judgment faulted the Kadhi for expunging from the record a medical report that had found the deceased to be of unsound mind, unfit to participate in the proceedings, the Judge finding instead that because the deceased had instructed an advocate to represent him in the proceedings he



was of sound mind. The Judge also found that because the respondent had prayed for “.... any other relief...” the Kadhi was entitled to grant what may have amounted to special damages.

3. In the Motion before us brought under rule 5(2) (b) of the *Court of Appeal Rules*, Sections 3A and 3B of the *Appellate Jurisdiction Act* and Article 159 of the *Constitution of Kenya, 2010* it is prayed in the main:
 2. THAT pending the hearing of the application inter-partes, the Honourable Court be pleased to grant an order of Stay of Execution of the Judgment/decree delivered herein by Hon. Justice Njoki Mwangi on MAAA (Suing in his capacity as the administrator of the Estate of AMAA (Deceased)) v. FSS and the Judgment/decree delivered by Hon. Sheikh Khamis Ramadhan, Senior Resident Kadhi on 27th March, 2017 in Mombasa Kadhi’s Court Civil Cause No. 173 of 2011.
 3. THAT pending the hearing of this Appeal, the Honourable Court be pleased to grant an order of Stay of Execution of the Judgment/decree delivered herein by Hon. Justice Njoki Mwangi on 21st May, 2021 in Mombasa High Court Civil Appeal No. 48 of 2018; MAAA (Suing in his capacity as the administrator of the Estate of AMAA (Deceased)) v FSS and the Judgment/decree delivered by Hon. Sheikh Khamis Ramadhan, Senior Resident Kadhi on 27th March, 2017 in Mombasa Kadhi’s Court Civil Cause no.173 of 2011.”

In grounds in support of the Motion and in a supporting affidavit of the applicant (MAAA) it is said *inter alia* that the High Court had upheld the Judgment of the lower court awarding the respondent the sum of Ksh.6,925,000; that the applicant has filed an appeal to this Court on whether an award of Ksh.3,200,000 for past maintenance was proper when it was not pleaded or prayed for; that the award of alimony/kut’a Ksh.2,500,000 was not pleaded or prayed for; that the High Court erred in not finding that the Kadhi entered a Judgment against a person of unsound mind; that there was no evidence to support the award of Ksh.1,000,000 compensation for personal belongings and effects, amongst other grounds. It is also said that the High Court in awarding costs and interest which were not prayed for:

“yet interests are prohibited and not awardable under Islamic law...”

There was no replying affidavit when the Motion came up for hearing before us on 28th July, 2021 and we were satisfied that the respondent had been served with a hearing notice for that hearing.

4. The principles that apply in an application of this nature are well known. For an applicant to succeed he must firstly show that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. An applicant who succeeds on that limb must, in addition, prove that the appeal would be rendered nugatory absent stay – See the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR*. It is also true to say that an arguable point on appeal is not one that must succeed – *Damji Pragji Mandaria v Sara Lee Household and Body Care (K) Limited, Civil Application No. NAI 345 of 2004 (ur)*.
5. The applicant says in the Motion and affidavit that costs awarded by the High Court have not been taxed yet the respondent is proceeding with execution. Section 94 *Civil Procedure Act* requires, unless the trial court grant an appropriate order, that costs be taxed before execution.



6. The applicant says that the awards made in respect of alimony, maintenance and loss of personal effects were made when they were neither pleaded nor proved. The applicant intends to argue, on appeal, that those awards were in respect of special damages which a claimant is required to plead and prove. On the whole we find these not to be idle points, they are arguable points on appeal.

7. On the nugatory aspect the applicant says that the only way the decree can be satisfied is by attachment of the property Mombasa/Block xxxxxxx where the applicant and his other relatives reside; that:

“It is not in dispute that the Respondent is a lady of straw who will not be in a position to repay the decretal sum to the Appellant in the event that the appeal will succeed.”

The respondent has not responded to the allegation that she would not be able to pay back.

8. If the property where the applicant and the rest of the family reside (their home) is seized in execution of the decree it could be sold and be beyond the reach of the applicants and the appeal, if successful, would be rendered nugatory.

9. The applicant has succeeded in satisfying the principles in an application for stay of execution pending appeal. We allow the Motion dated 21st June,2021. Costs of the same will be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

S. ole KANTAI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

