



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
DIVORCE CAUSE NO.128 OF 2010

R J W PETITIONER

VERSUS

F M W..... RESPONDENT

RULING

On 14th January 2010, this Court delivered a Ruling in respect of two applications that had been filed by the parties to these divorce proceedings on behalf of G.B. M. Kariuki J (as he was then). After the delivery of the ruling, the advocate for the Petitioner made an oral application for the court to grant the Petitioner twenty one (21) day stay of execution of the ruling pending the filing of a formal application. The advocate for the Respondent was not present in court due to misdirection by a clerk attached to the Family Division. The Respondent was clearly aggrieved by decision of this court to grant the temporary stay hence her decision to file a formal application seeking the setting aside of the ex parte order of stay. The Petitioner on his part has filed a formal application seeking to be granted an order staying the execution of the ruling G.B.M. Kariuki, J (as he then was), pending the hearing and determination of an appeal intended to be filed at the Court of Appeal. The application is supported by the annexed affidavit of the Petitioner. The application is opposed. The Respondent swore a replying affidavit in opposition to the application.

At the hearing of the application, Mr. Miller for the Respondent told the court that he would also be relying on the contents of the application that sought to set aside the initial order of stay issued by this court in opposition of the application. Mrs. Thongori, for the Petitioner was not opposed to the suggestion made by Mr. Miller. This ruling therefore is delivered in respect of the application made by the Petitioner seeking to be granted stay of execution pending the hearing of the intended appeal. The court will also consider the contents of the application made by the Respondent when she sought to set aside the temporary order of stay granted by this court in determining whether or not to grant the order of stay of execution that is sought by the Petitioner.

That the petitioner intends to appeal to the Court of Appeal is not in doubt. This court has seen the notice of the intention to appeal filed by the Petitioner. The principles to be considered by this court in determining whether or not to grant an order staying the execution of the order of this court are set out in Order 42 Rule 6(2) which provides as follows:

“(2) No order to 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.”

In **Butt v Rent Restriction Tribunal [1982] KLR 417** at page 419 Madan JA (as he was then) held as follows:

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in **Wilson v Church (No 2) 12 Ch D (1879) 454** at p 459. In the same case, Cotton LJ said at p 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.”

The proceedings in this cause are matrimonial. From the nature of the proceedings already conducted, it is apparent that it has the hallmark of being an acrimonious dispute. Matters are not helped by the fact that the matrimonial dispute appears to be somewhat intertwined with a commercial dispute touching on a limited liability company in which both the Petitioner and the Respondent are Directors. The ruling that is a subject of this application is in regard to the order made by G.B.M. Kariuki J, requiring the Petitioner to grant access and possession to a house within Lolldaiga Ranch known as Leopard House to the Respondent. The Petitioner is opposed to the Respondent being granted such possession pending the hearing and determination in the divorce proceedings, firstly, on the ground that taking into consideration the past conduct of the Respondent in attempting to poison him, and secondly, in interfering with the management of the company, such possession would create unmanageable tension between the two of them. On her part, it is the Respondent case that, as the wife of the Petitioner she had nowhere else to live, and further that the Petitioner had failed to pay her maintenance. The Respondent told the court that she was not in employment and was currently staying at a friend’s house in Nairobi having been evicted from an apartment she was living in due to failure by the Petitioner to pay the rent and her upkeep. She urged the court not to grant an order staying the execution of the ruling whose result was that she was restored to her matrimonial home. On his part, it was the Petitioner’s case that the Respondent had never resided in the matrimonial home since 2005 when they separated as witnessed by the deed of separation.

There are other issues which were raised by learned counsel for the parties herein during the hearing of the application which in the considered view of the court essentially amounted to urging this court to rule in favour of their respective clients on the basis of what they considered to be the applicable law. While this court may not have set out the said arguments in this ruling, it has nevertheless considered the same. This court is not being called upon to sit on appeal against the ruling of G.B.M. Kariuki, J. That is the preserve of the Court of Appeal. The impression this court got when the application was being argued, was that counsel to the parties in this application appeared to be re-urging the grounds which were presented before the learned Judge. This court cannot make any comment in regard to the said submissions because to do so would be tantamount to this court sitting on appeal on a decision of a then Judge of concurrent jurisdiction.

Has the Petitioner established that he would suffer substantial loss if the order issued by G.B.M. Kariuki J, is not stayed? In my considered view, the purpose of any application seeking the stay of execution of any order or decree is to preserve the status quo then prevailing pending the hearing and determination of appeal. This is because, otherwise, it would render the intended appeal nugatory and academic. In the present application, the Respondent is currently resident out of the **[particulars withheld]** Ranch. From the affidavits of both the Petitioner and the Respondent, it is clear that in the Ranch is the house which the Respondent refers to as the matrimonial home and also the business enterprise known as **[particulars withheld]** Hills Limited. As stated earlier in this ruling, the Respondent has lodged a claim touching on the management of the said business enterprise. The case is still pending hearing in this court. This court was persuaded by the argument put forward by the Petitioner that the issue of the return of the Respondent to the Ranch to occupy a premise there in was not only a

matrimonial issue, but an issue touching on the management of the company that is subject to court proceedings. For that reason, this court holds that the Petitioner established that he would suffer substantial loss if the Respondent is allowed back into the ranch pursuant to the said ruling of the court.

The issue that is left for determination by this court is where the Respondent will be housed pending the hearing and determination of the intended appeal or alternatively pending the hearing of these divorce proceedings. As security for the due performance of the order that may issued, the Petitioner offered to pay to the Respondent GB Sterling Pounds 100,000 immediately to secure her accommodation and maintenance. In this court's opinion the offer is reasonable. The above amount translates to more than Ksh.13,000,000/= which will enable the Respondent rent reasonable accommodation and maintain herself pending the hearing of the intended appeal.

The upshot of the above reasons is that the order issued by G.B.M. Kariuki J, in his ruling delivered by this court on 14th January 2013, is stayed pending the hearing and determination of the intended appeal. The Petitioner is ordered to pay to the Respondent GB Sterling Pounds 100,000 within seven (7) days of today's date or in default the order issued by this court shall lapse automatically. The cost of this application shall be in the cause.

DATED AT NAIROBI this 30th day of JANUARY, 2013

L. KIMARU

JUDGE