



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
DIVORCE CAUSE NO. 1 OF 2010

P A W M.....PETITIONER

VERSUS

C M A W.RESPONDENT

RULING

1. On 31st May, 2013 the Respondent herein filed a Notice of Appeal in respect of the ruling of this court delivered on 20th May, 2013. The said ruling was in regard to the Petitioner's Chamber Summons filed on 6th May, 2010. The key prayer (1) was for alimony pending suit in the sum of Shs. 250,000/- per month or such other sum as the court deemed reasonable and just.
2. In allowing the application the court stated:

“Considering all the foregoing, and doing the best in a situation clouded by reluctant disclosure on both sides, I have come to the conclusion that the Petitioner is entitled to prayer 1 allowing interim alimony, in the sum of shs. 127,000/- per month being the current equivalent of ?1000, which is half of the sum she was receiving until March, 2010. This sum is payable from 1st April 2010 until the suit is heard and determined..”

3. Upon delivering the ruling, the court granted 30 days stay of execution. By an application brought under Certificate of Urgency on 17th June, 2013 the Respondent, invoking Section 38 and Rule 3(3) of the Matrimonial Causes Act and Rules seeks to stay execution pending the hearing and determination of the appeal.
4. The main grounds on the face of application which are also fleshed out in the affidavit supporting the application are as follows:

“3. My advocates have drawn the draft Memorandum of Appeal to be filed with the Record of Appeal as soon as proceedings are typed. There is now produced and shown to me a copy of that draft marked “CMA2”.

5. **The judge ordered that I should pay ?1,000.00 from April, 2010 which by 30th May, 2013 amounts to some ? 37,000.00. I do not have this sum. It is a substantial amount. The Petitioner has no assets or income in Kenya to which I can turn to upon the success of the**

intended Appeal to recover any money that may be paid in the meantime. The appeal in that regard will be rendered nugatory. This is particularly so as the Foreign Judgments (Reciprocal Enforcement) Act does not apply to a judgment or order in a matrimonial cause of matter. I cannot therefore enforce recover any sums payable to the Petitioner in Kenya from her assets in the UK.

- 6. The grounds of appeal set out in the Memorandum of Appeal include the refusal by the Court to uphold to the Constitution of Kenya, discrimination on the grounds of sex, the award of alimony pending suit at 50% of my income against the clear proviso to Section 25(1) of the Matrimonial Causes Act that in no case shall alimony pending suit exceed 1/5 of the husband's average net income, the refusal by the Court to consider the Petitioner's independent income as shown in her various affidavits and the making of an award to the petitioner even though she had refused to state her needs resulting into the court plucking a figure from the air, the refusal by the Court to read the Petitioner's affidavit as to her means and the striking out of my application for maintenance.**
- 7. The court also relied on evidence improperly obtained by the Petitioner even though in a previous ruling the court had ordered that I shall have the benefit of objecting to the use of such evidence. The court also appears to have decided that my cross-petition can only be heard after the Petition. This denies me the right to be heard and goes against the provisions of the matrimonial Causes Act and the Rules of Procedure that require a Petition and a cross-petitioner for divorce to be heard together.”**
- 5. The Petitioner filed grounds of opposition dated 21st June, 2013. Part of these grounds raise issues of fact which as Mr. Kinyua argued during the hearing ought to be brought by way of a replying affidavit. The same cannot be said of grounds 1, 3, 7, 8, 11 and 12 are however proper grounds of opposition which are in the following terms:**
 - “1. The Certificate of Urgency is a gross mis-statement of the law and a deliberate attempt to mislead the court as The Foreign Judgments (Reciprocal Enforcement) Act Cap 43 does allow reciprocity regarding financial provisions and maintenance of a spouse – see Section 3(1) (a) and Section 3(3) (d) and is consequently a gross abuse of the process of court and should be struck out with costs against the Advocate making the incorrect allegations.**
- 3. That under the Civil Procedure Rules Order 22(3) the court will require security and no security has been offered.**
- 7. That there is no valid appeal because the Court of Appeal Rules have not been followed in that copies of the alleged Notice of Appeal were served out of time (see Order 77 (1) of the Court of Appeal Rules) and only received under protest and no application under Order 4 of the Court of Appeal Rules has been made to extend time.**
- 8. That the matrimonial Causes Rules (Rule 59) allows execution by way of attachment of the person or property of persons failing to effect payment of any sum of money ordered by the court.**
 - 11. It is Trite law that the Matrimonial Causes Rules do not cover all eventualities and that where the Matrimonial Causes Rules are deficient resort can be made to the Civil procedure Rules.**
 - 12. Section 38 of the Matrimonial Causes Act provides that appeals be treated as if they were decrees or orders made by the court in exercise of its civil jurisdiction. Therefore the interpretation is that this Honorable Court has no jurisdiction to grant the matters prayed for in the Respondent's said Chamber Summons and that such reliefs should be applied for direct to the Court of Appeal in**

accordance with Rule 4(2) of the Court of Appeal Rules.”

6. The application was heard interpartes on 18th June, 2013 and ruling initially set for 10th July, 2013. The same was delayed due to the fact of ongoing election petitions before the court. The delay is regretted.

