



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. 40 OF 2015

BETWEEN

M E K M APPLICANT

AND

G L M RESPONDENT

(Application for stay of execution from the Judgment of the High Court of Kenya at Eldoret (Kimondo, J.) dated 19th March, 2015

in

DIVORCE PETITION NO. 1 OF 2000

RULING OF THE COURT

1. This is an application for stay of execution of the High Court Order requiring the applicant to pay the respondent Kshs.20,000/= per month as maintenance pending hearing and determination of the appeal.
2. The applicant and the first respondent got married on 25th August, 1989. Subsequently the applicant sought to have the marriage dissolved as well as maintenance.
3. The first respondent filed an answer to the petition and a cross petition. He also sought maintenance by the applicant.
4. On 19th March, 2015 the High Court (**Kimondo, J.**) delivered a judgment allowing the petition and cross-petition for divorce on grounds of desertion and cruelty. The learned judge further ordered the applicant to pay maintenance to her estranged husband in the sum of Kshs.20,000/= per month until the respondent “*becomes capable of supporting himself; or, he remarries; or he dies, whichever is earliest.*”
5. Being aggrieved by that decision, the applicant preferred an appeal to this Court. She also applied to the High Court for stay of execution of the order for maintenance pending the hearing and determination

of her appeal. The application for stay of execution was dismissed vide a ruling delivered on 18th June, 2015.

6. In her affidavit in support of the application seeking stay of the maintenance before this Court, the applicant stated that she had to apply for a loan to meet part of the maintenance sum that she was ordered to pay. She did so because the respondent was threatening to execute the decree.

7. The applicant contended that her appeal is arguable, and added that the respondent “*has some means and is not a man of straw.*”

8. The respondent, who was unrepresented, opposed the application for stay of execution. He stated that he had no means of supporting himself. He has a one acre parcel of land and a residential house.

The respondent did not file a replying affidavit but made a brief oral reply as highlighted herein above.

9. In the judgment that gave rise to this appeal, the learned judge stated, *inter alia*:

“Article 45 (3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage, and dissolution of the marriage. Equality in marriage must surely relate to support of an impecunious spouse at the time of divorce. The petitioner had sought maintenance. But the husband is not a man of means. The husband seeks maintenance. The petitioner is well placed to support him. The respondent is now 68 years old. Just a year ago, the respondent was appointed a member of Athi Water Services Board. It is not a full time or permanent job. The term ends in two years. I cannot think of a better case where the wife should maintain the husband. The court has discretion to order the amount of maintenance. I think a sum of Kshs.20,000/= per month is just, reasonable and sufficient.”

10. In her memorandum of appeal that was filed on 4th August, 2015, the applicant (*Appellant*) faulted the learned judge for, *inter alia*, ordering her to maintain the respondent, even when the respondent had been maintaining himself for over 18 years and had not shown that his life had drastically changed; for ordering her to maintain the respondent when the respondent had not placed any evidence to show that the applicant had financial means and capacity to maintain the respondent; and for arriving at a maintenance figure of Kshs.20,000/= per month without any proof of her earnings.

11. We have considered the application before us as well as the brief submissions on record. It is now a well settled practice that in an application of this nature an applicant has to satisfy the court that the appeal or intended appeal is arguable and that unless the order of stay of execution is granted the appeal or intended appeal, if successful, shall be rendered nugatory. Whether or not an appeal would be rendered nugatory, if successful, would ultimately depend on the peculiar circumstances of each case. See **RELIANCE BANK LIMITED V NORLAKE INVESTMENTS LIMITED [2002] 1 E.A. 227.**

12. There is no dispute that the appeal is arguable. What we need to consider is the second limb, that is, whether the appeal, if successful, shall be rendered nugatory unless the order of stay of execution is granted.

13. From the material on record and by his own admission, the respondent is not a man of means. It appears to us that if the appeal was to succeed the respondent would be unable to refund the maintenance sums that would have been paid to him. In such an event, the appeal would have been rendered nugatory. The applicant says she has had to borrow funds from a bank to satisfy the decree issued by the High Court. She stands to lose that money if the appeal is successful.

14. Consequently, we allow the applicant’s application dated 10th August, 2015, with the result that the High Court order requiring the applicant to pay to the respondent Kshs.20,000/= per month for maintenance is stayed, pending the hearing and determination of the applicant’s appeal against the judgment delivered on 19/3/2015. Each party to bear its own costs of the

application.

DATED and Delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.