



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
DIVORCE CAUSE NO. 1 OF 2000

M. E. K. M.....PETITIONER

VERSUS

G. L. M.....RESPONDENT

DR. B. W.....1ST CO-RESPONDENT

PROF. R. M.....2ND CO-RESPONDENT

RULING

1. The petitioner is aggrieved by the judgment delivered on 19th March 2015. The petitioner has presented a notice of motion praying for stay of execution of the order for maintenance until her appeal is heard and determined. In the alternative, the petitioner prays for a stay of nine months to allow her to lodge a suitable application in the Court of Appeal.

2. The impugned judgment granted the petitioner and respondent a decree for *divorce*. The decree was to be made *absolute* after thirty days (now past). The court had ordered the petitioner to pay maintenance to the respondent of Kshs 20,000 per month effective 30th April 2015 and on each last day of every succeeding month. The sums were to be paid until the occurrence of *any* of the following events: the respondent becomes capable of supporting himself; or, he remarries; or, he dies whichever is earliest. The claims against both co-respondents were dismissed. Each party was to bear its own costs.

3. The motion is dated 2nd April 2015. The gravamen of the motion is that if the petitioner prevails in the intended appeal, the respondent will not be in a position to refund the sums paid. It is averred that the respondent is at the verge of executing the decree for maintenance; and, that the motion has been brought timeously. Those matters are buttressed by a deposition of the petitioner sworn before a Notary Public in Pretoria on 2nd April 2015.

4. The petitioner deposes that she wants to “*test the findings of the Honourable judge on the issue of maintenance*”. She has filed a notice of appeal to the Court of Appeal. The gist of the affidavit is that the respondent has maintained himself for the last eighteen years; that the judgment was “*lopsided focusing only on the needs and conditions of the respondent*” and failing to consider that the petitioner has other responsibilities; or, could lose her job; or, go into retirement. She avers that she is due to retire at sixty. Fundamentally, she claims that her salary is *insufficient* to maintain the respondent. She states there was no evidence in the trial court to show she could maintain the respondent. Lastly, she avers that the amount of maintenance was too high. She proposes that a sum of Kshs 5,000 would be more than adequate.

5. The motion is contested. The respondent has filed grounds of opposition and a replying affidavit. In a synopsis he says that he is in dire need of maintenance. He avers that since the judgment, he has lost his position as a member of the [*particulars withheld*]. He has annexed a copy of the *Kenya Gazette* notice of 24th April 2015 revoking his appointment. He used to earn Kshs 14,000 for *one* board meeting every *three* months. He states that the petitioner is trying to introduce new evidence that was not before the trial court; and, that no appeal has been lodged. He implored the court to dismiss the motion.

6. I have considered the application, depositions, and the rival submissions. The court may grant a stay pending appeal under Order 42 of the Civil Procedure Rules 2010. The present motion is predicated upon Order 42 rule 6 (1) of the Rules which provides-

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.”

7. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the learned Judge, Madan JA (as he then was) quoted with approval the views of Brett L.J. in *Wilson v Church* (No 2) 12 Ch D [1879] 454 at 459.

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”

8. Justice Madan delivered himself thus in the *Butt* case (Supra) at page 419,

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”

9. Again the court will grant a stay if special circumstances of the case dictate so. See *Attorney General v Emerson and others* 24 QBD [1889] 56 at page 59. In the *Butt* decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. Those general principles were restated in *Madhupaper International Limited v Kerr* [1985] KLR 840 at page 846.

10. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also *Harit Sheth T/a Harit Sheth Advocate Vs Shamas Charania* [2010] eKLR (Civil Application No 68 of 2008. The present motion also relies on sections 1A, 1B and 3A of the Civil Procedure Act.

11. I am satisfied that the application was brought *with expedition*. I am also satisfied that a *notice of appeal* has been lodged. Under order 42 of the Civil Procedure Rules 2010, the filing of the notice constitutes an *appeal* under the relevant Rules of the Court of Appeal. I have been asked to consider the *capacity* of the respondent to refund the sums in the decree. The court of appeal had occasion to consider

the matter in *MDC Holdings limited and others v J.P. Machira* Nairobi, Civil Appeal Nai 7 of 2002 (unreported). See also *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018.

12. The decree for maintenance was to take effect on 30th April 2015. There is no evidence that the respondent has commenced *execution*. I am alive that the court granted a temporary stay on 10th April pending hearing of this motion. The key question then is whether the respondent would be in a position to *refund* the decretal sums if the appeal is successful. Tied to that is the question whether the appellant stands to suffer *substantial loss*.

13. From the evidence at the trial, and the petitioners supporting affidavit, the respondent has a permanent home at Muraka. The level of maintenance ordered is only Kshs 20,000 per month. The respondent has no regular or fixed income. That is one of the reasons why maintenance was granted. But from the materials before me, I *cannot* say with confidence that the respondent would *not* be in a position to refund the sums if the appeal is successful. It is conceded that he owns a rural home and land on which he is residing.

14. The other key consideration is whether the petitioner will suffer substantial loss. I am alive that as a general proposition, the mere execution of a *money decree* does *not* constitute substantial loss. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018, *Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd* High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR. I cannot say that payment of maintenance to a spouse of Kshs 20,000 per month would constitute *substantial loss*. I have in any event stated that the respondent owns a rural home and land. I cannot categorically state that he would not repay the sums if the appeal is successful. I agree that the respondent has her needs. In the impugned judgment, the court at paragraph 29 stated-

“The court has discretion to order the amount of maintenance. I think a sum of Kshs. 20,000 per month is just, reasonable and sufficient. I have taken into consideration that the petitioner has needs abroad. I have also taken into account that the children are all grown up and that the respondent is living in his rural house”.

15. True, the petitioner could lose her job or go into retirement. If any of those events occur, there are provisions for review for the order of maintenance. The petitioner has not annexed any document or statement to show her salary is *insufficient* to maintain the respondent. If the respondent attains financial independence, it would be unjust to require the petitioner to continue to maintain him. Their roles may as well change. In a nutshell, the order of maintenance is not cast in stone.

16. I cannot comment on the merits of the appeal. On the face of it, it is an *arguable* appeal. But I am not satisfied that the periodical payments of maintenance would render the appeal *nugatory*. Neither am I satisfied that the petitioner has *demonstrated* she would suffer *substantial loss*. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018. There is then no good reason to deny the respondent maintenance at this stage. It follows as a corollary that no *sufficient* basis has been laid to exercise my discretion to grant stay pending appeal.

17. Granted all those reasons, the appellant’s notice of motion dated 2nd April 2015 is devoid of merit. It is dismissed but with *no* order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 18th day of June 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Andabi for the petitioner instructed by Andambi & Company Advocates.

Respondent (in person) absent.

Mr. J. Kemboi, Court clerk.