

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 54 OF 2016

E M G.....APPLICANT

VERSUS

G W M.....RESPONDENT

RULING

1. On 9th May 2016, the applicant lodged an application herein dated 5th May 2016. He seeks, principally, stay of proceedings in Milimani CMCD No. 32 of 2006 pending determination of an appeal that he proposes to file and leave to file appeal out of time. The application arose from a dismissal of a preliminary objection by the lower court on 24th March 2016, which challenged the constitutionality of an application that was before the lower on payment of alimony.

2. The affidavit in support of the application is sworn by counsel for the applicant. He avers that he was not able to immediately take instructions from the applicant until 3rd May 2016 when he eventually managed to contact the applicant. Incidentally that is also the same day that he was served with process relating to the hearing of the pending application for alimony. There is an affidavit on record sworn by the respondent in reply. It largely deals with matters that do not appear to be of any relevance to the application at hand.

3. The application was urged orally before me on 26th May 2016. I have noted the arguments made before me by counsel.

4. I have perused the record of the lower court. There is nothing in it to indicate that a ruling was ever delivered on 24th March 2016 on a preliminary objection. I have seen copy of the purported ruling in the affidavit filed by the respondent in reply to the instant application, and I have also noted that she has conceded that such a ruling was indeed delivered on the date alleged by the applicant. I have perused through the application in respect of which the preliminary objection was raised, the preliminary objection itself as well as the ruling thereon. I have noted the issues raised and addressed.

5. I have noted that the affidavit that supports the application is by the advocate appearing. There is nothing to explain the delay in getting instructions, or to be in contact with the applicant. Nothing by way of letters or email written by counsel to the applicant. The applicant has not himself sworn any affidavit to explain himself; after all it is he who seeks the orders. Needless to say that in cases of this nature it is advisable for affidavits in support of applications to be drawn by the parties themselves rather than by counsel.

6. There is no appeal before me to warrant grant of orders of stay of proceedings. But again I note that the applicant has a right to a date with an appellate judge. It would be premature at this stage to grant stay of proceedings.

7. The orders that I am persuaded to make are as follows: -

a. That leave to file appeal in respect of the decision made on 24th March 2016 in in Milimani CMCD No. 32 of 2006 is hereby enlarged by fourteen (14) days from the date hereof;

b. That stay of proceedings is to be sought within the appeal to be filed in accordance with (a)

above; and

c. That the lower court file shall be returned to that court's registry.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE