

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 31 OF 2011

C Y C.....PETITIONER/APPLICANT

VERSUS

K S Y.....RESPONDENT/RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion dated 21st February, 2014 and taken out under Order 42 Rule 6(1) of the Civil Procedure Rules (2010) and all enabling provisions of the Law. The Applicant seeks from court orders that the order for alimony/maintenance be stayed pending the hearing and final determination of the intended appeal.

2. The application is predicated on the grounds that the petitioner/applicant has filed a notice of intention to appeal and requested for proceedings to enable him prepare a record of appeal, that he is dissatisfied with the high award for maintenance which is not based on any tangible evidence, that the intended appeal has a high probability of succeeding, and that the petitioner/applicant may suffer irreparable loss if execution of the maintenance order is pursued against his business.

3. The applicant, C Y C, swore an affidavit on 21st February 2014 in support of the application. His contention is that the court had ignored his assertion that the respondent had means. He also contends that the interim alimony award was arrived at without evidence of income from either side, that he is currently providing for all the needs of the children, and that the circumstances have since changed from what they were when the application dated 20th March 2013 was heard.

4. The Respondent opposes the application. Her grounds of objection are dated 7th March, 2014. She is contends that the court concluded that prenuptial agreements can only be considered after a decree *nisi* issues, and was obligated to deal with the application for alimony *pendente lite* as was before court. She contends further that the applicant having ignored to furnish the court with full particulars of his property and income cannot now complain. She states that the court never awarded her the custody of the children or money for their maintenance, and therefore the allegations touching on that aspect of the application remain moot and are of no consequence to the applicant's application. Finally, she argues that no prejudice has been disclosed as likely to attach on the petitioner if he pays alimony, and the conditions for grant of stay of execution have not been met.

5. I have carefully considered the application, the affidavit on record, the grounds of objection and the oral submissions by counsel for the respective parties. I have formed the view that the only issue for determination is whether the Applicant has made out a case for stay of execution pending appeal.

6. To determine the issue, this court turns to the conditions that must be satisfied for an application under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. The said conditions are that an applicant must demonstrate that substantial loss may result to him unless the order was made, the application was made without unreasonable delay, and he shall furnish such security as the court would order for the due performance of such decree or order as may ultimately be binding on him.

7. Has the applicant demonstrated to the satisfaction of this court that he would suffer substantial loss? No evidence of substantial loss to the applicant has been provided, either to demonstrate that the paying of the sums awarded would cause difficulty to the applicant himself or that he would

lose his money since the respondent would be unable to repay the money. Indeed, the applicant has stated in his supporting affidavit, at paragraph 3, that the respondent has income. He does not say that the respondent would be unable to repay, but that he may suffer irreparable loss if execution of the maintenance order is pursued against his business.

8. Was the application made without unreasonable delay? I note that the order which the Applicant seeks to appeal against was made on 31st January, 2014 and the instant application was filed on the 26th February, 2014. To that end, this court is satisfied that the application was filed timeously, as the difference of about twenty-six (26) days was not unreasonable in the circumstances.

9. However, as has been observed herein above, this court is not satisfied that the Applicant may suffer substantial loss if stay of execution is not granted. There is absolutely nothing in his supporting affidavit that demonstrates that there is the likelihood of the applicant suffering substantial loss if stay is not granted.

10. The upshot of it is that the application lacks merit. It should be hereby dismissed with costs, and I hereby do so dismiss it.

DATED, SIGNED and DELIVERED at NAIROBI this 4th DAY OF September 2014.

W. MUSYOKA

JUDGE

In the presence of Mrs. Ondieki/Mr. Khamati advocate for the petitioner.

In the presence of Mr. Kimani for Mr. Oduk advocate for the respondent.