



**Mustafa v Abdullahi & another (Civil Appeal E070 of 2021)
[2023] KEHC 17373 (KLR) (Family) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E070 OF 2021
MA ODERO, J
APRIL 28, 2023**

BETWEEN

JAMIA ABDULRAHIM MUSTAFA APPELLANT

AND

ZUHURA ABDULLAHI 1ST RESPONDENT

ZENAB ABDULLAHI 2ND RESPONDENT

(Being an Appeal from the Ruling and Consequential orders delivered on 8th July, 2021 by Honourable Thulkif W. Karanja, Senior Resident Kadhi at the Kibera Kadhis' Court in Kadhi' Court Miscellaneous application No. E003 of 2021)

RULING

1. Before this Court for determination are two (2) Applications for determination. The first is the Notice of Motion dated October 19, 2021 by which the Applicant Jamia Abdullharim Mustafa seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That the Honourable Court be pleased to order stay of proceedings and subsequent execution of orders from the ruling and consequential orders made by Honourable Thulkif W Karanja, Senior Resident Kadhi at Kibera Kadhi's Court in Kadhi's Court Miscellaneous Application No E003 of 2021 pending the hearing and determination of this Appeal.
 4. That the costs of this application be provided for.



2. The second application for consideration is the Notice of Motion dated December 16, 2021 by which the same Applicant Jamia Abdullharim Mustafa seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That the Honourable Court be pleased to order stay of proceedings and subsequent execution of orders, warrants of arrest and committal to civil jail emanating from the ruling and consequential orders made by Honourable Thulkif W Karanja, Senior Resident Kadhi at Kibera Kadhi's Court in Kadhi's Court Miscellaneous Application No E003 of 2021 pending the hearing and determination of this Appeal.
 4. That the costs of this application be provided for.
3. The Applications were premised upon Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 3, 3A & 65 of the Civil Procedure Act and all other enabling provisions of the law and were supported by the Affidavits sworn by the Applicant.
4. The Respondents Zuhura Abdullahi and Zenab Abdullahi opposed both applications through their Replying Affidavit dated October 21, 2022.
5. The applications were canvassed by way of written submissions. The Applicant filed the written submissions dated May 16, 2022 whilst the Respondents relied upon their written submissions dated October 21, 2022.

Background

6. The Applicant and the Respondents herein are all parties in Kibera Kadhi's Misc Application No E003 of 2021.
7. On July 8, 2021 the Hon Kadhi issued the following orders against the Applicant
 - a) The Respondent is restricted from dealing in any way with the properties of the applicant's sister Hasina Faraj Mustafa who died on April 20, 2018.
 - b) The Honourable Court does issue orders compelling the Respondent to produce all documents belonging to the applicant's sister and her husband (both deceased) for purposes of ascertaining and ultimate distribution to the legal heirs."
8. Thereafter the Respondents filed an application seeking to enforce the decree by way of issuance of a Notice to Show cause why the Applicant should not be committed to civil jail for failing to obey the orders issued by the Hon Kadhi.
9. On December 15, 2021, 2022, Honourable TW Karanja, Senior resident Kadhi made the following orders:-
 - a) The application for stay of execution by the Respondent/judgement debtor is hereby dismissed.
 - b) The application for execution by the applicants/decreed holders is hereby upheld.
 - c) This court does order warrants of arrest to issue against the Respondent/judgement debtor for willfully disobeying orders of this court.
 - d) The OCS Kibera Police Station to ensure compliance with order (c) above.



