



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA , OUKO & GATEMBU, JJ.A)

CIVIL APPLICATION NO. NAI. 266 OF 2014

BETWEEN

C Y C APPLICANT

AND

K S Y RESPONDENT

(An Application for stay of execution pending the hearing and determination of the intended appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Musyoka, J.) delivered on 31st January, 2004

in

H.C. DIVORCE CAUSE NO. 31 OF 2011)

RULING OF THE COURT

1. Intending to appeal to this Court against the decision of the High Court (W. M. Musyoka, J.) given on 31st January 2014 ordering the applicant to provide alimony pending suit to the respondent, the applicant has in the meanwhile applied to this Court to stay execution of that decision under rule 5(2)(b) of the rules of the Court pending the determination of the intended appeal.
2. In a petition dated 8th March 2011 and amended on 21st September 2011, the applicant, as petitioner, applied for dissolution of his marriage to the respondent contracted on 9th May 1994 on grounds therein set out. The applicant further averred in his amended petition that the parties had entered into a post nuptial agreement dated 29th November 2005 under which agreement was reached regarding payments the applicant was to make towards the respondent's maintenance and support and the upkeep and education of the children among other things.
3. The respondent cross-petitioned for divorce through an answer to petition and cross petition dated 2nd March 2012 in which, in addition to the prayer for dissolution of the marriage, the respondent prayed for an order against the applicant for payment of "monthly alimony to the respondent" and for the "alleged post nuptial agreement dated 29th November 2005 to be declared inadequate, illegal and nullity and therefore of no consequence."

4. Having served notice on the applicant, expressed to be under sections 25 and 26 of the Matrimonial Causes Act, of her intention to apply to court for an order to compel the applicant to pay the respondent *alimony pendente lite* and for the actual and legal custody of the children, the respondent presented an application dated 30th March 2012 to the High Court on 4th April 2012 in which she sought: interim custody, care and control of the children of the marriage; maintenance of the children pending hearing and determination of the suit and an order for the applicant to provide the respondent with alimony pending suit. Specifically the respondent sought provision for:

- a. 4-bedroom mansion or an apartment in a decent neighborhood or the provision of the rent of approximately Kshs. 300,000.00 per month.
- b. Furniture, houseware and home necessities or approximately Kshs. 3,000,000.00 for such purchases.
- c. Kshs. 2,000,000.00 per month for living expenses to cater for the family's electricity, water, food and other sundry expenses.
- d. School fees for the two infant minors at the International School of Kenya and any other tuition and school fees as may be required while at school.
- e. Kshs. 2,000,000.00 per month to cater for the children and respondent's annual holiday together with 3 return air tickets to South Korea or any destination of their choice.
- f. Unlimited medical cover for the respondent and the infant minors.
- g. Return or replacement of the two cars (Prado & Lexus) to be placed at the disposal of the respondent for her day to day use.

5. The applicant responded to that application by filing a notice of preliminary objection dated 27th April 2012 and a replying affidavit sworn on 17th May 2013 and filed in court on 20th May 2013. The preliminary objection was to the effect that in so far as the prayers for custody, care and control of the children of the marriage and maintenance of the children are concerned, the proper forum was the Children's Court.

6. In his replying affidavit, the applicant deposed that the parties entered into a postnuptial agreement dated 29th November 2005 on the basis of which he agreed to pay to the respondent in the currency of Korean Won, and did pay, an amount equivalent Kshs. 30,000,000.00 "in full and final settlement of the respondents maintenance and support" and that the respondent was to provide for the upkeep and education of the children out of that amount; that the respondent invested that amount in stocks in Korea, an apartment and money lending business from which she derives returns and from which she can comfortably take care of the children. For those reasons, the applicant contended that the respondent was adequately provided for and was not entitled to any alimony pending suit. The learned judge of the High Court did not however agree with the applicant in that regard. The judge was also not persuaded by the submission by the respondent that postnuptial agreements are not recognized in Kenya. Having found, however, that post-nuptial settlement agreement "*are recognized under section 28 of the Matrimonial Causes Act*" and that "*the settlement made on 29th November 2005 is a matter that this court can entertain*" the learned judge went on to hold that: "***...going by the provisions of sections 28 of the Act, such settlement can only be considered after pronouncement of the decree for dissolution of the marriage the subject of the proceedings. This court cannot make an inquiry into such settlement before then.***"

8. In effect, the learned judge was of the view that the settlement agreement between the parties on maintenance alluded was irrelevant for purposes of the application before him.

9. The other ground on the basis of which the learned judge determined the application was that the

applicant “did not furnish court with full particulars of his property and income by way of affidavit as required” under section 44 of the Matrimonial Causes Act and that he had “no other materials to act on apart from what is contained in paragraph 12 of the respondent’s affidavit.” Paragraph 12 of the respondent’s affidavit contained the request for provision as set out under paragraph 4 above.

10. Although during the hearing of the application before us Mr. Ezekiel Oduk, learned counsel for the respondent, argued that on the face of the decision by the learned judge of the High Court the intended appeal is frivolous, we think there is merit in the submission by Ms Jane Ondieki, learned counsel for the applicant, that the intended appeal is arguable. There is the question, for instance, whether if indeed the parties did enter into the postnuptial agreement that settled the issue of maintenance and support on a ‘full and final settlement’ basis, whether it was still open to the respondent to seek further provision, even on an interim basis.

