REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL APPEAL NO. 2 OF 2004

IBRAHIM MAGONA (ALIAS) JOSEPH MAGONA ::::::::::APPELLANT

VERSUS

SAUMU ABDALLAH :::::::::::::::::::::::::::::::::::::: RESPONDENT

R U L I N G

The application before me was filed on 3/3/2004 under a certificate of urgency.

The applicant has moved the court under OXLI R4 of the Civil Procedure Rules. He is asking the court to order a stay of execution of the Kadhi's judgment in Eldoret Divorce suit No. 8 of 2002 pending hearing and determination of his intended appeal. He is also asking for costs of the application.

The application is based on two grounds i.e.

(a) That the children of the marriage are in danger of being disrupted in their education if this application is not granted; and

(b) That the children are in Boarding schools and should remain there pending the hearing of the Appeal.

He has also filed a supporting affidavit in support of the same. The respondent in response filed her grounds of opposition together with a replying affidavit on 11/3/04 I have read these affidavits along with the grounds in support of the application and the grounds of opposition. I have also read the annexed judgment of the Kadhis court and noted the contents therein.

Basically, the applicant is asking the court to stay execution of the Kadhi's judgment and order that he continues staying with the 2 issues of the marriage pending the hearing of the intended appeal.

The application pre-supposes that the judgment in question has not been executed.

In paragraph 4 of his supporting affidavit, the applicant has deponed that

"I reside with the 2 issues of the marriage……."

In paragraph 5 of the same affidavit, he had avered that the children go to St. Bridgid's Girls and Erait Academy respectively.

In response to these two allegations, the respondent in paragraph 9 of her replying affidavit has deponed that "*The applicants affida vit is full of falsehoods and half truths and is only armed at a vain attempt to mislead the court*".

In her paragraph 13, she had deponed that one of the children namely Jean Magoma is in her custody and is a pupil at Kaimosi Junior Academy. To support this averment, she has annexed receipts for school fees and some test papers for the month of February, 2004.

Not surprisingly, the applicant herein remained more to this allegation. Although he filed a supplementary affidavit after receiving the reply affidavit, he chose not to rebut these averments. His silence would only mean one thing in that the respondent is telling the truth about the present whereabouts of the said children.

In her address to court, she told the court that although the other daughter is still at St. Brigid's secondary school, she served the decree from the Kadhi's court on the school, and she therefore has custody of the child. The applicant herein did not rebut that issue either. She also said that she has paid all their school fees including the arrears since the judgment was delivered.

Again, the applicant did not controvert this. He is just asking the court to maintain the status quo yet he has failed to tell the court what the current status quo is.

Indeed he has not annexed to his supplementary affidavit, any evidence that he is the one who paid this term's school fees for the 2 children yet the respondent has shown that she has paid the school fees for one of the girls.

I am therefore inclined to agree with the respondent that the applicant herein is quite economical with the truth.

Form the respondent's averments which have not been rebutted or challenged in any way by the applicant, it is clear that the decree has already been executed. The respondent has already taken custody of the children in question.

The court cannot stay a judgment which has already been executed. I cannot order that the prevailing situation be reversed to what it was before the date of the Kadhi's judgment. This is what would disrupt the lives of these innocent children.

I have also read the said judgment and noted that indeed, the applicant herein has the custody of other children from a previous marriage while the respondent has none. In my considered view, the applicant has his hands full with these other children and he should take care of them.

The applicant has not shown the court that the respondent is not a fit mother, or that she is otherwise incapable of taking proper care of the children in question while awaiting the determination of the appeal.

The intended appeal can still be prosecuted and if eventually the applicant is given custody of the children, he can still take care of them. Fortunately, they are big girls, they know their father and it would not be too destabilising if they were to be placed back into his custody.

As for now, as stated hereinbefore, there is nothing for this court to stay. The judgment has already been executed. In my considered view, there is no evidence that the children are suffering in any way. The current status quo is what should be preserved.

For the aforegoing reasons, I find that the application before me cannot succeed. I find the same devoid of merit.

I consequently dismiss the same with orders that each party bears its own costs.

WANJIRU KARANJA

AG. JUDGE

DATED THIS 4TH DAY OF JUNE, 2004.

DELIVERED & SIGNED AT KITALE THIS ……. DAY OF JUNE, 2004 IN PRESENCE OF: