



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 3 of 2019

PMGGAPPLICANT

VERSUS

EMJ..... RESPONDENT

RULING

1. The Applicant, PMGG through his notice of motion dated 28.1.19 seeks stay of execution pending appeal of the decree issued in favour of the Respondent, EMJ on 16.1.19 in Mombasa CM Divorce Cause No. 8 of 2018. The Application is premised on the grounds on the face thereof and in the supporting affidavit of the Applicant sworn on 28.1.19.

2. In the judgment from which the decree emanates, the Respondent was awarded maintenance of Kshs. 50,000/= per month with effect from 31.1.17 until the Respondent remarries or dies. Being aggrieved by the judgment of the trial court, the Applicant has filed the appeal herein against the same. The Applicant asserts that the Respondent has threatened to execute the decree which will defeat his right of appeal. The Applicant further avers that he has an arguable appeal, which he filed timeously. He is ready to provide such security as may be directed by the Court. According to the Applicant, the Respondent will not suffer any prejudice as stay of execution will only be temporary pending appeal.

3. The Respondent has by her undated replying affidavit opposed the Application. She avers that the Application has no merit; the Application is based on a misapprehension of the law; the orders sought are incapable of being granted; the application is bad in law, frivolous and vexatious and an abuse of the Court process; brought in bad faith to scuttle execution of a valid decree; does not meet the conditions for stay pending appeal; the Court is *functus officio* and the application is *res judicata*.

4. According to the Respondent, the Applicant threw her out of their matrimonial home and shut her out of family businesses, property and assets acquired, developed and/or improved during their marriage. The Respondent has since had to rely on friends and family while the Applicant lives lavishly. She asserts that she is entitled to a reasonable source of livelihood from the Applicant who is now using the present Application to further delay or obstruct the same. The Applicant has not demonstrated that he will suffer any substantial loss if the decretal amount is paid to her. She urged the Court to disallow the Application.

5. Directions were taken for filing submissions and timelines given. However, neither party complied with the said directions. The Court has therefore proceeded to consider the Application on the basis of affidavit evidence.

6. In considering whether to grant an application for stay of execution or not, the Applicant must satisfy the provisions of Order 42 rule 6 (2) i.e.

(i) The application is brought without undue delay;

(ii) Substantial loss will result;

(iii) Provision for security for costs.

7. The judgment appealed against was delivered on 16.1.19 while the Application for stay was filed on 28.1.19. I am satisfied that the Application was filed timeously.

8. On loss, the Applicant has stated that if stay is not granted and execution proceeds, his right of appeal will be defeated. The Court notes that the Respondent did state in her affidavit that she depends on friends and relatives for her upkeep. For this reason I am of the view that if

the decretal amount is paid to her at this stage, she may be unable to refund the same in the event that the appeal succeeds. This may render the appeal nugatory.

9. As regards provision for security, the Applicant has stated that he is ready to provide such security as may be directed by the Court.

10. Having considered the foregoing, I find that the Applicant has satisfied the legal provisions for an order of stay of execution. Accordingly, I allow the Application and grant the Applicant a conditional stay of execution on the following terms:

- i) That the Applicant shall file the record of appeal within 21 days.
- ii) The Applicant shall deposit in Court the decretal amount in Court within 14 days.
- iii) In default of any of the above orders, the stay granted herein shall automatically lapse.

DATED, SIGNED and DELIVERED in MOMBASA this 17th day of January 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**