



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 8 OF 2015 (O.S.)
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT

T S J.....APPLICANT

VERSUS

S H S RRESPONDENT

RULING

APPLICANT'S CASE

This Ruling is based on the Notice of Motion filed on 19th December 2016 which the Applicant seeks orders that;

1. 1A stay of any further proceedings in this matter pending the hearing and determination of the intended Appeal against the ruling and order of the High Court (Hon. Kimaru J.) issued on 5th June 2014 in Miscellaneous Application no. 118 of 2013.

2. Costs of this Application be provided for.

The Application is on the following grounds;

On 5th June 2014, in **Miscellaneous Application no. 8 of 2013**, Hon L.Kimaru J. issued a ruling and dismissed the Applicant's application seeking orders to recognise an Arbitral Award issued by the Conciliation and Arbitration Board of Nairobi. The arbitration award was on the divorce and the maintenance and custody of the children of the marriage. The decision came to the attention of the Applicant after the time for lodging a Notice of Appeal had lapsed. The Applicant opted to lodge an appeal against the Ruling of this Court, since the requisite period lapsed she first filed an application that the appeal out of time. Hon. Lady Justice Nambuye (JA) granted leave to the Applicant to appeal against the decision of the High Court out of time as follows;

“The upshot of all the above is that I find merit in the Applicant’s application and I am inclined to allow in on the following terms:-

1. The Applicant has seven (7) days from the date of delivery of the Ruling to lodge and serve a

notice of appeal;

2. Thereafter parties to proceed according to law;

3. Costs of the application to abide the outcome of the intended appeal.”

Accordingly the Applicant filed her Notice of Appeal on 25th November 2016. By a letter of the same date she also sought typed certified copy of the proceedings for the purpose of appeal. The Applicant is apprehensive that if stay of these proceedings is not granted; this matter will proceed for judgment before the intended Appeal is heard and determined. This would render the intended appeal an academic exercise and probably result in conflicting orders being issued by this Court and the Court of Appeal. The Applicant further intimates that the intended Appeal is arguable and has merit.

Owing to the irreconcilable differences of the parties, the Applicant petitioned to His Highness Prince of Aga Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi in 2011 for dissolution of their marriage. These arbitration proceedings culminated with an award that the Respondent was to pay maintenance and school fees for the children which the Respondent blatantly neglected to comply with.

The Applicant further filed **High Court Divorce Cause no. 8 of 2003 TSJ vs. S H S R** seeking orders for enforcement of the above stated orders. The Court ruling of 5th June 2014 by Hon. Justice Kimaru, the Application was dismissed on *inter alia* grounds that only a court of law could make an order granting divorce and further only the Children’s Court was conferred with the jurisdiction to grant orders relating to the custody and maintenance of children.

Thereafter the Respondent instituted other divorce proceedings in the High Court to wit **Nairobi HC. Divorce Cause NO. 118 of 2013 SHSR vs. TSJ** which was determined by a judgment delivered on 25th February 2015 by Hon. L. Justice R. Ougo wherein the court dissolved their marriage on grounds that the marriage had irretrievably broken down. The Respondent thereafter instituted the current proceedings following the determination of the above suit. Throughout the pendency of these proceedings the Applicant intended to appeal against the ruling by Hon. Justice L. Kimaru but it was not lodged within the stipulated time owing to the strained relationship of the Applicant with her former firm of Advocates. On 6th October 2016 the Applicant filed an Application through her current advocate seeking leave of the court to appeal against the Ruling and Order of Hon. Justice Kimaru aforementioned out of time.

High Court Divorce Cause no. 8 of 2003 TSJ vs. S H S R was filed by the Applicant seeking orders for enforcement of the decision of His Highness Prince of Aga Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi, 2011 on dissolution of the parties’ marriage. By ruling of 5th June 2014 by Hon. Justice Kimaru; the application was dismissed as follows;

“...this court holds that the arbitral award made on 15th September 2012 is null and void and is not capable of enforcement as it is purported to grant an order of divorce which is within the exclusive jurisdiction of either the ordinary courts or the Kadhi’s Courts. The board did not have the jurisdiction to grant orders relating to custody and maintenance of the children. That jurisdiction is within the exclusive jurisdiction of the Children’s court as established under the Children Act. The Application by the Applicant dated 18th February 2013 is therefore dismissed with costs to the Respondent. The orders granted by the Board cannot be enforced because the Board exceeds its jurisdiction when granting the same.”

RESPONDENT'S CASE

The Respondent filed Replying Affidavit on 22nd February 2017. Therein he states *inter alia* that; it is true that the Applicant was granted leave to appeal out of time the Ruling By Hon. L. Kimaru of 5th June 2014. However; he vehemently opposes the same on grounds of lack of merit. He avers that the leave so granted was sought and the Applicant has used it with the intention to delay the determination of the main suit. Further, after the dissolution of the marriage of the parties in **HC Divorce Cause 118 of 2013** that

the Respondent filed this suit for division of matrimonial property. The Appeal against the ruling of Hon. Kimaru J. on the arbitral award is not in any way related to this suit; the intended appeal relates to the arbitral award which did not include division of matrimonial property. The division of matrimonial property was not the ground for appeal, only the jurisdiction of the RCAB was.

