



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
MILIMANI COMMERCIAL COURT
CIVIL APPEAL 20 OF 2015
DIVORCE CAUSE NO. 390 OF 2014

S. N.....APPELLANT

VERSUS

G. N.....RESPONDENT

JUDGMENT

By an appeal memorandum of appeal filed on 28th February 2015 by the Appellant aggrieved by the Chief Magistrate's Court Ruling of 13th February 2015, he relied on the following grounds;

- a. The court relied on the wrong provisions of law and ended up arriving at the wrong conclusion that the Appellant should provide alimony to the Respondent.
- b. The court took into account the Appellant means and the Respondents responsibilities and arrived at the wrong conclusion.
- c. The court contravened **Article 45 (3) of the Constitution of Kenya 2010**.
- d. The court misdirected itself in awarding alimony of Kshs. 50,000/= without giving any recourse.

The Appellant sought;

- a. The trial Court's ruling be set aside with regard to payment of Ksh. 50,000/=
- b. The Appellant to continue with his parental responsibilities to his children as he has been doing.
- c. The amount of alimony be determined at the hearing of the main suit.
- d. The costs of the suit be granted to the Appellant.

The Appellant filed affidavit of means of 12th May, 2015 and outlined monthly expenses of Ksh. 60,000/= for his house rent, food and related expenses utilities (water electricity and garbage) and miscellaneous expenses.

He annexed statement of accounts to show he paid Ksh. 1,000/= to the Respondent for the maintenance of the child. He annexed fees for the two (2) children of the marriage. He also annexed copies of medical care expenses for the children.

The Respondent filed supporting affidavit 19th May, 2015 and stated that the Appellant abandoned the

matrimonial home and he sent inadequate amounts of money for her and the children.

He is a man of means capable of providing for the family and education. He owns [*particulars withheld*] and has a salary every month. He is also a land lord with houses close to their matrimonial home. He collects Ksh. 83, 500/=as evidenced by document annexed as “**GM**”.

The Respondent and children’s expenses amount to Ksh. 45,000/=.

- i. Medical - 10,000/=
- ii. Clothing - 10,000/=
- iii. Utility bills - 5,000/=
- iv. Food - 10,000/=
- v. Shopping - 10,000/=

For these reasons the Respondent opposes the appeal for stay of execution of the ruling of the Court as she will suffer loss. The Respondent filed an affidavit of means on 29th July 2015 and in paragraph 3, 4 and 5 outlined her personal expenses at Ksh. 28,000/= and general expenses at Ksh. 36,000/=

ORAL SUBMISSIONS

Learned Counsel for the Appellant sought the Court by an application filed on 25th March 2015 for a stay of execution of provision for alimony payment as it would render the hearing and determination of the appeal nugatory.

The Appellant has always taken care of two (2) children of the marriage. The Appellant stands to suffer irreparable damage. Relying on the Supporting Affidavit of 17th June 2015 and 5th March 2015 and affidavit of means of 12th May 2015 Counsel for the Appellant stated;

- a. The Appellant has maintained his children paid school fees, school expenses and medical care.
- b. He does not have any extra income; apart from the Ksh. 83,000/= or so per month.
- c. He sends the Respondent Ksh.1, 000/= weekly for the young child.
- d. He does not own the properties of the houses as alleged, the properties belongs to the mother as evidenced by the annexed Title document.
- e. He filed the affidavit of means to explain the source of income and financial obligations.
- f. The award of Ksh. 50,000/= as alimony offends **Article 45(3)** of the **Constitution 2010**.
- g. The contribution by the Respondent has not been disclosed and she is placed on a high pedestal and not as equal before the law.

The Learned Counsel for the Respondent objected to the stay of execution application and relied on the affidavit dated 19th May 2015, affidavit of means of 29th June 2015 and Supplementary Affidavit of 17th October 2014.

The Respondent opposed stay of execution on the following grounds;

- 1. That she and the Appellant were married for 20years and he took care of her and the children of the marriage.
- 2. The issue of Ksh. 83,000/=as rent receivables was not contested by the Appellant.
- 3. The issue of being a [*particulars withheld*] was also not contested.
- 4. She filed her affidavit of means as to the expenses Ksh. 1,000/= per week for the young child is not sufficient.
- 5. She needs alimony for accommodation elsewhere.

The Appellant relied on the following;

- 1. **HCCA 13 OF 2013 –Z. M. O VS E.M**

On the grounds that stay of execution of an order is Court's discretion based on if the order will cause substantial loss, the application is made without unreasonable delay and the applicant provides such security.

D.C 154 OF 2008 – R. P. M VS P.K.M

Dealt with the import of the Constitutional provisions **Article 45(3), Article 53(1) and Article 27(3)** on the marriage divorce and matrimonial matters.

