



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 22 OF 2017

CAOAPPELLANT/RESPONDENT

VERSUS

SNN.....RESPONDENT/APPLICANT

(Being an Appeal from the Judgment of Hon. L. M. Wachira at Nairobi Milimani Commercial Courts dated 17th March, 2017 in Divorce Cause NO. 440 of 2015)

BETWEEN

SNN.....PETITIONER

V E R S U S

CAO.....RESPONDENT

RULING

(1) Before this Court is the Notice of Motion application dated **16th December 2019** by which SNN the Petitioner seeks the following orders:-

1. SPENT

2. THAT this Honourable Court be pleased to grant an order releasing the maintenance monies owed to me, which amount to Kshs. 600,000/-.

3. THAT costs of this application be provided for.

(2) The application was premised upon **Sections 3, 3A, and 63(e)** of the **Civil Procedure Act** and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Petitioner.

(3) The Appellant / Respondent **CAO** opposed the application by way of his Replying Affidavit dated **4th February 2020**. The application was canvassed by way of written submissions. The Petitioner filed her written submissions dated **17th February 2021**, whilst the Appellant / Respondent filed her submissions dated **24th February 2021**.

BACKGROUND

(4) Vide the Judgment delivered in the lower Court on **17th March 2017** the Appellant/Respondent was ordered to pay monthly maintenance to the Petitioner herein in the sum of **Kshs. 160,763/-**. Being dissatisfied with the decision of the trial Court the Appellant / Respondent filed in the High Court Appeal **No. 22 of 2017**. On the basis of his pending Appeal the Appellant / Respondent sought and obtained orders of stay of the Judgment of **17th March 2017**. As a condition for said stay the Appellant / Respondent was on **26th April 2017** ordered to deposit as security for costs the sum of **Kshs. 600,000/-**.

(5) **Hon. Lady Justice Ali-Aroni** in her judgment dated **28th November 2019**, dismissed the Appellant's Appeal with costs.

(6) The Petitioner submits that in light of the dismissal by the High Court of the Appellant / Respondent's appeal she as the successful party is entitled to the sum of **Kshs. 600,000/-** which had been deposited in the Court.

(7) On his part in opposing the application, the Appellant / Respondent submits that he has filed an application in the Court of Appeal seeking a Stay of Execution vide **Application Number 81 of 2020**. He contends that if the monies held by the Court are released to the Petitioner then his appeal before the Court of Appeal will be prejudiced. The Respondent further submits that the Petitioner does not have the means to refund the **Kshs. 600,000/-** should his appeal in the Court of Appeal be successful.

ANALYSIS AND DETERMINATION

(8) I have carefully considered the application before me, the Replying Affidavit and the submissions filed by both parties. It is common ground that on **6th December 2017** the Appellant / Respondent in compliance with orders made by the High Court deposited in Court the sum of **Kshs. 600,000/-**. Annexure **SNN2** to the Notice of Motion dated **16th December 2020** is the copy of the official receipt Serial No. **[XXXXXX]** issued by the High Court of Kenya.

(9) It is not denied that the Petitioner obtained Judgment in her favour in the lower Court and was awarded an amount of **Kshs. 160,763/-** monthly as maintenance. It is also not denied that following an appeal lodged in the High Court against that decision, the Petitioner was again successful as the Honourable Judge dismissed the Respondent's appeal with costs.

(10) This means that from the time the lower Court made its decision in **March 2017** (four (4) years ago), todate the Petitioner has been unable to enjoy the fruits of her Judgment.

(11) The Respondent argues that the **Kshs. 600,000/-** ought to be retained by the Court pending a decision on his application or stay before the Court of Appeal. In my view such an argument is not tenable. Firstly the **Kshs. 600,000/-** was ordered to be deposited as security in respect of **the High Court matter only**. There were no directions that this money be rolled over to cover any possible Court of Appeal applications. Secondly the Respondent claims that the release of the **Kshs. 600,000/-** will prejudice his upcoming appeal. This argument presupposes that the Respondent has filed an appeal against the Judgment of **Hon. Lady Justice Ali-Aroni**. There exists no evidence that such an appeal has actually been filed.

(12) Following the dismissal of his appeal the Respondent is obliged to make good the arrears of maintenance owed to the Petitioner. The Respondent has not demonstrated that he has complied with the orders of maintenance made by the trial Court. The Petitioners claim that the Respondent now owes her close to **Kshs. 5,465,942/-** as arrears of maintenance is not far-fetched. This sum of **Kshs. 600,000/-** is a mere drop in the ocean and would not serve to clear the arrears so owing.

(13) I find that the Petitioner herein is entitled four (4) years after the fact to the fruits of her Judgment. Any appeal and/or applications which the Respondent may chose to file in the Court of Appeal are distinct and separate from this High Court matter. There exist no orders from the Court of Appeal directing that the **Kshs. 600,000/-** be held pending a determination on the Respondent's application for stay. Accordingly I allow this Notice of Motion and direct that the **Kshs. 600,000/-** which was deposited in Court by the Appellant/Respondent on **6th December 2017** be released immediately to the Petitioner **SNN**. As this is a family matter I make no orders on costs.

Dated in **Nairobi** this **21st** day of **May, 2021**.

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MAUREEN A. ODERO

JUDGE

Mr. Musebe for Appellant/Respondent

Mr. Mugo for Respondent