11. The other issue that requires further interrogation and which we think is arguable as submitted by counsel for the applicant is whether the learned judge was right to order provision of maintenance on the basis, and without more, of the expressed or stated needs as set out in paragraph 12 of the respondent’s affidavit. Whereas under section 44 of the Matrimonial Causes Act the applicant was required, after service on him of the notice of application for alimony pending suit to file an affidavit setting out full particulars of his property and income, it is arguable whether the learned judge should have inquired into and taken into account the financial position of both parties. In that regard, we observe, that under section 48 of the Matrimonial Causes Act, there is power given to the court to investigate allegations made in support of and in answer to the application including the power to require attendance for examination or cross examination and for calling of further affidavits.

12. Mindful as we are that an arguable appeal is not one that must succeed, we are for the reasons given above satisfied that the applicant has demonstrated that the intended appeal is arguable.

13. The other matter taken up by counsel for the respondent was that the impugned decision of the High Court is not appealable, as of right, by reason of section 38 of the Matrimonial Causes Act, which according to him, imports provisions of the Civil Procedure Act, which would in turn require leave under section 75 of that Act. He referred us to the decision of **Protein & Fruits Processors Limited vs. Enkasiti Flower Growers Civil Appeal (Application) No. 27 of 2006** and **Elijah C. Mwangi vs. Paustine Akumu Sereje Civil Appeal No. 88 of 1996**.

14. Ms. Ondieki does not agree that leave is required and submitted that the notice of appeal dated 14th February 2014 was properly filed and the jurisdiction of this Court under rule 5(2)(b) is properly founded.

15. In **Elijah C. Mwangi vs. Paustine Akumu Sereje** this Court struck out the appeal on grounds that the same had been filed without the requisite leave to appeal. That case involved an appeal from a decision of the High Court made under the Civil Procedure Rules granting conditional stay of execution of a decree passed by a senior resident magistrate’s court and the Court held that there was no automatic right of appeal.

16. **Protein & Fruits Processors Limited vs. Enkasiti Flower Growers** involved an appeal from a decision of the High Court made in exercise of its inherent jurisdiction to extend time under section 8(1) of the Land Control Act, which did not have any provision for an appeal to this Court and nor was the Land Control Act quoted in the Civil Procedure Code or the rules thereunder. In that regard, the Court stated:

“Section 75 of the Civil Procedure Act and Order XLII of the Civil Procedure Rules list the orders out of which appeals lie to this Court as of right. In any other case under Chapter 21 Laws of Kenya not provided for, an appeal only lies with leave of the Court. Such leave must be sought and obtained in the Court for the first instance. If the leave is refused then this becomes a ground of appeal. Otherwise all other statutes, independent of the Civil Procedure Act and Rules have provisions for appeals. The Land Control Act is one such statute.” (Emphasis added)

17. In the case before us, the Matrimonial Causes Act has provision in section 38 for appeals which 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.” (Emphasis added)

18. We do not construe that provision as importing the Civil Procedure Act and the Civil Procedure Rules into matters under the Matrimonial Causes Act. We are therefore not persuaded that there is merit in the argument that the notice of appeal in this case is incompetent by reason that leave to appeal was not obtained.

19. As to whether the intended appeal will be rendered nugatory unless we grant the relief sought, the impugned decision requires the applicant, pending the determination of the divorce petition, to provide the respondent with a 4 bedroomed mansion or apartment in a decent neighborhood in Nairobi or monthly rent at a sum between Kshs. 150,000.00 and Kshs. 250,000.00; furniture, houseware and home necessities or Kshs. 1,500,000.00 for purchase of such items; Kshs. 300,000.00 per month to cater for living expenses and utilities, and a vehicle in the range of a Prado or Lexus.

20. The effect of that order, according to the applicant is that he is required to pay a total of Kshs. 8,050,000.00 initially and thereafter Kshs. 550,000.00 monthly, despite already having paid a substantial settlement. The applicant says that the amount involved is enormous by any standards and there is no likelihood that he will ever recover it from the respondent should the appeal succeed

In **Oraro Advocates v Co-operative Bank of Kenya Ltd Civil Application No. 358 of 1999 (UR 149/1999 [1999] 1 E A 236**, the Court held that:

“In dealing with the issue whether or not success in the intended appeal will be rendered nugatory if a stay is not granted, the court ought to weigh the claims of both sides. The Applicant law firm might find themselves in a very tight situation if required to pay the full decretal amount, whereas the Respondent bank would not be affected by being kept out of the sum. The balance of convenience overall favored the Applicant.”

22. That decision has been followed in subsequent decisions such as

RELIANCE BANK LIMITED VS. NORLAKE INVESTMENTS LTD. [2002] 1 EA 227, where the Court further stated that:

“The factors that could render an appeal nugatory had to be considered within the circumstances of each particular case.”

23. The circumstances in the present case are that the applicant says, though this is challenged by the respondent, that he has already paid approximately Kshs.30, 000,000.00 for the maintenance of the respondent and the children; that despite that agreement he is paying for their child’s education and upkeep in university in the United States of America as well as the education and upkeep of their second child at International School of Kenya. The respondent acknowledges having received some payment in the form of what she referred to as “consolation money.”

24. Weighing the claims by both parties, we think the circumstances favour the exercise of our discretion under rule 5(2)(b) of the Rules of the Court in favour of the applicant. Prayer 1 of the applicant’s application dated 9th October 2014 succeeds with the result that we order a stay of execution of the ruling and order of the High Court dated 31st January 2014 in High Court Divorce Cause No. 31 of 2011 pending the hearing and determination of the appeal. Costs of the application shall abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 27th day of February, 2015.

D. K. MUSINGA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR