



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL 105 OF 2007**

**MAUR ABDALLA BWANAMAKA ..... PLAINTIFF**

**- Versus -**

**NASSIM SALIM HADI..... DEFENDANT**

**Coram: Before Hon. Justice Njagi**

**Court clerk - Ibrahim**

**R U L I N G**

By a ruling delivered by the Children's court on 13<sup>th</sup> July, 2007, the defendant in Children Cause No. 137 of 2007 was ordered to pay a monthly sum of Kshs. 28,225/= to the plaintiff towards the upkeep and maintenance of their children, pending the final hearing and determination of the aforesaid suit. He appealed against that order after which he also filed this application by way of a notice of motion dated 19<sup>th</sup> July, 2007, under O. XLI rule 4 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The application seeks from the court orders-

- 1. That there be a stay of execution of the order issued by the Children's Court on 13<sup>th</sup> July, 2007 pending the hearing and determination of the applicant's appeal to this court, and**
- 2. That the costs of this application be provided for.**

The application is supported by the applicant's affidavit sworn on 3rd September, 2007, and is based on the grounds that-

- (a) The Children's Court has issued an order directing the applicant to pay a sum of Kshs. 28,225/= as monthly maintenance to the respondent pending the hearing of the suit.**
- (b) The applicant has now filed an appeal against the said order and it will take time before the appeal is heard.**
- (c) The respondent may wish to enforce the order and the applicant has no means by which to pay the said sum.**
- (d) The applicant has been paying Kshs. 7,000/= as maintenance to the Respondent since their divorce in March, 2007, apart from paying School fees and medical expenses of the children.**

**(e) The applicant is willing to pay the said sum of Kshs. 7,000/= pending the hearing and determination of this appeal.**

In her replying affidavit sworn on 15<sup>th</sup> September, 2007, the respondent denies that the applicant has been paying a maintenance of Ksh 7,000/= per month, and avers that the amount paid was in respect of eddat in accordance with Islamic Sharia. This amount is not for the children but for the divorced wife only. She concedes that the applicant has been paying school fees, but avers that all she has seen in respect of medical cover is a medical application form without the valid policy. She also states that she knows of her own knowledge that the applicant's income is well above Kshs. 300,000/= per month; that he is a prominent politician in the Coast Province and especially Kisauni Constituency where he personally bank-rolls a football tournament each year; and that he routinely books full page advertisements in the local dailies, and owns Real Kisauni Football Team.

The respondent further avers that in her plaint in the Children's Court, she had prayed for maintenance at Kshs. 56,450/= per month as was commensurate with the standard of living her children were accustomed to at the time she was living together with the applicant, and the award of Kshs. 28,225/= was in fact only a half of what she had prayed for. She therefore prays that the application be dismissed with costs.

During the hearing of the application, Mr. Khatib appeared for the applicant while Mr. Mwinyi appeared for the respondent. Mr. Khatib submitted that there was no legal basis for making the order as no definite figures had been pleaded, and no documents were attached to prove the sum of Kshs. 28,225/=. He contended that the applicant was ready to pay Kshs.7,000/= per month as he is also paying school fees, and taken a medical cover for the children in order to enable them live in comfort. He also maintained that the applicant is a business person running a clearing and forwarding business, and can ill afford to pay Kshs. 28,225/= per month. He concluded by arguing that there was no proof that the applicant's income was Kshs. 300,000/= since a company is a different person from the shareholders, and then applied for leave to continue to pay Shs. 7,000/= per month pending the hearing of the appeal.

Opposing the application, Mr. Mwinyi submitted that the respondent had given an extensive breakdown to justify her application for Kshs. 56,450/= per month. She was awarded only a half of what she had applied for and therefore there was a basis for the award. Contrary to what the applicant's counsel alleges, the applicant is not paying anything and that what he had paid was something called "eddat" which is a payment to a wife upon divorce. The applicant was a man of means and a payment of Kshs. 28,225/= would not pose any hardship to him. Counsel finally argued that a stay was an equitable remedy and the applicant had not come with clean hands as he had not paid even one installment. He therefore asked for the application to be dismissed with costs.

In reply, Mr. Khatib said that in the plaint, part of the maintenance was meant to go to education as one of the Children was going to school. He then submitted that school fees and transport had been paid for as well as medical cover, and finally that upon a divorce a wife is not entitled to eddat.

