



N.S.G.....PETITIONER

VERSUS

S.C.G.....RESPONDENT

RULING

The applicant in the Notice of Motion dated 16th December 2011 is the respondent in the Divorce Cause No.[.....] of 1992 whose marriage to the petitioner/respondent was dissolved on 7th June 1994. Subsequently the applicant was ordered to pay the petitioner/respondent maintenance of Kshs.30,000/= per month, commencing on 1st January 2000.

Upon default by the applicant, the petitioner/respondent applied to have the applicant condemned to pay the arrears (outstanding as at May 2010) with interest, and for orders that the applicant be committed to jail for failure to comply with the order for the payment of maintenance.

On 10th May 2010 the applicant applied for an order to liquidate the maintenance arrears by instalments of Kshs.30,000/= which would be paid alongside the monthly instalment of Kshs.30,000/=. Accepting the petitioner/respondents' argument that interest on arrears was payable and that the proposal for payment of such arrears by instalments could only be considered if the sum payable monthly was enhanced, the Honourable Mr. Justice Maraga (now J.A.), on 30th November 2011, allowed the applicant to liquidate the arrears due by instalments, but ordering that the same be paid in 12 equal monthly instalments of Kshs.250,000/= with effect from 30th December 2011.

Further, the judge ordered that in default of payment of any one such instalment the couple's matrimonial home be sold to clear the arrears and interest, with the balance being deposited in an interest bearing account in the joint names of their advocates, pending the determination of the severance suit between the parties.

Aggrieved by the said order of Maraga J. (as he then was), the applicant filed this Notice of Motion, praying that temporary orders do issue, staying the execution of the order pending the hearing and determination of his appeal, filed under a Notice dated 13th March 2011.

Additional to the existence of the appeal (which he believes has high chances of success) the applicant's other grounds cited in support of the Notice of Motion are that he is not financially able to raise the Kshs.250,000/= ordered, (being retired and sickly) and that the sale of the matrimonial home, if not restrained, would render him and his family homeless, and as such occasion him substantial/irreparable loss. A further ground raised is that the amount of arrears, as ordered by the court are disputed.

The application is opposed on the strength of a replying affidavit of the petitioner/respondent sworn on 19th January 2012 and filed on the same date. The same sets out the petitioner/respondents' tabulation of arrears, inclusive of interest, which the Hon. Mr. Justice Maraga ordered to be at court rates.

The application was argued by way of written submissions followed by brief oral highlights. The

applicant has rightly submitted that, for the court to grant a stay of execution, the applicant must satisfy it that:

- 1. He will suffer substantial loss if the stay order is not granted.**
- 2. The application for stay has been made without undue delay.**
- 3. He has given such security as may be ordered by the court for the due performance of the decree or order as may be ultimately binding upon him.**

The petitioner/respondent's reply submission is mainly that the application is unmeritorious since the applicant has admitted being indebted to the petitioner/respondent for the payment of arrears of maintenance over and above his monthly liability to pay maintenance until the matrimonial property is severed. She also argues that the application is procedurally defective, having been brought under the Civil Procedure Rules. Further the petitioner/respondent has submitted that the appeal itself would not succeed having been filed outside the prescribed time frame. Lastly the petitioner/respondent has submitted that the applicant has failed to demonstrate his willingness to abide with any order for security by proposing that he be allowed to deposit Kshs.100,000/= in court.

There is no dispute that the application herein was timeously brought. As regards the issue of procedure I choose to be guided by **Article 159 (d) of the Constitution of Kenya 2010**, which requires that the court administers justice without undue regard to procedural technicalities. It is trite that the principles upon which to grant or refuse a stay of execution of orders or decrees are as set out in Order 42 of the Civil Procedure Rules.

The issue as to what constitutes the correct arrears as to justify or not justify the orders appealed against is for the Court of Appeal to decide. I am of the considered view that the main question for determination herein is whether the applicant has demonstrated that he would suffer substantial loss if the stay is not granted. He says he is unable to raise the amount necessary to liquidate the outstanding arrears in order to bring the instalments for maintenance up to date. His reasons for financial incapacity have been rejected by the court in past rulings.

In the ruling exhibited by the applicant, it is recorded that the applicant has previously deponed that he was willing to have the arrears of maintenance defrayed from his entitlement after the suit property "*which is the subject of the suit No. H.C.C. Misc. Appl. No. 30 of 2005 is severed.*" It is not clear whether the said property is the same one that the applicant says is his home and now threatened with a sale, as a consequence of the court orders sought to be stayed. What is clear is that the said property is matrimonial property.

The applicant having admitted that the petitioner/respondent is entitled to a share of the matrimonial property, and having deponed as to his willingness to have the maintenance arrears defrayed from his entitlement thereto, he cannot now, rightfully allege that such a sale would cause him substantial loss.

In view of the above I am not satisfied of the merits of the application, which, from my perusal of the record, appears to be a delaying tactic. The same is hereby dismissed with costs to the petitioner/respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21st DAY OF JUNE, 2012.

M.G. MUGO

JUDGE

In the presence of:

for the petitioner.

for the respondent.