



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 19 OF 2004

J P V G.....PETITIONER

VERSUS

A N W.....RESPONDENT

RULING

Before court is the Notice of Motion application dated 31st October, 2012 brought under certificate of urgency in which the applicant prays *inter alia*, for orders that:

“3. THAT this Honourable court be please to

grant a stay of execution of the judgment and/or decree in this petition pending the hearing and determination of the appeal lodged in the Court of Appeal.

4. THAT the applicant be at liberty to apply for

further orders and/or directions as the Honourable court may deem fit and just to grant in the interest of justice.

5. THAT costs of and incidental to this application do abide the outcome of the appeal.”

The application was supported by the affidavit of **J N P V G**. The respondent **A N W** on her part opposed the application by way of a replying affidavit sworn on 28th November, 2012.

This application arises from the judgment delivered by **Hon. Justice Mohamed Ibrahim** on 27th day of January, 2004. In that judgment the Honourable Judge allowed the respondent’s cross-petition for divorce and further ordered that the applicant do pay to the respondent a monthly maintenance of 2000 Euros for the upkeep of the respondent herself and the couple’s minor daughter. The applicant being dissatisfied with this decision filed an appeal. He also filed this present application seeking to stay the decision of the court with respect to payment of maintenance pending the hearing and determination of his appeal. On 5th November, 2012 this court did grant temporary orders of stay pending the hearing and determination of this application. By consent it was agreed that the application be disposed of by way of written submissions and both parties did duly file submissions in court.

I have carefully perused the written submissions made by each party. At this stage the court is not required to go into the merits or otherwise of the appeal. The only question or this court to determine is

whether the prayer for a stay of the orders on maintenance is merited. Counsel for the applicant **MS. OKATA** argues that failure to grant the stay will render the intended appeal nugatory. Counsel further submits that the respondent who currently resides in the Netherlands with the couple's daughter is receiving state benefits and is therefore adequately provided for. On his part counsel for the respondent **MR. MRIMA** submits that the applicant has a legal obligation to contribute towards the upkeep of his ex-wife and child. He further submits that due to ill health the respondent has been unable to secure employment in the Netherlands so as to provide for her own upkeep.

The Matrimonial Causes Act Cap 152 Laws of Kenya provides for the payment of alimony to a divorced partner at section 25(2) and (3) which reads:

“25(2) The court may, if it thinks fit, on any

decree for divorce or nullity of marriage, order that the husband shall to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem reasonable.

(3) In any such case as aforesaid the court may

if it thinks fit, by order either in addition to or instead of an order under subsection (2) of this section, direct the husband to pay to the wife such monthly or weekly sum for her maintenance and support as the court may think reasonable.”

The learned trial Judge having listened to evidence from both parties found it reasonable to award a sum of 2000 Euros as a monthly alimony payment. The applicant submits that payment of this amount is likely to bankrupt him. However, the applicant did not make use of section 25(3)(1) of Cap 152 to seek a variation or discharge of the order. Instead he chose to appeal against the whole judgment. It is a fact that this appeal could be determined either way. The court must balance between the interests of both parties.

The applicant is apprehensive that if the orders sought are not granted then the appeal may be rendered nugatory. On the other hand the respondent having already been awarded maintenance stands to be denied the alimony due to her as awarded by a court of law. In order to balance these competing interests and bearing in mind the fact that the applicant is obliged to maintain his child (paternity is not denied) I deem it fair and just to direct that pending the hearing and determination of the appeal the applicant will pay to the respondent the sum of 1000 Euros a month. Such payment is to run from the date of judgment being 17th August, 2012. Each party to meet its own costs for this application. It is so ordered.

Dated and delivered in Mombasa this 17th day of July, 2013.

M. ODERO

JUDGE

In the presence of:

Ms. Omuko h/b Ms. Okata for Petitioner

Mr. Okuthe h/b Mr. Mrima for Respondent

Court Clerk Mutisya