



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 56 OF 2013

(Being an appeal from the Judgment of Mrs M. A. A. Ochieng – SRM,

in Kajiado Principal Magistrate’s Court Divorce Cause No. 3 of 2011)

LOKK.....APPELLANT

VERSUS

REL.....RESPONDENT

RULING

1. The application dated 8th October 2014 seeks orders that an order of stay of execution be issued against the judgment and order dated 20th March 2013 in Kajiado Senior Resident Magistrate’s Court Divorce Cause No. 3 of 2011, LOKK –vs- REK pending the hearing and determination of this application inter-partes.

2. As is stated in the affidavit in support that judgment was entered on 20th March 2013 dismissing the applicant’s divorce case. That an order was made directing the Applicant to settle the Respondent, her children and livestock on a portion of the applicant’s land parcel known as Kajiado/Elangata Wuas/709. It is deponed that the question of settling the Respondent on the aforestated land never arose in the pleadings.

3. It is further stated that the Applicant is apprehensive that a notice to show cause has been filed in the lower court and the Applicant risks being committed to civil jail. According to the Applicant, some of the children born by the Respondent were not sired by him. That he had petitioned the court for a dissolution of the marriage with the Respondent on grounds of cruelty and adultery. The Applicant was aggrieved by the court’s finding that it was not possible for him to divorce the Respondent under the Maasai Customary Law and was ordered to settle the Respondent in the portion of land in question.

4. There were no papers filed in opposition to the application. An affidavit of service was filed which reflected that both the Respondent and his advocates were duly served and the case proceeded *ex parte*.

5. As stated in **Order 42 rule 6(2)** of the **Civil Procedure Rules 2010** –

“(2) No order for stay of execution shall be made under subrule (1) unless –

a. the court is satisfied that substantial loss may result to the applicant unless the order is

made and that 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.”

6. The application was filed without undue delay.

7. The Applicant has not disputed that the law applicable to the divorce proceedings in question is the Maasai Customary Law. What has aggrieved the Applicant is the failed divorce proceedings and the order for him to settle his estranged wife and his children and livestock in the aforesated land. Even if one was to presume that the Applicant was entitled to the dissolution of the marriage, the question of the maintenance and custody of the children is yet to be resolved by the children’s court. The maintenance of the Respondent and what her share of the family property she is entitled to has also not been resolved. There is therefore no substantial loss that the Applicant will suffer pending the hearing of the appeal herein.

8. With the foregoing, I find no merits in the application and dismiss the same with costs in the cause.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 7th day of May, 2015

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B. THURANIRA JADEN

JUDGE