



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

Civil Appeal No. 9 Of 2017

M I A.....APPELLANT

VERSUS

R H M.....RESPONDENT

RULING

Before me is a Notice of Motion dated 16th October, 2017 filed by the appellant under Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) and Order 42 Rule 4 of the Civil Procedure Rules.

The main prayer is for stay of execution of decree or order of the Magistrate's Court at Mandera made on 21st September, 2017 pending hearing and determination of the appeal.

The application was filed with a supporting affidavit sworn by the appellant on 16th October, 2017.

This court heard the application on 20th November, 2017, which is yesterday and both the appellant and respondent addressed me orally at length. The appellant stated that he was a [particulars withheld] teacher earning Kshs.14,000/= per month, and that prior to the case before the magistrate, he paid the respondent his wife (now former wife) Kshs.10,000/= per month as mutually and informally agreed between them for the upkeep of the children. He stated that he was not able to pay the large amount of Kshs.21,000/= per month ordered by the magistrate.

The respondent on the other hand, stated that the appellant earned Kshs.90,000/= per month from the [particulars withheld] school, and that he had previously paid her Kshs.30,000/= a month. According to her, before case was filed in Magistrate's Court, the appellant started neglecting the children by sometimes paying her Kshs.8,000/= a month and sometimes not paying anything for the upkeep of the five (5) children of the marriage. She thus urged that the appellant be ordered to comply with the magistrate's courts orders and do pay to her arrears for amounts he had not paid.

This is an application for stay of execution of decree order pending appeal. I observe that the appeal was filed on 18th October, 2017 the same day of filing this application.

Such applications for stay of execution pending appeal are governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules- the relevant part of which provides as follows:-

“6(2) No order or 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; 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.

The decision of the Magistrate's Court at Mandera herein was made on 21st September, 2017. The application was filed here in Garissa High Court on 18th October, 2017. The respondent has not complained about any delay in filing the application. I also take judicial notice of the fact that the Mandera Court is far away, and transport and security logistics between Mandera and Garissa can be challenging.

In my view therefore, this application was filed without unreasonable delay.

The second consideration is whether the appellant will suffer substantial loss if the stay orders are not granted.

The issue revolves around payment of money by the appellant to the respondent from the alleged monthly income of the appellant. The appellant claims that he earns Kshs.14,000/= a month while the respondent claims that he earns Ksh.90,000/= a month. No documentary evidence was provided or relied upon by any of the parties to demonstrate what the appellant earns or indeed whether he was previously paying the respondent Kshs.30,000/= per month before the case was filed in the Magistrate's Court. It is however admitted by both parties that after divorce, the appellant had been paying the respondent about Kshs.8,000/= or 10,000/= per month for the upkeep of the five (5) children of the marriage. The respondent however maintained that the appellant paid her Kshs.30,000/= per month before the divorce.

It is apparent to me that the Kshs.30,000/= per month if it was paid, was for use of both the appellant and the respondent and the children when they lived together. The magistrate ordered payment of Ksh.21,000/= per month to the respondent. In those circumstances, I find that the appellant will be unnecessarily burdened currently before the appeal is heard and determined, if he pays the respondent Kshs.21,000/= per month as the appellant also needs to live separately. I thus find that the appellant will suffer substantial loss if the stay of execution orders sought are not granted pending appeal. I will thus order stay of execution of Kshs.21,000/= per month. Instead I order that the appellant will pay the respondent Kshs.14,000/= per month for upkeep of the children until the appeal is heard and determined.

With regard to provision of security, I do not find any need for provision of security by the appellant, as he is required to pay the respondent Kshs.14,000/= per month till hearing and determination of the appeal.

I thus allow the application and order that the trial court's order for payment of Kshs.21,000/= per month to the respondent be and is hereby stayed pending the hearing and determination of the appeal. The appellant will however pay the respondent Kshs.14,000/= per month for the upkeep of the children pending hearing and determination of the appeal. Costs of the application are in the cause.

Dated and delivered at Garissa this 21st November, 2017.

George Dulu