The Applicant in the arbitral award sought monthly support of Kshs. 50,000 from the Respondent in the arbitral award which has nothing to do with the main suit. The proceedings in this matter which relate to division of matrimonial property will in no way render the Appeal nugatory. This suit is independent of the appeal, the Respondent is misleading this court.

Staying these proceedings only and not **Children's Court matter filed in relation to the children of the marriage where** the Children's court has already ordered that the Respondent pays a sum of over Kshs. 2,000,000 in school fees which are already way above his means, is selective and portrays selfish interests on the part of the Applicant to continue holding the matrimonial property to the Respondent's disadvantage. It is only just and fair that the suit for the division of the matrimonial property be heard and determined.

Further, the arbitral award sought to be upheld on appeal had provided that the matrimonial property be sold and the proceeds be divided equally among the parties. Therefore it is hypocritical for the Applicant to allege that if these proceedings are not stayed, they will lead to contradictory orders being issued in this Court and in the Court of Appeal. He seeks that the court quickly determine this matter so he may dispose of the matrimonial property and use part of his share of the proceeds to pay school fees for the children. Staying this suit will be prejudicial to the children in terms of the above stated fees and to the Applicant in terms of the fact that he continues to remain attached to the Respondent even after dissolution of their marriage.

DETERMINATION:

The Application for Ruling before this court has been brought under **Order 42 Rule 6** of the **Civil Procedure Rules** and **Sections 1A, 1B, 3a & 63(e)** of the **Civil Procedure Act**.

Order 42, rule 6 provides;

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside

No order of stay shall be made under sub rule (1) unless:-

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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”

Further in the case of **GLOBAL TOURS & TRAVELS LIMITED; NAIROBI HC WINDING UP CAUSE NO. 43 OF 2000** Hon. Ringera J stated;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of

proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

In light of the above provision of the Civil Procedure Code and the decision by Hon. Ringera J. stated above, this court has considered the following issues; on the one hand, the Applicant delayed in lodging an appeal understandably due to representation problems. The Ruling was delivered in 2014 and notice of appeal filed in 2016. Finally she managed to obtain leave to file the notice of appeal within the prescribed 7 days. She stated that she wrote to Court for typed proceedings and ruling of the Court. To date it is not clear from the record what happened that the said appeal has not been heard or any information of at least any other steps taken since then. This Court can only infer in the absence of any action taken that there has not been concerted effort to dispose of the appeal.

On the other hand, whilst the High Court Ruling found that arbitral award of 15th September 2012 by Ismailia Conciliation and Arbitration Board was null and void as the Board exceeded its jurisdiction and granted divorce, determined custody and maintenance for the children of the marriage among other issues in the award as these are only granted by Courts. When the Applicant decided to appeal and pursued the process; it is on record that the Applicant participated in divorce proceedings filed in **High Court Divorce Cause 118 of 2013** and divorce was granted. The Applicant did not object or seek stay of proceedings pending the appeal to reinstate the arbitral award.

Similarly a matter was filed in the Children Court where the Respondent was ordered to pay school fees and expenses for the children of the marriage. Again the Applicant did not stop and seek stay of proceedings pending the outcome of the intended appeal.

It is therefore curious to this Court that the stay of proceedings is sought only in these proceedings after the Children Court and the High Court have heard and determined matters are subject of the contested arbitral award and intended appeal. If the fear is that the High Court and Court of Appeal shall grant different orders on the same issues, clearly that has already happened. In fact the Applicant has complied with the orders of the High Court that the divorce ought to be granted by the Court. She participated in the divorce proceedings that culminated in divorce. Similarly she participated in the Children Court case over custody and maintenance of the children of their marriage. Again the applicant complied with the orders of the Court from the Ruling of 5th June 2014.

In fact the intended appeal is compromised because if the Court of appeal were to reinstate the arbitral award; the High Court has already granted divorce between the parties and the Children Court has also heard and determined the issue of custody and maintenance of the children of the marriage. Therefore it would be overtaken by events. In the same vein; there is no reasonable ground to stay these proceedings as the Applicant already wilfully participated in the other 2 cases without seeking stay of the proceedings.

This Court finds that the proceeding herein if heard and determined will not cause substantial loss, whether the appeal is an arguable one or not; it is already compromised as 2 of the issues appealed against have been canvassed in the High Court and Children court and determined. It is not logical and reasonable in the circumstances to hold up hearing and determination of division of matrimonial property awaiting the hearing and determination of the intended appeal.

DISPOSITION

From the above reasons this court finds as follows;

- 1. The application for stay of proceedings is hereby dismissed as the intended appeal is compromised by hearing and determination of 2 cases that addressed the issues of the appeal.**

2. Each party to bear own costs.

DELIVERED SIGNED DATED IN OPEN COURT ON THIS 5TH DAY OF MAY . 2017.

M. W. MUIGAI

JUDGE