



REPUBLIC OF KENYA



KENYA LAW
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**MRM aka RLM v SMRM (Civil Appeal 124 of 2022)
[2024] KEHC 446 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 124 OF 2022
RE ABURILI, J
JANUARY 25, 2024**

BETWEEN

MRM AKA RLM APPELLANT

AND

SMRM RESPONDENT

RULING

1. The appellant filed an application dated 18th August 2023 seeking the following orders;
 - i. Spent
 - ii. That pending the hearing and determination of this appeal, there be issued an order of stay of execution of the ruling and order of the Chief Magistrate’s Court in Kisumu in Kisumu CM Divorce Cause No. E037 Of 2022 given on the 7th day of December 2022, particularly order D thereof directing the appellant to pay to the respondent the sum of Kshs. 150,000 monthly back dated to January 2022 as maintenance.
 - iii. Spent
 - iv. That there be issued an order of stay of proceedings in Kisumu CM Divorce Cause No. E037 Of 2022 pending the hearing and final determination of this suit.
 - v. Spent
 - vi. That the costs of this application be provided by the applicant.
2. It was the appellants case as pleaded and submitted on orally is that on the 17th December 2022, the trial court in Kisumu Chief Magistrate’s Court Divorce Cause No. E037 of 2022 awarded the respondent maintenance of Kshs. 150,000 per month and back dated the payment to the month of January 2022 an amount which stood at Kshs. 3,000,000 as at August 2023.



3. The appellant averred that being aggrieved by the said judgement, he preferred an appeal that had good chances of success in light of the fact that he resides in the same house with the respondent and pays all her expenses, a fact the trial court failed to consider.
4. It was the appellant's case that he was not in a position to settle the amount passed by the trial court and thus stood to suffer substantial loss as payment of the judgement debt would spell financial doom for his business.
5. The appellant further averred that he had previously filed an application for stay of execution before the trial court which was dismissed vide a ruling rendered on the 1st August 2023 and thus he had filed the instant application without reasonable delay.
6. It was the appellant's case that the respondent was not destitute as he continued to cater for her reasonable needs including giving her cash and that he was in a position to pay the sum of Kshs. 20,000 per month in the interim as maintenance.
7. The appellant further averred that he was willing to provide security in the form of depositing the log book to his vehicle with the court upon demand and that it was in the interest of justice to grant the orders sought.
8. Counsel for the appellant, Mr. Charles Onyango submitted before court that the award granted by the trial court was excessive and was made without proper explanation as the court based the order on its own view, feeling, belief or understanding that the appellant was a rich man.
9. It was further submitted that the appellant was being punished during the pendency of the divorce proceedings and that there was no tangible evidence to suggest or prove the appellant's ability the decretal sum on a monthly basis.
10. It was submitted that the guiding principle in maintenance proceedings was for basic needs to be covered which would be covered by Kshs.20,000 as the appellant currently pays all basic bills.
11. The appellant further submitted that the respondent was free to seek temporary relief in the matrimonial cause if she had been denied access to property or accounts.
12. In opposition to the application, the respondent filed a replying affidavit sworn on the 26th September 2023. It was her contention that contrary to the allegations by the appellant, they did not live in the same house nor does the appellant pay for her living expenses but rather that the appellant lived in his sister's house.
13. The respondent averred that contrary to the appellant's allegation that he was a struggling person, he withdrew millions of shillings from the business that she helped him set up and thus payment of alimony as ordered by the trial court would not cause him harm.
14. The respondent further averred that the appellant had kicked her out of the business and frozen her account and operating mandate for several accounts in which she was a signatory thus leaving her destitute.
15. It was the respondent's contention that the instant appeal had zero chances of success and that the application was misconceived and did not meet the criteria for the grant of the orders sought.
16. Mr. Otieno David counsel for the respondent submitted that the conditions under Order 42 Rule 6 (2) of the *Civil Procedure Rules* had not been met as no substantial loss had been demonstrated as the appellant was demonstrating the difficulty in making the payments rather than the failure to get the refund which burden had to be demonstrated by the appellant.



17. It was submitted that the appellant's capacity to pay the decretal sum was evident from list of properties registered jointly between the parties herein whose value was Kshs. 700 million and bank accounts listed which the appellant had barred the respondent from accessing.
18. It was submitted that the strength of the appeal was not a consideration in grant for orders of stay of execution under Order 42 rule 6 of the [Civil Procedure Rules](#) and further that contrary to averments by the appellant, the trial court gave reasons for its decision which was reasonable as the respondent had asked for more than what was awarded.
19. It was submitted that there was evidence that the parties herein lived a quality life and that the appellant was not being truthful as he had offered Kshs. 40,000 before the trial court yet before this court he offered Kshs. 20,000 as monthly maintenance.

