

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPLICATION NO. 112 OF 2021

JACKLINE HAMSON GHIKAS.....APPLICANT

VERSUS

MLATIE RICHIE ASSEY RESPONDENT

Date of last order: 25/05/2021

Date of Ruling: 25/06/2021

R U L I N G

MGONYA, J.

Before me is an application under certificate of urgency where Counsel for the Applicant is seeking for stay of execution of the Decree of Kisutu Resident Magistrate's Court in **Matrimonial Cause No. 07 of 2019** pending an appeal filed before this Honourable Court.

The instant Application has moved this Court by the provisions of **Order XXXIX Rule 5 (1), 3(a), (b), (c) and (4) of Civil Procedure Code, Cap. 33 [R. E. 2019]**. The Application is accompanied by an Affidavit of the Applicant one **JACKLINE HAMSON GHIKAS**.

When the matter was scheduled for hearing, Counsel for the Applicant prayed before this Court that the matter be

disposed of by way of written submissions a prayer that was not objected by the Respondent's side and hence the Court granted the prayer. It is after the final filing of the correspondences with the Court, I am at this position determining the same as hereunder.

It is the Applicant's submission that the application is made under the provision of the law stated in the Chamber Summons for the same donates powers to the High Court to stay an appealable Decree or Order pending determination of an appeal against a Decree or Order. The same provisions provide for criteria to be met by the party when seeking for such orders.

The said criteria are said to be **one**, the Applicant is required to satisfy the Court that if an order for stay will not be granted, the Applicant will suffer substantial loss or in other words the applicant will suffer irreparable injuries which cannot be remedied by way of damages. **Two**, the Application for stay should be made without undue delay and after the appeal is filed and, **three** the Applicant is required to give security for the due performance of the decree or order as may ultimately be binding upon one.

The applicant further states that the first condition as reiterated above has been fulfilled by the Applicant since the Judgment and the Decree of Kisumu Resident Magistrate's Court

granted the Applicant Custody of the three children to the marriage and yet still the Court has ordered the Applicant to vacate the matrimonial house they live in. It is the Applicant's assertion that the Respondent started process of evicting the applicant and by such act she would be homeless and will be prone to suffer damages which cannot in anyway be remedied by damages since this is a matrimonial matter, so for this the 1st condition is said to have been met.

On the second condition the Applicant submits that the Application for stay of execution is required to be filed without undue delay. It is said that this condition was met as well since the Judgement and Decree were delivered on the **22/02/2021** and evidence shows that the appeal was filed on **03/03/2021** which is currently pending before this Court. And the Application for stay of execution was filed on the **17/03/2021**.

Lastly on the third condition the Applicant avers that the matter at hand is a matrimonial case and that it is not common for one to provide for security for the due performance of the decree intended to be stayed. Further that, the Applicant is ready to provide for security on any terms and conditions that the Court feels deem to set.

However, it is the Applicant's averments that the pending appeal has over whelming chances of success, based on the

facts that the Judgement and Decree of the trial Court was entered against the favour of the Applicant and has caused injustice to the applicant and issues of the marriage.

In reply to the Applicant's submission the Respondent strictly objects the application for stay of execution and prays this Court dismisses the application.

Moreover, the Respondent avers that, he has complied to the Decree in **Matrimonial Cause No. 07 of 2019** and referred the Court to page 8 of the Counter Affidavit. The Respondent avers that the Applicant has refused to comply with the Judgement and the same has been admitted in paragraphs **9, 15** and **16** of the supplementary affidavit which has also been attacked by the Respondent to have been filed without leave of the Court.

The Respondent further states that the Applicant is acting contrary to the orders of the Decree from Kisumu Resident Magistrate's Court. Therefore, it is trite law that whoever comes to equity must come with clean hands, since the Applicant before this Court does not deserve the prayed orders be granted to her for the reason of disobeying the Decree of Kisumu of which in the pleadings admits not to adhere to such orders.

