



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL NO. 216 OF 2011**

*(Being an appeal of the decision of the Senior Principal Magistrate, W. N. Njage dated 15<sup>th</sup> November, 2011 in the Principal Magistrate's Court at Narok Divorce Cause No. 7 of 2010)*

L.T.K.....APPELLANT  
**VERSUS**  
C.N.K.....RESPONDENT  
**RULING**

This Ruling relates to a Notice of Motion dated and filed on 16<sup>th</sup> December 2011. On the said day, I certified the Motion as urgent and directed counsel to serve it upon the Respondent. In the event, this was done and the matter came up for hearing before me on 19<sup>th</sup> December 2011 when counsel for both the Applicant and the Respondent addressed me. The Application sought five orders and because the prayer for urgency was granted, and only three prayers were sought and urged before me on that date. These were -

- (1) that there be a temporary stay of execution of the order issued against the Appellant on 29<sup>th</sup> November 2011 requiring the Appellant to pay the Respondent a monthly sum of Ksh 70,000/= pending the hearing and determination of the application,
- (2) that the Appellant be allowed to pay a global monthly sum of Ksh 10,000/= to the Respondent pending the hearing and determination of the Appeal,
- (3) that there be a temporary stay of execution of the order issued against the Appellant on 29<sup>th</sup> November 2011 requiring the appellant to pay to the Respondent the monthly sum of Ksh70,000/= pending the hearing and determination of the appeal,
- (4) that costs of the application be in the cause.

Against this Application the Respondent filed a Replying Affidavit sworn on 16<sup>th</sup> January 2012 as well as a Notice of Preliminary Objection, dated 18<sup>th</sup> January 2012 and filed on 15<sup>th</sup> January 2012. The objection is based upon these grounds -

- (1) that applicant has blatantly refused to obey the valid court orders that he seeks to set aside compelling him to remit the sum of Ksh 70,000/= as maintenance for the Respondent and her children, and has not provided a motor vehicle or paid school fees for the children,
- (2) that in the face of this failure to comply with a court order, the plaintiff should not be granted further audience and/or relief in this matter until the order is complied with.

Unfortunately, Mr. Rombo learned counsel for the Respondent did not raise this issue before Mr. Amadi argued his application for stay. Mr. Rombo took up the issue when replying to Mr. Amadi's submissions for stay of execution of the orders of the lower court pending appeal.

I take it up as a preliminary issue in this Ruling for determination before considering the orders sought by the Applicant. Mr. Rombo argued that the Applicant cannot be heard until the orders made by the lower court are complied with, that the applicant has not come to court with clean hands, and that unless he first complies with those orders he should not be heard at all. Counsel relied upon the decision of Hon. Justice Njagi in the case of **RAMESH POPATLAL SHAH & ANOTHER t/a LENTO AGENCIES VS. NATIONAL INDUSTRIAL CREDIT BANK LTD [2005] eKLR**. Although the court upheld the Preliminary Objection in that case, the decision in that case is distinguishable from the position in this case. In that case, the Respondent (the Bank), had not complied with orders of court, and the Applicants, had already filed an application to cite the Bank's Chief Officer's with contempt of court by disobeying the court's orders, and sought orders denying audience to the Bank until the contempt was purged.

There is no similar application for contempt of court in this matter, if there were, that question would have been taken up and determined first. I cannot at this stage of the proceedings say that the Applicant is in contempt of court, and should be denied audience. In the English case of **HADKINSON VS. HADKINSON [1952] ALL E.R. 567** which was cited in the **Ramesh Popatlal** case (*supra*), Denning L.J. said at pp. 574 - 585 -

***"...It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing compliance .... I am of the opinion that the fact that a party to a cause has disobeyed an order of court is not itself a bar to being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."***

In the same case (**HADKINSON VS. HADKINSON**), at p. 570, Romer L.J. referred to exceptions to the general principle that a party who is in contempt of court should not be heard since those orders would be valid, and should be obeyed in observance, not in breach. Romer LJ said -

***"... one such of exceptions is that a person can apply for the purpose of purging his contempt, and another is that he can appeal with a view to setting aside the order on which his alleged contempt is founded ..."***

In this case the Applicant had **firstly** filed an appeal challenging the orders of the lower court, and **secondly** filed an application to stay of those orders pending appeal. Although such a party may not have obeyed the orders, it cannot be said he sat back and held the orders of court in contempt. He has come to court, and his situation falls under one of the exceptions referred to by Lord Justice Romer in **Hadkinson vs. Hadkinson** (*supra*). If this was not the case, the provisions for stay under Order 42, rule 6 of the Civil Procedure Rules, 2010 would be spurious and serve no purpose. It was therefore proper to allow the Applicant to urge his application. I would have dismissed the Preliminary Objection if it had been urged before the application for stay was argued.

The grounds for stay of execution are set out in rule 6(2) of Order 42. These are -

- (1) the application has been made without unreasonable delay.
- (2) the applicant will suffer substantial loss unless the order is made.
- (3) such security as the court orders for the due performance of such decree or order as they ultimately be binding on the applicant has been given by him.

The decree or orders herein were made on 15<sup>th</sup> November 2011, and issued on 29<sup>th</sup> November 2011. The application for Stay of Execution was made on 16<sup>th</sup> December 2011 that is some 21 days later. That was not an unreasonable delay. The first condition for stay of execution was met.

On the second question whether the applicant would suffer substantial loss, it is necessary to look at the context of the orders. An acrimonious Petition and Cross-Petition for divorce. Without a proper and detailed Affidavit of Means, there may have been no proper basis for awarding the Respondent a global maintenance sum of Ksh 70,000/= per month. He could indeed suffer substantial loss and suffer financial embarrassment as he has now to maintain two houses, the house of his divorced wife, and his own home with a new wife. Matters of this nature have to be considered in a wholistic manner, keeping in mind always, the welfare of the children who are in the custody of the mother.

Being of this mind, what is the proper basis for granting the Applicant the prayers he seeks? To find favour with the court, the Applicant must provide security adequate to guarantee his observance of the orders which the court would ultimately make, and would be binding on him. I order that there be a stay upon the condition that the applicant deposits in court a sum of Kenya Shillings five hundred thousand (*Ksh 500,000/= within 21 days of the date herein*). Costs in the cause.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 24<sup>th</sup> day of February, 2012**

**M. J. ANYARA EMUKULE**  
**JUDGE**