



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 19 OF 2014

FRANCIS MUKONO KIRUTHU.....APPELLANT

VERSUS

AGNES WAMUYU.....RESPONDENT

RULING

1. This ruling concerns two applications filed by the Appellant. The first is a Notice of Motion dated 7/02/2014 wherein the Appellant sought the following orders: That:

a) there be a stay of execution of the orders of maintenance made by the Chief Magistrate's Court at Naivasha on 04/02/2014 in CMCC No. 584 of 2011, Francis Mukono Kivuthu V. Agnes Wamuyu, pending the hearing and determination of the application *inter-partes*;

b) there be a stay of execution of the orders of maintenance made by the Chief Magistrate's Court at Naivasha in CMCCNo. 584 of 2011, Francis Mukono Kivuthu V. Agnes Wamuyu, pending the hearing and determination of the appeal; and

(c) the costs of the application be in the cause.

2. The second application is one dated 23rd July 2014 wherein the Applicant seeks the following orders:

a) That this honourable court be pleased to review its order dated 7/02/2014 for payment of Kshs. 35,000/= to the Respondent per month as maintenance and do hold that the Respondent is a person of means with reasonable income that takes care of her needs;

b) That alternatively this court do order payment of a lesser amount of maintenance to the Respondent taking into account her income and means;

c) That alternatively this court do order provision of alternative security by the appellant as condition for stay pending appeal;

(d) That this court do give such directions as may be appropriate as a condition for stay pending appeal;

(e) **That the costs be provided for.**

THE APPLICANT'S CASE

3. The Applicant filed this appeal against the decision of the Chief Magistrate's court at Nakuru made on 4/02/2014 in CMCC No. 584 of 2011. By that ruling the court directed the Applicant to pay the Respondent monthly maintenance of Kshs. 70,000/= pending the hearing and determination of the suit.
4. With regard to this application the Applicant avers that he has good grounds of appeal. His argument is that the lower court erred in awarding such a high sum without any basis. He stated that at that interlocutory stage, the court did not have before it sufficient evidence which had been tested by way of cross-examination and on which it could award maintenance.
5. He averred that the court did not take into account that he could not afford such a high amount because he had married a second wife under customary law, and who also was entitled to his support. He further averred that the court failed to take into account that despite being separated from the Respondent, he continued to provide her with monthly maintenance of Kshs. 10,000/= which was sufficient as she was not as ill as she had represented to the court.
6. The second application concerns the *ex-parte* orders issued by this court on 7/02/2014 granting a temporary stay of execution pending the *inter-partes* hearing of the application dated 7/02/2014. The Applicant was granted the temporary stay of execution on that he pays the sum of Kshs. 35,000/= per month and that the first payment be made within 7 days of the ruling.
7. The Applicant now alleges that the Respondent is able to support herself from the income she receives from one of the properties. That, following the order of the lower court in Nairobi Milimani CMCC NO. 5835 of 2013, the Respondent took possession and control of the property known as **NAIROBI/UMOJA BLOCK 109/1/135** from which she derives income in terms of rent of Kshs. 28,000/=. In addition, the Respondent now resides in a farm where she has access to farm produce and is therefore well provided for.
8. It was his view that the sum of Kshs. 35,000/= should be reviewed downwards. In the alternative, he should be allowed to provide an alternative means of security instead of an order for payment of money.

THE RESPONDENT'S CASE

9. The Respondent's position was that the Applicant did not deserve the orders sought. It was her case that the lower court considered the evidence before her and found that it was sufficient to make the interlocutory orders sought. She contended that the Respondent was a man of means and earns a monthly income of Kshs, 400,000/=. He was therefore capable of complying with the order of the court.
10. The Respondent was of the view that the court should not review its orders. His intention was solely to frustrate her and this is evidenced by the fact that he opted to deposit the money as ordered into court instead of paying her directly. Further he was undeserving of the orders sought because he had failed to comply with the court's orders and should be denied audience until he purges the contempt.
11. She contended that she cannot carry out any meaningful enterprise on account of her age and medical condition. She needs the money for her ongoing treatment. Therefore, any other form of security other than monetary would defeat the purpose of the maintenance orders. She further averred that the income derived from **NAIROBI/UMOJA BLOCK 109/1/135** should not be considered by the court in making its determination on the amount to award her because it is her property which she acquired before her marriage to the Respondent and it does not constitute matrimonial property.