Analysis & Determination

20. I have considered the application and the opposition thereto as argued orally by both parties' counsel. The subject matter of the proceedings in the lower court was the respondent's maintenance. The Applicant's key plank in support of the application is that he is not able to make the monthly payment of Kshs. 150,000 backdated to January 2022 as directed by the trial court as the same would have the effect of exposing him to substantial loss as it would spell financial doom for his business.
21. The principles upon which the court may stay the execution of orders appealed from are settled. The Applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the performance of the decree in the event the appeal does not succeed. These are the requirements stipulated in Order 42 r 6(2) of the [Civil Procedure Rules](#).
22. The decision appealed from was rendered on 7th December 2022 and the appeal filed 7 days later on the 14th December 2022. The applicant then filed an application for stay of execution in the trial court which was dismissed vide a ruling delivered on the 1st August 2023. The present application was filed on 18.8.2023. The period is reasonable.
23. On whether substantial loss would result to the applicant if the stay orders are denied, the Court of Appeal in [Shell Ltd v Kibiru and Another](#) [1986] KLR 410, Platt JA set out two different circumstances when substantial loss could arise as follows:

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the [Civil Procedure Rules](#) was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the 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 repay the decretal sum plus costs in two courts...”

24. The learned Judge further observed that: -

“It is usually a good rule to see if Order XLI Rule 4 of the [Civil Procedure Rules](#) can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has



to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.” (emphasis added)

25. Earlier on, Hancox JA in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the questions of whether to refuse it would... render the appeal nugatory.

This is shown by the following passage of Cotton L J in *Wilson -vs- Church* (No 2) (1879) 12ChD 454 at page 458 where he said: -

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

26. What I hear the present Applicant to be stating is not so much that he may be unable to recover the monthly payments as ordered by the lower court if his appeal succeeds. Rather, that he will suffer difficulty in making the payments in light of the fact that the amount ordered is too high.

27. However, the respondent has adduced evidence of the appellant’s ability to settle the decretal sum in the form of M-pesa messages as well as bank account statements. The respondent also made averments that the appellant had offered to pay a monthly maintenance of Kshs. 40,000 in the lower court but in the current appeal and application, he was proposing to pay Kshs. 20,000 and this showed that the applicant was not truthful. This averment was not controverted.

28. Taking all the aforementioned into consideration, it is my view that the appellant has failed to demonstrate that he will suffer substantial loss if he is denied orders of stay.

29. The applicant offered to have his logbook for his car deposited in court as condition for grant of orders of stay. I note that on matters security for the due performance of decree, the applicant cannot dictate to court what security to order. Further, as the instant case involved a liquidated amount, it would be unreasonable to order security to be an asset that is yet to be valued.

30. Consequently, I hereby find that the applicant has failed to satisfy the conditions to warrant the grant of stay of execution pending appeal.

31. this court is alive to the sentiments expressed in [*Nduhiu Gitabi and Another v Anna Wambui Warugongo*](#) [1988] 2 KAR, citing the decision of Sir John Donaldson M. R. in [*Rosengrens v Safe Deposit Centres Limited*](#) [1984] 3 ALLER 198 that:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff..... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

(See also [*James Wangalwa & Another v Agnes Naliaka Cheseto*](#) [2012] eKLR.)



32. However, in this case, there is no evidence that the applicant will in any way be prejudiced or that the appeal herein will be rendered nugatory if he pays to the respondent the amount ordered by the trial court in the interim pending the hearing and determination of divorce proceedings.
33. Weighing all the relevant factors and circumstances of this case where live hood for the respondent is key, and considering the interest and welfare of the respondent, I am persuaded, that the applicant has not made out a case for stay of execution of the interim orders of maintenance made by the trial court. I decline to grant stay.
34. The applicant also sought stay of proceedings in Kisumu CM Divorce Cause No. E037 of 2022 pending the hearing and final determination of this suit.
35. In the case of *Kenya Wildlife Service vs James Mutembei* (2019) eKLR, Gikonyo J held that:
- “Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.
36. Further, in the persuasive case of *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated that: -
- “As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.
37. In the *Kenya Wildlife case* (*supra*), Gikonyo J quoted *Halsbury's Law of England, 4th Edition*. Vol. 37 page 330 and 332, that:
- “The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”
- This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”
- It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.



38. I am persuaded by the above authorities which lay down the clear principles that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* (2002) eKLR: -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

39. In the instant case, the applicant seeks to stay proceedings separate and distinct from which the instant appeal emanates. Furthermore, the appellant has not addressed this court on whether he warrants grant of orders of stay of proceedings.

40. In the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* (2009) eKLR, the Court of Appeal stated that:

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

41. It is my finding that the stay orders sought are not merited. Thus, the prayer for the stay of proceedings is rejected.

42. In the end, I find the application herein dated 18/8/2023 for stay of execution pending appeal and stay of proceedings pending appeal not merited. I dismiss the application on both limbs.

43. Costs shall be in the appeal.

44. The appellant to expedite the filing of the record of appeal within 21 days of today. Mention on 28/2/2024 to confirm compliance.

45. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024.

R. E. ABURILI

JUDGE