Having considered the pleadings and submissions of counsel, it appears to me that what stands out to be determined is whether the applicant qualifies for a stay of execution pending appeal in terms of O. XLI rule 4 (2) of the Civil Procedure Rules. This subrule states as follows –

**“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.**

The first condition is that the court must be satisfied that substantial loss may result to the applicant unless the order of stay is made. In this case, Mr. Khatib for the applicant argued that there was no specific sum prayed for and therefore there was no basis for the Children's Court awarding a figure of

ksh. 28,225/=. In her replying affidavit, however, the respondent avers that she had prayed for maintenance at Kshs. 56,450/= per month. This is confirmed by the Magistrate's ruling where he says –

**“In this regard his being a joint duty and bring (sic) to the fact that the defendant and applicant have admitted earning an income, I hereby apportion their contribution to a 50 – 50% basis. Accordingly the court awards the applicant Kshs. 28,225/= as monthly maintenance payable by the defendant to the plaintiff towards the maintenance of their children...”**

Since the sum of Kshs. 28,225/= awarded is only 50%, it follows that the sum which had been claimed was Kshs. 56,450/= per month as submitted by Mr. Mwinyi and as averred in paragraph 11 of the respondent's replying affidavit.

Arising from this, the next issue is whether the applicant can ill afford to pay Kshs. 28,225/= per month for the upkeep and maintenance of his own children as submitted by Mr. Khatib. He further argues that he is already paying school fees for the elder child, and that has also taken out insurance cover for the medical expenses of the children. In the circumstances, he offers to pay Kshs. 7,000/= per month, which he alleges he is currently paying, pending the hearing and determination of the appeal. The issue of the insurance cover is debatable. Whereas the applicant says that he has taken out that cover, the respondent disputes it. She states in her replying affidavit that all she has seen is a medical application form without the valid policy. This derives support from the ruling of the learned Children's Magistrate when he said –

**“Although the defendant alleged to be paying the fees and taken out medical insurance cover, there is absence of proof since all that is annexed to his replying affidavit is a medical application form that cannot be construed as a genuine medical cover...”**

From this observation by the court, it is patently clear that the applicant has not taken out a medical insurance cover as he alleges or at all.

The second related matter is in connection with the payment of Kshs. 7,000/= per month which the applicant alleges he has been paying and undertakes to continue paying till the appeal is heard and determined. The respondent states that by so saying, the applicant has perjured himself because in fact he has not been paying any such money. All he paid was “eddat”, a payment made to a wife on divorce, and which therefore has nothing to do with maintenance of the children. I find, therefore, that the applicant has not been forthright on that issue.

The applicant says he cannot pay the sum of Kshs 28,225 which is "being demanded." I would say that this amount is not just being demanded, as he puts it, but also that it is a sum which the court itself ordered to be paid. It is significant that the applicant is very quick to tell the court that the respondent earns Kshs 7,000/= per month. He is equally quick to offer a payment of Kshs. 7,000/= per month. Surprisingly, he does not as much as whisper, even to the court, how much he earns. His own income remains a closely guarded secret which he is keeping very close to his chest. The respondent has stated on oath that she knows, of her own knowledge, that the applicant's income is well above Ksh. 300,000/= per month. The applicant has not denied it. In paragraph 10 of his supporting affidavit, he avers as follows-

**“That I am a businessman undertaking a clearing and forwarding business which I cannot afford to pay (sic) a sum of Kshs. 28,225/= per month as maintenance.”**

There has to be a basis upon which he can afford to pay Kshs. 7,000/= per month but not Kshs. 28,225/=. That basis is his income and expenditure, which he has very carefully avoided disclosing to the court. By so doing, he has failed to satisfy the court that substantial loss may result to him unless the order of stay is granted.

As for whether the application was filed timeously, I note that the applicant filed a memorandum of appeal on or about 20<sup>th</sup> July, 2007. That was seven days after the order for the payment of maintenance at the rate of Kshs. 28,225/= per month. However, this application was not filed until 4<sup>th</sup> September,

2007. That was slightly over 7 weeks since the order was made, and six weeks after the appeal was filed. Seven weeks is a long time and the applicant ought to have come to court much more expeditiously. I therefore find that the application was not made without unreasonable delay.

Finally, this is a court of equity and he who comes to equity should do equity and come with clean hands. The applicant was ordered to pay maintenance at Kshs. 28,225/= per month on 13<sup>th</sup> July, 2007. By the time of filing the application, and the time of canvassing this application, he had not paid a single installment as a token of his bona fides in this matter. He has neither done equity, nor has he come to court with clean hands.

For the above reasons, the order of stay is not merited and the application, therefore, is hereby dismissed with costs.

It is so ordered.

Dated and delivered at Mombasa this 18<sup>th</sup> day of December, 2007

L. NJAGI

JUDGE