SUBMISSIONS

12. At the hearing of the applications, Counsel for the Applicant submitted that the principles set out under **Order 42 Rule 6** had been satisfied. This application was filed without unreasonable delay and the applicant is willing to abide by any terms ordered by the court with regard to security. On

the substantial loss, Counsel submitted that the Appellant had demonstrated substantial loss that the lower court had no basis for granting the orders sought. Firstly the court's decision was made under the provisions of **Section 25** of the now repealed **Matrimonial Causes Act**. This section provided that the husband may be ordered to pay maintenance of upto 1/5 of his earnings. There was no evidence of the Applicant's earnings and therefore no basis for the order. In any case, the Applicant cannot afford the substantial sum ordered by the court of Kshs. 70,000/= as he is not salaried and only survives on the proceeds of sale of farm produce. Therefore if the orders made against him are not stayed pending the determination of the appeal, he stands to suffer substantial loss.

13. He stated that the Applicant was also not willing to abide with the terms of the conditional stay granted pending the *inter-partes* hearing of the main application hence he filed the second application. He argued that under **Section 78** of the **Marriage Act** which came into force in May 2014, that order of maintenance should lapse if the person is able to support herself. Further Section 80 of the Marriage Act provides that the court may revoke or vary a subsisting order for maintenance of any kind, whether secured or unsecured, if it is satisfied that the order was based or obtained as the result of any misrepresentation or mistake of fact or that there has been a material change of circumstances since the order was made. In the instant case, it was argued that the circumstances had since changed as the Respondent was now earning an income of Kshs. 28,000/=. She is therefore able to cater for her needs and does not require to be maintained by the Applicant.
14. On her part, Counsel for the Respondent conceded that the Respondent now resides in a farm in Nyandarua but she is unable to carry out any activities on account of her illness. As a result she relies on the Applicant who was able to maintain her prior to their separation. Counsel argued that the Applicant controls the matrimonial properties. If the Applicant's contention that he cannot afford the sum sought was made in good faith then he should have disclosed his earnings.
15. She further submitted that the property from which the Respondent is taking rent was acquired before their marriage and does not constitute matrimonial property. The intention of the Applicant is to deprive the Respondent the fruits of the ruling made in her favour. That the Applicant will not suffer any substantive loss if the orders sought are not granted. In any event any damages that will be suffered by the Applicant are quantifiable and may be recovered. It was her contention that the alternative security will defeat the essence of the order of security which was to provide maintenance. It was her view that the order of Kshs. 35,000/= be maintained as he can be reimbursed if the appeal succeeds.

ANALYSIS

16. I have considered the pleadings and the rival submissions of Counsel. It is clear that neither party has a dispute with the orders of the lower court against which this appeal has been filed. The contention, which constitutes the issue for determination by this court, is on the terms of such stay and in particular whether the condition of payment of Kshs. 35,000/= monthly maintenance to the Applicant pending the *inter-partes* hearing of the application for stay pending appeal should be upheld as the condition for stay of execution pending the hearing of the appeal.
17. The principles upon which this court will stay the execution of a judgment or ruling pending the determination of an appeal filed before it are provided for under **Order 42 Rule 6** as follows-

“(2) 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.”

18. At this juncture the court is not concerned with the merits of the appeal although a determination of whether the appeal appears frivolous or vexatious may inform the court's decision. Its primary concern is whether if stay is not granted, the applicant will stand to suffer substantial loss, his

- ability to provide the security as ordered by the court and whether the application has been made without unreasonable delay.
- 19.As stated earlier in this ruling, the parties have no objection to the orders of stay being granted. The dispute is on the terms of stay. The Applicant's position is that the Respondent is not entitled to any maintenance as she capable of taking care of herself firstly from the rent she now receives following the court order and from the farm she resides on.
- 20.The Respondent regarded the earlier terms of the court for payment of Kshs. 35,000/- per month pending the *inter-partes* hearing of the application as just and was of the view that the same should continue in place until the appeal is determined.
- 21.The undisputed evidence however is that the circumstances have changed and the Applicant now receives income from the rental houses situated on **NAIROBI/UMOJA BLOCK 109/1/135**. The submission that the property does not constitute matrimonial property and should therefore not be considered by the court in making the maintenance order cannot be upheld. A proper interpretation of **Section 79** of the **Marriage Act, No.4 of 2014** is that whether a spouse is able to support herself informs that decision to award her maintenance. This change of circumstance are grounds upon which the court may vary a maintenance order under **Section 80**.
- 22.The Respondent was satisfied with being paid Kshs.35,000/= per month, pending the hearing of this appeal. In the circumstances and taking into account the additional income of Kshs.28,000/= I find that the sum of Kshs.10,000/= will be sufficient support.

DETERMINATION

23.For the above reasons, I allow both applications on the following terms:

- a) that there shall be a stay of execution of the order of the Chief Magistrate's Court made on 4/2/2014 in Naivasha CMCC No.584 of 2011 pending the hearing and determination of the appeal;
- b) this stay shall be on condition that the applicant pays the Respondent directly a monthly sum of Kshs.10,000/= before the 7th day of each and succeeding month until appeal is determined
- c) the costs of this application shall be in the cause.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 17th day of February, 2015

A. MSHILA

JUDGE