



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 93 OF 2019

MWK.....APPELLANT

VERSUS

JDK.....RESPONDENT

RULING

1. This matter arises from the proceedings in Kerugoya Divorce cause No. 7 of 2019. The appellant has filed a memorandum of appeal dated 5th December, 2019. She has also filed an application under *Section 51 Rule 1 & 14 order 42 Rule 6 of the Civil Procedure Rules , Section 1A , 1B 7 3A of the Civil Procedure Act.*

It Seeks the following orders:

1. Spent
2. That this Hon. Court be pleased to order Ex-parte for a Temporary Stay of further proceedings in Kerugoya Divorce Cause No. 7 of 2019 including the delivery of Judgment on 11/12/2019 pending the hearing & determination of this application.
3. That this Hon. Court be pleased to order for a Stay of further proceedings in **KERUGOYA DIVORCE CAUSE No. 7 of 2019** including the delivery of Judgment on 11/12/2019 pending the hearing & determination of the Appeal already filed herein.
4. That the costs of this application be provided for.

The application is based on the following grounds;

- (a) That grounds as stated in the Certificate of Urgency filed together herewith.
- (b) The Appellant has never been heard in the matter which is a divorce contrary to Natural Justice and our constitution.
- (c) After the Ex-parte hearing on 6-11-2019 (*when the matter was not even ready for hearing*) and now the dismissal of the appellants application in the Divorce cause dated 12/11/2019 on 4/12/2019 there is a clear signal legally and judiciary that there is something more than meets the eye which is yet to come in the open and whatever it is does not stand for equality of fairness before the law.
- (d) It is the appellants view for reasons stated in the application dated & filed on 12/11/2019 as well as the dismissal of her application on 4/12/2019 that the proceedings in the Divorce Cause No. 7 of 2019 under Section 50 of the constitution cannot be said to be fair at all.

2. The application is supported by the affidavit of the applicant sworn on 9th December, 2019 wherein he has reiterated the above grounds.

3. The respondent opposed the application and filed a replying affidavit sworn 13th December, 2019.

He deposes that the application is not only incompetent but is also without merit.

4. The appeal upon which it is based is also incompetent with no chances of success. That the application is based on a claim that the trial court dismissed the application with no grounds of objection or a replying affidavit.

5. He has deponed that it was not automatic for the court to allow an application which was unopposed. But depends on whether the court finds merit in it.

The appeal upon which the application is filed has no chances of success.

The applicant has not demonstrated that she will suffer loss and he prays that the application be dismissed.

The parties address the court by way of oral submissions.

I have considered the application and the submissions and I find that what the applicant is seeking is not a stay of execution but stay of proceedings.

The applicant is therefore seeking the exercise of discretion by this court, and it is trite that courts discretion must be exercised judicially.

In the case of; Global Tours & Travel limited (Nairobi) H.C. Winding up Cause No. 43 of 2000 quoted with approval in Kenya Wildlife service -versus- Mutembei (2019) eklr.

“The court stated; As I understand the law whether or not I 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 to order a stay of proceedings, and if it is on what terms it should be granted.

In deciding whether to order a stay, a 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 or whether it is an arguable one.

The scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

In this case it is in the interest of Justice to exercise discretion and grant stay of proceedings. The applicant have demonstrated that she has an arguable appeal.

The issues the applicant is raising are weighty and she should be given an opportunity to pursue the appeal as there is a possibility of the Judgment in the matter being delivered by the trial court, as it is at the stage of Judgment without giving her the opportunity to be heard.

The applicant has raised an issue that she was not given an opportunity to be heard.

Right to be heard is a principle of natural justice, it is also a principle of fair trial and fair trial is one of the rights under the Constitution which cannot be limited as provided under **Article 25** of The Constitution also under **Article 51** of the Constitution, It Is provided;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.”

The applicant filed this application expeditiously. The respondent will not suffer any prejudice.

I have considered the facts as submitted by the counsel for the applicant and it shows that the applicant had filed an application under certificate of urgency, no replying affidavit was filed, and the application was dismissed.

The applicant was seeking an order that she be given an opportunity to be heard after the matter was heard ex-parte.

However, the application was dismissed and the matter set for judgment.

Nothing much can be said, she was denied an opportunity to be heard. The suit before the trial magistrate is about a domestic issue where the parties must be given an opportunity to present their case and the case be heard on merit and this was not done.

I find that the application ought to be allowed so that the appeal can be heard on merit and the court to decide whether the proceedings before the lower court should be upheld or should be set aside.

I find that the application has merit, there will be no prejudice on the side of any party. I should therefore exercise discretion and allow the application.

I allow the application and make an order that;

- The proceedings in Kerugoya Divorce Cause No. 7 of 2019 including the delivery of Judgment be stayed pending the hearing and determination of this Appeal.

- The costs shall be in the cause.

Dated, Signed at Kerugoya this 29th day of May 2020

L.W. GITARI

JUDGE