



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. 103 OF 2016**

**C. H. P.....APPELLANT/APPLICANT**

**VERSUS**

**P. M. C.....RESPONDENT**

**(Being an appeal from the Ruling of the Senior Resident Magistrate Hon. Orange K.I.**

**delivered on 18<sup>th</sup> October 2016 in Milimani Petition No. 708 of 2016)**

**RULING**

1. The applicant and the respondent got married on 23<sup>rd</sup> May 2015 in India under Hindu Customary law. The respondent is an Indian national and the applicant is a Kenyan national. On 18.10.2016 the respondent obtained from the Senior Resident Magistrate's Court at Nairobi an order for her to be paid by the applicant Kshs.100,000/= every month towards rent and upkeep pending the hearing and determination of the cause she had filed before that court. He was also ordered to pay rent arrears for the house occupied by the applicant. In the suit the respondent had sought monthly maintenance of Kshs.168,500/=; restoration of conjugal rights; applicant be compelled to provide a dependency visa for the respondent; the applicant be restrained from abusing, harassing, assaulting intimidating her; etc. It is in the suit that an application was made seeking interim maintenance of Kshs.168,000/=.

2. The applicant was aggrieved by the orders contained in the ruling of the lower court. He filed an appeal to this court. With the appeal was the present application seeking the stay of execution of the orders pending the hearing and determination of this appeal. The application was on the grounds that the appeal had high chances of success; the application had been brought without unreasonable delay; he stood to suffer substantial loss if the application was not granted; the respondent was merely a tourist in Kenya and any money paid to her would be irrecoverable; he had no means to raise Kshs.100,000/= per month; the respondent was educated and capable of working but had voluntarily refused to work; the lower court order was permanent and final amounting to attachment before judgment; and, that the respondent had survived in Kenya since June 2016 without any assistance. In the affidavit sworn on 15<sup>th</sup> November 2016 the applicant stated that the lower court order was defective

**“as it does not expressly state the date on which the monthly payment of Kshs.100,000/= is to commence and does not expressly state the amount of arrears to be paid and the reason to whom the alleged arrears are to be paid. Consequently, the issuance of a Notice to Show**

**Cause is premature and un-procedural.”**

I will deal with this aspect of the application straightaway. The ruling clearly states that:-

**“The rent has not been paid for three months. The rent is Kshs.50,000/=. The applicant has prayed for an order for immediate payment of rent as she risked eviction.”**

In the “affidavit of means” filed by the respondent she indicated that rent was Kshs.50,000/=. Rent for three months was therefore Kshs.150,000/=. It was clear that the Kshs.100,000/= maintenance was to be paid to the respondent from the date of the ruling. The ruling was delivered on 18<sup>th</sup> October 2016. One cannot reasonably argue that he does not know to whom the rent arrears (total Kshs.150,000/=) was to be paid. The application that led to the ruling was by the respondent. She is the one who sought the order and therefore the money was payable to her for onward transmission to the landlord.

3. The application was opposed by the respondent in the replying affidavit sworn on 6<sup>th</sup> December 2016. Her case was that following their marriage in India on 23<sup>rd</sup> March 2015 they relocated to Kenya (in Nairobi) where the applicant had a permanent residence. They lived together in a house rented by the applicant. On 14<sup>th</sup> June 2016, she stated, the applicant deserted the house and left her there without any support. She had no relative and no source of income as she was not employed. She could not seek employment as the applicant had refused to get her a dependant’s visa. She was on visitor’s visa. Her rent of Kshs.50,000/= per month had remained unpaid. The arrears was Kshs.150,000/= at the time of her application and upto now it was growing. She stated that the applicant had failed to provide her with shelter, food and clothing to which she was constitutionally entitled. She denied the claim by the applicant that she was a tourist, and stated that she was here legitimately as his wife.

4. It is also notable that the applicant deponed that the respondent –

**“is a foreigner who has not disclosed her sources of income. She also has no assets within the jurisdiction of this Honorable Court and therefore cannot refund any mounts paid to her should the Appellant’s appeal succeed.”**

This was an admission that the respondent had no income or means of livelihood while in Nairobi.

5. Lastly, it is not in dispute that the applicant has filed in India a petition to divorce the respondent. The petition has not been heard and determined. As long as that situation obtains, the two are still legally married.

6. On the onset, it should be clear that appeal filed by the applicant against the ruling by the subordinate court has not been heard. The appeal will basically decide whether, given all the facts that were presented before the lower court, the respondent was entitled to the orders that were granted on 18<sup>th</sup> October 2016. What is before this court now is whether or not, given the material that the parties have presented in this application, the court can exercise its discretion to stay the execution of the orders subject of the appeal.

7. The applicant has appealed to this court in exercise of his undoubted right. The court has to guard against the appeal being rendered nugatory. At the same time, it has to be appreciated that the respondent has obtained orders whose fruits she is entitled to enjoy.

8. Secondly, there is no dispute that the application for stay was made without unreasonable delay. Before making an order of staying the execution of the orders contained in the ruling, the court has to be satisfied that substantial loss may result to him unless the order is made (**New Stanley Hotel Limited –v- Arcade Tobacconists Limited [1986] KLR 757**). The applicant is saying that if he pays the ordered money, which he says he does not have in the first place, he may not get it back should the appeal succeed. This is because the respondent is a foreigner who has no source of income. Yet, it is for this same reason that the respondent was seeking to be maintained by the applicant. She stated that she was married to the applicant in India and brought to Kenya as a wife. She was put in a rented house and

provided for by the applicant. She had to abandon her professional career in India to follow her husband in Kenya. She is on a visitor's visa. Her husband has refused to get her a dependant's visa to enable her get a work permit to be able to work. The applicant operates a business in Kenya. This was disclosed in the petition of divorce filed in India. He therefore has income. He did not otherwise swear affidavit of means.

9. Once again, it is when the court will be dealing with the appeal that it will consider the rights of the parties under **Article 45(3)** of the Constitution of Kenya 2010. The court will consider whether the respondent is capable of supporting herself, and whether she is capable of engaging in gainful employment given her visa status. For the time being, and upon consideration of the circumstances that this application has presented, I find that granting stay of execution of the orders of the lower court issued on 18<sup>th</sup> October 2016 will be against the interests of justice. I consequently dismiss the application with costs.

**SIGNED and DATED at NAIROBI this 25<sup>th</sup> JANUARY 2017**

**A.O. MUCHELULE**

**JUDGE**

**DELIVERED at NAIROBI this 26<sup>th</sup> JANUARY 2017**

**M. MUIGAI**

**JUDGE**