7. At the hearing the parties canvassed the positions adopted in their respective filed documents. As I understood it, the key plank in Mr. Kinyua's argument on behalf of the Respondent is this:

That the Respondent lives on monies paid out of trusts set up by his grandfather and has no independent income. Equally, that the Petitioner has no income or assets in Kenya although she has income from properties in the UK. That if the Respondent pays the sums ordered by the court, it will not be possible to recover such payments in view of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act (Foreign Judgments Act).

8. I was unable to follow Mr. Kinyua's related argument to the effect that should the Court of Appeal revise the award, the Respondent “cannot recover it being maintenance.” He went to suggest that if the court had ordered for payment of alimony pending suit that would be enforceable. My difficulty arose from the fact that in the grounds of the application and supporting affidavit, the Respondent has referred to the payment ordered in the court's recent ruling as “alimony pending suit”. Be that as it may Mr. Kinyua asserted that the Respondent cannot be asked to give security as the Petitioner occupies his first-row beach house in Kilifi and does not pay rent.

9. For his part, Mr. Osmond for the Petitioner insisted that some form of security is necessary as the Petitioner has a monetary decree to execute. He cited the Constitution Section 93 of the Land Registration Act in asserting that the Petitioner has an interest in the Kilifi house, and therefore has assets in Kenya. His contention is that the decree herein being monetary in nature is enforceable under the Foreign Judgment Act.

10. Further, that there is no reason to justify the stay sought by the Respondent. In answer to the matter of the Kilifi house Mr. Kinyua asserted that the same was not acquired as a matrimonial home, and besides, if that was so the Respondent would not sell it if he won on appeal.

11. Having considered all the material placed before me with regard to this application, I take the following view of the matter. Section 38 of the Matrimonial Causes Act provides that:

“Any decree nisi in a suit for dissolution or nullity of marriage may be appealed from within thirty days after the date of the making thereof and all other decrees and orders made by the court in proceedings under this Act shall be enforced, and may be appealed from, as if they were decrees or orders made by the court in exercise of its civil jurisdiction.”

12. It was therefore not surprising that in urging this application, the parties appeared to advert to the provisions of the Civil Procedure Rules. As far as this court is concerned the exercise of its civil jurisdiction regarding appeals is regulated by Order 42 of the Civil Procedure Rules. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules states:

“ (6) (1) 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 appreciation 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.

(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”

13. The main question for determination is whether the applicant has satisfied the conditions in rr 2(a) and (b). Mr. Kinyua, no doubt alluding to the Court of Appeal Rules, has contended that the appeal will be rendered nugatory if the Respondent wins, as the Petitioner has no assets in Kenya, and that no decree arising out of a matrimonial cause is enforceable against her in the UK, where her assets are.

14. From the pleadings and depositions of the Respondent, there is no doubt that the Petitioner has properties in the UK and is therefore not a woman of straw. Indeed, in his Answer to Petition and Cross Petition filed on 1st November, 2010 the Respondent has included the following prayer:

“c) That the Respondent, Charles, Michael Angus Walker-Munro be granted the following relieves (sic):-

- 1. an order for maintenance to be paid by the Petitioner to the Respondent pending the determination of these proceedings.***
- 2. A periodical payment order***
- 3. A secured provision order***
- 4. A lump sum payment order”***

15. These prayers suggest firstly, that the Petitioner has means, and secondly, that if granted, the resulting orders would be enforceable against her. Rule 59(1) of the Matrimonial Causes Rules provides for enforcement of orders for payment by way of “attachment of the person or of the property of the person in default. Thus it cannot be correct to peg the nugatory element of the application on one mode of attachment, namely attachment of property.

16. Besides, reading through the provisions of Foreign Judgments Act, I cannot find support for the proposition that an order granted under Section 25 of the Matrimonial Causes Act for payment of alimony pending suit, as in this case is not enforceable in the UK. (See Section 3 of the Foreign Judgments (Reciprocal Enforcement) Act.

17. The question of the decree holder's ability to make restitution in the event the decree is set aside on appeal, is not synonymous with the question of the mode of enforcing restitution or the convenience thereof.

18. Although both parties have delved into issues which touch on the merits of the appeal, I would decline the invitation to deal with that aspect as it properly belongs to an application for stay in the Court of Appeal. The discretion of the High Court in dealing with applications of this nature is fettered, unlike the Court of Appeal, by Order 41 rule 6 (See **Vishram Ravji Halal vs Thornton and Turpin [1990] KLR 365.**

19. On many occasions however, the question of an applicant suffering substantial loss and his appeal being rendered nugatory could well coincide. In **Kenya Shell Limited vs Kibiru [1986] KLR 410 Platt, Ag. JA** had this to say:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil procedure rules can be

substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in all its various forms, is the corner stone of both jurisdiction for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

20. The subject matter herein being in the nature of a monetary decree, I am not satisfied that in this case the Respondent has satisfied the requirements of Order 42 rule 6(2)(a) although his application was in the circumstances of this case timeously made. And neither is the offer of the disputed Kilifi matrimonial home as security without its own set of complications in the setting of this case.

I do therefore find no merit in the Respondent's application and will dismiss it with costs.

Delivered and signed at Malindi this 1st day of November, 2013

in the presence of Mr. Kinyua for the Respondent,

Mr. Shujaa holding brief for Mr. Osmond for the Petitioner.

Court clerk – Samwel.

C. W. Meoli

JUDGE

MR. KINYUA – I pray for a copy of the ruling.

C. W. Meoli

JUDGE

COURT – Let copy of ruling be provided.

C. W. Meoli

JUDGE