



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 100 OF 2010**

**BETWEEN**

**V.V.A .....APPLICANT**

**AND**

**H.S.P.....RESPONDENT**

*(Being an application for an injunction and/or stay of the orders of the High Court pending the lodging, hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Rawal, J.) dated 11<sup>th</sup> February, 2010*

**in**

**H.C.Divorce Cause No. [...]**

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**RULING OF THE COURT**

This application by notice of motion under **rule 5(2)(b)** of the Court of Appeal Rules dated 22<sup>nd</sup> April, 2010 and filed in Court on 10<sup>th</sup> May, 2010 seeks a stay of execution and stay of further proceedings in Nairobi **High Court Divorce Cause No. [...]** and that the costs thereof be provided for. The same is based on the grounds set out in the body thereof and also on the supporting affidavit. The main grounds set out on the body thereof are that unless stay of execution is granted as a matter of urgency, before the hearing of the appeal, the appeal’s result, should it succeed, will be rendered nugatory and will occasion loss and prejudice to the applicant. The applicant reproduced in the application the grounds set out in the draft memorandum of appeal attached thereto and the averments in the affidavit to demonstrate that the appeal is arguable and that he has no capacity to pay to the respondent the monthly amount for her maintenance and the payment of his son’s school fees, as ordered in the Judge’s ruling.

When the application was heard by this Court on 10<sup>th</sup> June, 2010 **Ms Janmohamed** holding brief for **Mr. Menezes** submitted on behalf of the applicant while **Ms Kethi Kilonzo** submitted for the respondent. Ms Janmohamed submitted that there was no submissions made before the superior court to guide it in awarding the respondent Kshs.180,000/= per month in maintenance and payment of school fees for the son of the couple without the production of accounts. She also submitted that it was improper for the learned Judge to take into account the applicant’s position as Managing Director of his company

as the basis of making the maintenance award against him without realizing that he was answerable to the company as his employer.

On the nugatory aspect she submitted that it was too heavy for the applicant to pay the huge maintenance and school fees for the son.

In reply, Ms Kilonzo, learned counsel for the respondent submitted that since the respondent was not employed, it was the responsibility of the applicant to maintain her and also to pay their son's school fees fully. According to her the Judge's assessment was based on the applicant's replying affidavit where he admitted he was paying Kshs.75,000/= per month as maintenance and that there was sufficient material before the superior court to make the assessment.

The twin principles which the court considers before granting an application of this nature are well known. These are for the applicant to show that he/she has an arguable appeal, or in other words that the intended appeal is not frivolous, and that if the application is refused and the appeal eventually succeeds its result will be rendered nugatory; see *Hanishai Devani Limited vs Kenya Commercial Limited – Civil Application No. Nai. 128 of 2006 (UR)* and *Reliance Bank Limited (In Liquidation) vs Norlake Investments Limited – Civil Application No. Nai. 93 of 2002 (UR)*. The application is for maintenance pending divorce proceedings which are in the process. The order of the superior court was for the applicant to maintain the respondent at Kshs.120,000/= per month and payment of rent at Kshs.60,000/= if and when the petitioner enters into a tenancy agreement for her own independent premises. There is also an added responsibility for the applicant to take care of the educational needs of the child of the family *M. V.S.*

The applicant complains that no accounts were placed before the learned Judge to assist her make the right decision on what amount to award the respondent particularly for maintenance. She based this on the claims made by the respondent for Kshs.50,000/= for telephone expenses, Kshs.75,000/= for DSTV and entertainment and Kshs.200,000/= for clothing and accessories, which she considered excessive. We are of the view that this is an arguable point which requires investigation during the hearing of the appeal. In fact the order for the payment of Kshs.60,000/= for rent may be found to be speculative as the respondent had no rental house of her own at the time.

And if the applicant continues to pay the amounts ordered by the learned Judge and the appeal eventually succeeds, he is likely to suffer prejudice as he is unlikely to be refunded the excess payments, if any. In the circumstances we are of the view that this is a proper case for this Court to grant the order of stay sought in prayers 1 and 2 of the motion dated 22<sup>nd</sup> April, 2010 which we hereby do on condition that the applicant pays to the respondent Kshs.60,000/= per month for her maintenance as well as payment of school fees and other expenses for the son as and when they fall due until further orders. A decision on rental payments will await the decision of the intended appeal. Each party to bear his/her own costs of this application. We were not addressed on stay of further proceedings in the superior court and we will not grant that prayer. These are the orders of this Court.

***Dated and delivered at Nairobi this 9<sup>th</sup> day of July, 2010***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**