It was also claimed by the Respondent that, on the ground that the pending appeal has overwhelming chances of

success because the Judgement and Decree of the trial Court is illegal in view of the provisions of **the law of Marriage Act Cap. 29 [R. E. 2019]**, is misconceived since the Court's order was very clear upon matters of maintenance. Further, that the Courts have warned themselves on the danger of relying on such a ground as named above when ordering for stay.

Having gone through the submissions by the parties on the application as prayed for by the Applicant it is with no doubt that the provisions of **Order XXXIX Rule 5 of the Civil Procedure Code (supra)**, do provide for the criteria for one to be granted a stay of execution by the Court that ordered the decree or by an appellate Court.

It is my firm view that I am inclined to put to test each of the criteria for one to qualify for the order of stay of execution to be granted to the Applicant or otherwise.

Firstly, to begin with the criteria under the provisions of **Order XXXIX Rule 5 (3) (a) of Civil procedure Code**, it requires that the Court has to be satisfied that substantial loss may result to the party if the order is not made. It is from the records that the Applicant submits that she is in danger of suffering a loss that is not in any way recovered by damages due to the nature of the matter at hand. It is her call that if execution is carried out, she and the issues of the marriage will be homeless since they will have no place for accommodation.

The Respondent is of the view that the act of the Applicant denying to obey a Court's order makes the applicant a party subject to contempt and is not fit to be granted the said order for the doctrine that he who comes to equity must come with clean hands.

It is from the records of the Court that the Decree and Judgment prayed to be stayed originate from a Matrimonial Cause that was decided before the Kisumu Resident Magistrate's Court, therefore, as submitted, if Execution of the Judgement and Decree will take place at this particular time take place it will obvious affect the issues of the marriage and the Applicant's interest to the effect that they will be rendered **homeless**. It is from the above observation that the Court finds the first criteria has been met by the Applicant.

Secondly, as with regards to the second criteria as per **Order XXXIX Rule 5 (3) (b) Civil Procedure Code (Supra)** the application being made without unreasonable delay. Taking into consideration the submissions of the Applicant it is also proven on the face of records that the matter was filed without delay within **8 days**. It is so since the records show that the judgement was delivered on the **22/02/2021** and the application at hand was filed on the **18/3/2021**. Hence before the eyes of law is reasonable

enough to find that second criteria has been met and this Court finds no doubt in that.

Lastly as per the requirement of **Order XXXIX Rule 5 (c) of the Civil Procedure Code**, on the criteria that, security has been given for the due performance of such decree or order as binding upon the Applicant. The Applicant in the affidavit states that matters of matrimonial are not commonly to have found this criteria met. However, it is her averments that she is willing to do the same as the Court may order. The Respondent in the other hand had not submitted in response to this submission. As to the nature of the matter being a Matrimonial, the Court has noted that this condition can hardly be complied under the circumstances. Further, since the same has not been fulfilled due to the nature of the case but still this Court takes into consideration the aspect that each case has to be determined according to its merits/circumstances. The only fact that the Applicant is enough security to the Court under the given circumstances. It is therefore the Court's conclusion that this condition too has been fulfilled.

It is also the Applicant's claim that the appeal before this Court has overwhelming chances of succeeding, and hence the grant of the application is of utmost importance. Since an appeal is one's right and where one appeals against the

decision has and believes that the decision made against him/her was erred in one way or the other, this Court's main duty being dispensing justice finds this reason a **qualifier** to the application at hand.

All said, I am satisfied that the application has met all the imperative considerations for the grant of an order for stay of Execution and the **Application is hereby granted pending the determination of the intended appeal.**

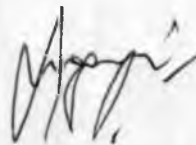
It is so ordered.

Each party to bear their own costs since the matter is matrimonial in nature.



L. E. MGONYA
JUDGE
25/6/2021

Court: Ruling delivered in my chambers in the presence of Ms. Crecencia Rwechungura, Advocate for the Applicant, Mr. Fredrick Massawe, Advocate for the Respondent and Ms. Msuya RMA, this 25th day of June, 2021.



L. E. MGONYA
JUDGE
25/06/2021