2. M.C 8 OF 2013 – W. N VS P.B

Dealt with alimony pending divorce under **Section 25(1)** of the M. C. A (repealed). The ratio of alimony must be not beyond 1/5 of the husband's average net income. A claim of maintenance ought to consider the financial capacity of the spouses.

ISSUES

1. Did the Trial Court contravene the provisions of Article 45(3) of the Constitution?
2. Did the Trial Court give reasons for alimony Ksh.50,000/=
3. Should the Court grant stay of execution of payment of alimony at Ksh. 50,000/= until hearing and determination of the appeal?

ANALYSIS

Article 45(3) Constitution 2010 provides;

“parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage”.

In the present case the Trial Court record shows that the Appellant and Respondent were married for close to 20 years, the Respondent was the home maker and the Appellant breadwinner for the family. Therefore the same arrangement ought to subsist during, and after dissolution of the marriage.

Secondly, parents of the children have a legal duty to provide their basic needs. They supply the psychological day to day physical needs of the children at the initial stage of the child's life feeding, nurturing, comforting and caring for the child, and later educating, guiding, protecting and socializing with the child(ren).

Both parents contribute to both tangible and intangible needs of the children. When the parents do not live together, the resident parent shoulders the largest responsibility to the children.

Therefore in the instant case, **Article 45(3) of the Constitution** like any other law does not operate in a vacuum but is contextualized to the existing circumstances of a marriage.

It would not mean that both spouses share equally responsibility and contribution to the children and the home, but what each spouse deals with should continue to do so in spite of the divorce. The Respondent was the home maker and now the resident parent; she will continue to attend to and/or supervise cleaning the house, washing, ironing of clothes, nurturing, comforting, protecting and socializing with the children.

In this instance the law provided under **Article 45(3) Constitution** is not contravened.

The Trial Court states in page 3 of the Ruling;

“from the affidavit on record, the Applicant has been a house wife though the Petitioner states that she has refused to engage in business and prefers to sit at home. Under the Matrimonial Property Act (2014) child care and taking care of the house and domestic chores is considered

contributions by the party who has done the work. It is clear for the affidavit on record that the Appellant does not have an Income of her own.”

This confirms that the Trial Court gave reasons to justify the payment of Kshs. 50,000/= would be paid each month.

1. Should this Court stay the execution of Kshs. 50,000/=?

This Court adopts the reasoning in the case of **Z.N.O VS E.M CIVIL APPEAL NO 13 OF 2013** that in order for the Court to grant stay of execution in (matrimonial cases ;) **Order 42 Rule 6 CPR 2010;** should be complied with

- a. The Court must be satisfied that substantial loss may result.
- b. The application is made without unreasonable delay.
- c. There is such security as the Court order for the due performance of the decree may ultimately be binding on the Appellant.

In the instant case, the Ruling was on 13th February 2015 and the application for stay of execution was filed on 5th March 2015. So there was no unreasonable delay.

The Court has considered that the Appellant and Respondent were married and they have two (2) children of the marriage the fact that they are separated does not absolve each one of them of their parental responsibility which is statutory and mandatory.

There are two (2) children one aged 17years old and the other 7years old. They are with the Respondent who is their resident parent. The Appellant has been paying school fees, school expenses and medical care and the mother seeks alimony to sustain herself and the children in the home.

Although children matters ought to be canvassed in the Children's Court until, the matter is filed the children continue to require food, clothing and shelter. So there would be substantial loss if the stay of execution was allowed at all in light of the Children's prevailing needs. At least in order not to render the appeal nugatory, the Court may consider conditional stay of execution.

The Court finds that the amount disclosed of Ksh.83,500/= rent receivables, the proceeds from the Appellant being a *[particulars withheld]* have not been confirmed. Suffice is to state that the Appellant was able to fend for his family during the marriage single handedly.

Therefore this Court in line with **Article 165(3) of the Constitution of Kenya 2010** involves its unlimited original jurisdiction to hear a criminal or civil matter. The Court considers as follows; exercising judicial discretion the Court is taking into account the Ksh.83, 500/= that the Appellant is running a separate living unit and carrying out his obligations of school fees and expenses and medical care. The amount of Ksh. 50,000/= is astronomical.

FINAL ORDERS

The Court grants conditional stay of execution in the following terms;

- a. **The Appellant shall pay to the Respondent monthly maintenance of Ksh 20,000/= for food, shopping and utilities of the home and the children until the hearing and determination of the appeal.**
- b. **The Respondent shall remain in the matrimonial home as provided under Section 12 of the Matrimonial Property Act until hearing and determination of the suit (this will reduce the amount as funds to relocate to another house are not to be paid).**
- c. **The Appellant to continue to provide for his children's school fees and school expenses and medical care for the children of the marriage.**
- d. **Each party to bear its own costs.**

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS DAY OF 9TH OCTOBER 2015

M.W. MUIGAI

JUDGE

In the presence of;

Mr. Muchiri holding brief for M/s. Njagi