



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 20 of 2009

MSANYA WAWUDA MWATIKA.....APPELLANT

VERSUS

PENINA WANJALA MSANYA.....RESPONDENT

RULING

Before me is the appellant's Notice of Motion under Order XXI Rule 22, Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Section 3A of the Civil Procedure Act is incorrectly invoked as there are express provisions of the Civil Procedure Rules under which the relief sought by the appellant can be made. The appellant primarily seeks stay of execution of the judgment of the children's court in Mombasa Children's Case No. 295 of 2009 pending hearing and determination of the appeal filed herein. The application is based on the main ground that the appellant has been ordered to pay more than $\frac{1}{3}$ of his net income and if that is allowed the appellant's appeal shall be rendered nugatory.

The appellant further relies upon his affidavit sworn in support of the application. In the affidavit, it is deponed, *inter alia*, that the order of the Children's Court infact coerces the appellant to pay a monthly salary and further orders him to meet medical expenses for his adult son. It is further deponed that unless stay of execution is granted this appeal will be rendered nugatory.

The application is opposed and there is a replying affidavit sworn by the respondent. It is deponed, *inter alia*, that notwithstanding the appeal the appellant should still meet his responsibilities as a parent and this application should be disallowed.

The application was canvassed before me on 19th March 2009. Counsel took me through their client's respective affidavits and urged their client's respective positions. I have considered the application, the said affidavits and the submissions of counsel. Having done so, I take the following view of this matter. The appeal challenges the Lower Court's findings of fact and Law and concludes that the decision is likely to bring the marriage between the parties herein to an end. That challenge in my view is not frivolous. The appeal is therefore arguable. If the order sought is not granted, the Lower Court's decision will be executed and in the event that the appeal succeeds, there is no evidence that the respondent will be in a position to pay back the sums that will have been paid in the interim. I am in the circumstances, persuaded that the appellant has demonstrated that there is sufficient cause to order stay of execution.

Besides showing sufficient cause, the appellant had to show that substantial loss may result to him unless the order of stay is granted. I have already found that the respondent has not demonstrated that the sums ordered to be paid will be refunded in the event the appeal succeeds. By the time the appeal is finalized that sum may not be described as insignificant in view of the known earnings of the respondent. In the absence of evidence that the respondent has the means to pay back the sum decreed by the Lower Court in the event the appeal succeeds, I have come to the conclusion that the appellant will suffer substantial loss unless stay is granted.

The decision appealed against was delivered on 14th January 2009. The appellant lodged his appeal on 17th February 2009 and this application was filed on 4th March 2009. The delay involved is about 1 $\frac{1}{2}$ months. That delay in the circumstances of this case is not in my view inordinate.

The last condition for the grant of an order of stay of execution is one of security. The applicant must give security for the due performance of the decree as may ultimately be binding on him. The applicant has not deponed to the issue of security in his supporting affidavit. The court however, still has the discretion to order the furnishing of such security for the due performance of the decree as may ultimately be binding on him.

Since the appellant has satisfied the rest of the conditions prescribed in Order XLI Rule 4, I am inclined to order a stay of execution of the decree on condition that the appellant deposits the sum of Kshs. 6,000/= per month into an interest bearing account in a reputable financial institution in the joint names of the parties' advocates every 7th day of the month commencing from the 7th of June 2009 until the appeal is determined or until further orders of the court failing which this application shall stand dismissed.

The respondent shall have the costs of this application.

Each Party has liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Angote holding brief for Kipsang for the respondent.

F. AZANGALALA

JUDGE

7TH MAY 2009