



MAA v SIE (Civil Appeal E009 of 2024) [2024] KEHC 4894 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E009 OF 2024
EM MURIITHI, J
APRIL 25, 2024**

BETWEEN

MAA APPELLANT

AND

SIE RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 23th January 2024 brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, the Appellant seeks:
 1. Spent
 2. That this Honorable Court be pleased to order stay of execution of ruling of Senior Resident Kadhi at Isiolo, Hon. Gavava A. Mohamed delivered on the 8th of January 2024 in Divorce case no E016 of 2020 and all other consequential orders emanating from there pending the inter partes hearing of this application.
 3. That this Honorable Court be pleased to order stay of execution of ruling of Senior Resident Kadhi at Isiolo, Hon. Gavava A. Mohamed delivered on the 8th of January 2024 in Divorce case no E016 of 2020 and all other consequential orders emanating from there pending the hearing and determination of the Appeal.
 4. That this Honorable Court be pleased to order the lifting of the salary attachment order pending the hearing and determination if this application and appeal.



5. The costs of the Application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the Appellant herein sworn on even date. He was dissatisfied with the ruling of the learned Kadhi and has already lodged an appeal against it. He faults the learned Kadhi for issuing an order attaching his salary without due regard to the law and procedure and making a determination on an issue that was never pleaded by the Respondent. The said ruling is per incuriam as the learned Kadhi did not have jurisdiction to issue the said orders and unless the orders sought are granted, his appeal will be rendered nugatory. He is advised by his advocate that the application has been brought without undue delay and should be allowed in the interest of justice. The Respondent has no known assets or property and the substantial amount herein, if paid to her will be unrecoverable should the appeal be successful.
3. The Appellant swore a further affidavit on 17/3/2024 in support of his application.
4. The Respondent has opposed the application vide her replying affidavit sworn on 12/2/2024. She avers that on 8/1/2024, the learned Kadhi issued a ruling requiring the Appellant's salary to be attached for a monthly remittal of Ksh.28,000 to cater for the maintenance and accommodation of the children. The ruling was delivered following an application dated 5/12/2023 which was as a result of non-compliance with a previous court order dated 26/8/2020. The application is bereft of merit as the Appellant has not established any prima facie case with high probability of success to warrant this court's intervention. The issues of law raised by the Appellant in the memorandum of appeal are misconstrued rendering the appeal an exercise in futility, an attempt to steal her march and a waste of precious judicial time. She is advised by her advocate on record that this court has power to summarily reject an appeal if it considers that there is no sufficient reason for interfering with a decree. The learned Kadhi in delivering the impugned ruling applied the principles of Islamic law as well as the applicable provisions of the *Children Act* and *the Constitution*. Despite earning a basic salary of Ksh. 143,640, the Appellant has deliberately failed to comply with the court directives to her detriment. She will suffer irreparable loss and substantive injustice if the application is allowed.

Analysis and Determination

5. The issue for determination is whether stay of execution of the judgment and decree of the trial court is deserved.

Jurisdiction

6. The Appellant has questioned the jurisdiction of the Kadhi's court to deal with maintenance and children matters.
7. The jurisdiction of the Kadhi's Court is provided under section 5 of the Kadhis' Court Act as follows:-

“ A Kadhi's Court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion, but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”
8. The preamble of the Kadhis' Court Act declares it as, “An Act of Parliament to prescribe certain matters relating to Kadhis' Courts under *the Constitution*, to make further provision concerning Kadhis' Courts, and for purposes connected therewith and purposes incidental thereto.”



9. Custody and maintenance of children are incidental to marriage and divorce and therefore they fall squarely within the jurisdiction of the Kadhi's Court.
10. In finding that the Kadhi's Court had jurisdiction to issue the orders of maintenance and custody, this court is counseled by ZUDG v SJKUR (2020) eKLR, where the court (Ali-Aroni J as she then was) stated:

“This court for now, aligns itself, so did the Kadhis who sat in this matter with the thought that the Children's Act did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children. Indeed, lately all magistrates are gazetted to handle children matters and in this court's considered view, by implication Kadhis too being in the category of magistrates should and ought to hear such matters and more so where the same are connected and incidental to the cause before the kadhi, so long as the said court applies the principles laid down by The Children's Act and in particular applies the best interest of the child's principle as enunciated by the said Act.”

Stay of Execution

11. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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.
 - 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.”
12. This court notes that the application was filed timeously on 24/1/2024 while the decision sought to be appealed against was made on 8/1/2024.
 13. Whereas the Appellant contends that his appeal, which has high chances of success, will be rendered nugatory if stay is denied, the Respondent feels that she will suffer irreparable loss unless the application is dismissed.
 14. While the grounds of appeal as raised in the Appellant's memorandum of appeal challenging inter alia jurisdiction of the Kadhi's Court over matters concerning custody and maintenance of children and attachment of his salary cannot be termed as frivolous, the Court is mandated by the provisions of



Article 53 (2) of the Constitution to give paramount consideration to the best interests of the children in all cases, as follows:-

“(2) A child’s best interests are of paramount importance in every matter concerning the child.”

15. The Appellant has expressed his willingness to continue providing for the minors at paragraph 8 of his further affidavit as follows, “That despite the irregularity of proceedings before the Kadhi Court, I have never failed to provide for my children and I have continued and I am willing to continue providing for them including payment of school fees and other expenses.”

16. In SKM v MWI [2015] eKLR the court (W. Musyoka J) stated that:-

“Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the child or children in question, while at the same time respecting the financial status of the parent. A child can only be maintained within the means of the parent in question.”

17. This court finds that, it is in the best interest of the minors that the deduction of the decreed monthly sum of Ksh.28,000 from the Appellant’s salary for the maintenance and accommodation of the minors, shall continue pending the hearing and determination of the appeal.

ORDERS

18. For the reasons set out above, this court allows the Appellant’s application dated 23/1/2024 on the following terms:

1. An order for stay of execution of the Judgment of Hon. Gavava A. Mohamed, Senior Resident Kadhi at Isiolo in Divorce Cause No. E016 of 2020 delivered on the 8th January, 2024 is hereby issued pending the hearing and determination of this appeal.
2. The deduction of the monthly sum of Ksh. 28,000 from the Appellant’s salary, for maintenance and accommodation of the minors, shall continue pending the hearing and determination of the appeal.
3. The Record of Appeal to be filed within 60 days from the date hereof, in default of which the stay of execution shall lapse and be of no effect.
4. As usual in children matters, the appeal shall be heard on priority basis on a date to be fixed in consultation with counsel.
5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF APRIL, 2024.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Mr. Jarso for the appellant/applicant.

Mr. K. Mugambi for the Respondent.