- e) The Respondent/judgment debtor is hereby committed to civil jail for a period of Six (6) months for willfully disobeying orders of this court.”
10. The Applicant was aggrieved by the orders made by the Hon Kadhi, and filed a Memorandum of Appeal. The Applicant now prays that pending the hearing and determination of his appeal the Warrants of Arrest issued by the Hon Kadhi be stayed. The Applicant is also seeking to have the proceedings before the Kibera Senior Resident Kadhi stayed.
11. Order 42 Rule 6 (2) of the Civil Procedure Rules provides for guiding principles that one must satisfy before the court can grant a stay of execution, it provides as follows:-
- “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.”
12. It is appreciated that stay of execution is a discretionary power however the court in setting out the guidelines for granting a stay, stated in the case of Butt - vs - Restriction Tribunal [1979] eKLR that:-
- 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - 2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 - 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.”
13. In the case of Loice Khachendi Onyango – vs Alex Inyangi & another [2017] eKLR the court stated as follows on the question of stay pending appeal:-
- “The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly 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.....”
14. I will now proceed to deal with each application individually.



Notice of Motion Dated October 19, 2021

15. In this application the Applicant seeks to stay the orders made by the Hon Kadhi on July 8, 2021 directing that the Applicant be arrested and committed to civil jail for Six (6) months for disobeying the Courts orders.
16. The orders in question were made on July 8, 2021. The application for stay was made three (3) months later on October 19, 2021. The period of three (3) months cannot be termed to be unreasonable delay. I find that the application was made timeously.
17. The orders made by the Hon Kadhi directed that the Applicant be arrested and committed to civil jail. Obviously if the stay is not granted then the Applicant's appeal will be rendered nugatory as he will have already served the sentence.
18. Given that the orders include the deprivation of the Applicant's personal liberty I find that he stands to suffer substantial loss if the stay sought is not granted.
19. The case of Commissioner of [Mines & Geology & 2 others v Stema Alloys Enterprises Ltd](#) [2015] eKLR the Court stated as follows:-

“Deprivation or threat to deprivation of personal liberty is a serious constitutional issue. Where personal liberty is threatened in a case where the applicant has challenged or intends to challenge on appeal the very basis of such threats, the court will be inclined to grant an order of stay because liberty once lost, even for a second, cannot be reversed.”

20. I therefore find merit in the application dated October 19, 2021 and grant the stay of execution prayed for.

Notice of Motion Dated December 16, 2021

21. The Applicant has by this application sought a stay of the proceedings in the Kibera Kadhi's Court pending the hearing and determination of his Appeal. The Applicant argues that there is another case being Kajiado Succession Cause No 65 of 2021 involving the same case parties which is still ongoing. The Applicant is apprehensive that the Respondents may take advantage of the proceedings and orders in the Kadhi Court thereby rendering the Kajiado case nugatory.
22. The jurisdiction to stay proceedings is discretionary and is primarily intended to obviate a situation where the appeal by the Applicant may be rendered nugatory in that he would suffer substantial loss if stay were refused. *In Re Global tours and Travels Ltd* Civil Application No NAI 322 of 2006 (UR) the court stated that:-

“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 interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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 timeously brought.”

23. In *Niazons (Kenya) Ltd v China Road and Bridge Corporation Kenya Ltd* NRB HCC No 126 of 1999 it was held that:-

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render orders made nugatory and render the exercise futile... stay should be granted”

24. The Applicant’s apprehension do not appear to be exaggerated. The Kadhi Court has already issued orders of arrest against him.
25. I am satisfied that the Applicant has an arguable appeal. It is therefore in the interests of justice to grant a stay to allow the Applicant to ventilate his appeal.

Conclusion

26. Finally this court makes the following orders:-

- (i) A stay of execution be and is hereby granted in terms of prayer (3) of the Notice of Motion dated October 19, 2021.
 - (ii) A stay of proceedings be and is hereby granted in terms of prayer (3) of the Notice of Motion dated December 16, 2021.
- SUBJECT TO**
- (iii) The Applicant settling down the appeal for hearing within Ninety (90) days of the date of the Ruling.
 - (iv) Failure to comply with (iii) above means that the stay granted in (i) and (ii) above will lapse automatically with no further reference to the Applicant.
 - (v) Each party to meet their own costs.

DATED IN NAIROBI THIS 28TH DAY OF APRIL, 2023.

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MAUREEN A. ODERO

JUDGE

