



**IN THE COURT OF APPEAL OF KENYA
AT NYERI
CIVIL APPLICATION 143 OF 2008 (UR 90/2008)**

JBM APPLICANT

AND

BNB RESPONDENT

**(An application for stay of execution pending the hearing and determination
of an intended appeal from the ruling and order of the High Court**

at Embu (Khaminwa J.) dated 6th June 2008

in

H.C.DIVORCE CASE NO.2 OF 2007)

RULING OF THE COURT

By its ruling dated 6th June 2008, the superior court (Khaminwa J.) awarded **BNB** (*the respondent*) Kshs.250,000 per month as alimony pending determination of a divorce petition she filed against her husband, **JBM**, the applicant herein.

In his application before us, dated 16th June 2008, JBM, prays for an order staying the execution of the superior court order pending the lodgment and determination of an intended appeal against that order. The application is expressed to be brought under **rule 5(2)(b)** of the Court of Appeal Rules. That being the case he was obliged to show not only that his appeal or intended appeal is arguable or that it is not frivolous but also that unless he is granted the order of stay, his appeal or intended appeal if it eventually succeeds, will be rendered nugatory. In his affidavit in support of the application his main ground of complaint is that he is unable to comply with the order of the superior court because his gross income is about Kshs.134,000/= per month, and he has children in foreign universities for whom he pays fees. Additionally, he has another wife with children who depend on him.

Mr. Mageto for the respondent having conceded that the applicant’s intended appeal is arguable for the simple reason that the income of the applicant is not ascertainable at this stage, we do not consider it necessary to deal with the issue whether the applicant has satisfied the first condition. One issue however, remains for consideration. Will the applicant’s intended appeal, if successful, be rendered nugatory unless he is granted the order of stay prayed for herein? Mr. Kariuki for the applicant submitted before us that the applicant is not financially able to satisfy the order of the superior court. The resources the applicant has, he said, go to meet the college fees of their children in foreign universities. He also submitted that the respondent is a rich woman and that she is able to maintain herself. Mr. Mageto swore the affidavit in reply to the application before us. In that affidavit he has deponed, among other things, that the applicant is by law obligated to maintain the respondent who is his wife, and that he has the means to do so. In his submissions before us, Mr. Mageto expressed the view that the respondent has no income of her own and is therefore not able to maintain herself.

The dispute between the parties in actual fact centres on how much the applicant earns. The respondent contends that his income is more than Kshs.900,000 per month. The applicant on the other hand contends that his income does not exceed Kshs134,000 per month, gross. We are conscious of the fact that we should avoid expressing concluded views in this matter as this is not the applicant’s appeal. It is however necessary to make some observations on relevant aspects of the application before us. In view of the fact that the applicant has deposed in his affidavit in support of the motion before us, that he spends over Kshs.2.1 million in fees for his children in overseas colleges, it is doubtful whether he earns only Kshs.134,000. He said that he has to take loans to meet that expenditure. That may well be so, but loans once taken must be repaid. The applicant did not say he is in arrears in loan repayment. From the scanty material before us, we are satisfied that Kshs.250,000/= per month may be on the high side and to require the applicant to pay it in absence of concrete evidence regarding his ability to pay it may expose him to undue hardship and default in payment. Such default may expose him to execution proceedings and thus render his appeal or intended appeal, if successful nugatory.

We also appreciate that the respondent is the wife of the applicant. He is obligated under the law to maintain her. She may be having

income of her own. However, no evidence was placed before us to establish that fact.

In the foregoing circumstances we think that while the interests of justice demand that the applicant be granted a stay, it is also in the interests of justice that the order be conditional in view of what we stated earlier that the applicant is obligated to maintain his wife pending the filing and determination of the applicant's intended appeal. We think that Kshs.50,000/= per month is a fair sum. Accordingly we order that there shall be a stay of execution of the order of the superior court dated 6th June 2008 on condition that the applicant pays to the respondent a monthly sum of Kshs.50,000/= for her maintenance with effect from the date hereof. In default of payment of any one instalment, this application shall stand dismissed with costs.

The costs of this motion shall be in the intended appeal.

Dated and delivered at Nyeri this 12th day of June 2009

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR