



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 22 of 2009 (UR 11/2009)

Z **APPLICANT**

AND

Z..... **RESPONDENT**

(Application for stay of execution pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Rawal J.) dated 21st January, 2009

in

DIVORCE CAUSE NO. 74 OF 2007)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for stay of execution of the ruling and order of the superior court given on 21st January, 2009 whereby the superior court ordered the applicant, *inter alia*, to pay and maintenance and school fees pending the determination of the petition for dissolution of the marriage.

The applicant is the husband of the respondent. They got married on 19th October, 1990 in Colombo, Sri Lanka but since November, 1990 they have been living in Kenya. They have two children of the marriage **N** – a girl born on 2nd September, 1992 and **B** – a boy born on 6th August, 1995. **N** has been studying at B School, a boarding school in Kent, United Kingdom since September, 2006.

The respondent pays school fees of about \$26,000 annually and other school requirements for **N**. **B** studies locally at International School of Kenya where the applicant pays his school fees which is about Shs.255,000/= per term.

The applicant and the respondent have been living in a house on L.R. No. 9..... U Avenue, Gigiri which they own jointly. However, on 30th June, 2005, the applicant left the matrimonial home and now lives in an apartment elsewhere. During their happier times, the applicant and the respondent were running some family businesses, including **R Travel (K) Ltd**, **FR Ltd.**, **BF Products Ltd.** and **Z Holdings Ltd.** However, since their relationship became acrimonious, both have been involved in several litigation primarily concerning property disputes. The respondent has in particular, filed *Winding-Up Cause No. [...]* seeking to wind-up Z Holding Ltd. which is the holding company of the other family companies. The respondent has further filed constitutional Cause No.[.....] against the Attorney General and the Commissioner of Police to prohibit them from charging her with criminal offences in respect of acquisition of Kenyan citizenship through alleged forgery which she claims to have been instigated by the applicant.

On 22nd July, 2007, the respondent filed *High Court Divorce Cause No. [...]* in the superior court for the dissolution of the marriage; custody of the two children of the marriage and maintenance for herself and the children of the marriage. She subsequently filed an application for alimony pending suit; interim custody of the children and maintenance, and, for an order compelling the applicant to pay school fees for the two children. The application was heard by the superior court (Rawal J.) by *viva voce* evidence and by a ruling dated 21st January, 2009 the superior court allowed the application with costs, gave the custody of the children to the wife, awarded monthly maintenance of Shs.200,000/= from July, 2005 when the applicant left the matrimonial home and further ordered the applicant to pay school fees for the two children and back dated school fees for **N** to year 2007. The applicant being aggrieved by the decision filed a notice of appeal and the present application. The husband had already lodged *Civil Appeal No. [...]* before the application was heard.

The principles which guide the Court in an application of this kind are notorious. The applicant is required to demonstrate both that the intended appeal or appeal is arguable and, further, that, unless the order sought is granted, the intended appeal or appeal, if ultimately successful, would be rendered nugatory.

Mr. Billing, learned counsel for the applicant, submitted that the appeal is arguable. He referred to the grounds in the draft memorandum of appeal. It is clear that the applicant will be contending, among other things, that the monthly maintenance of Shs.200,000/= is unreasonable; that the award is based on erroneous computation of his monthly income at Shs.1,250,000/=; that the superior court erred in backdating the award of maintenance to July, 2005 and the award of school fees for N to January, 2007, and, that the superior court erred in not taking into account the respondent's admitted monthly salary of Shs.110,000/=. The applicant states that as a result of the orders of the superior court, the advocates for the respondent has demanded a total of Shs.14,864,000/= comprising of Shs.8,400,000/= being maintenance at the rate of Shs.200,000/= per month for a period of 42 months and Shs.6,446,000/= being the school fees for N at the rate of \$26,000 per annum from January, 2007.

Mr. Ongicho, learned counsel for the respondent on his part contended that the appeal is not arguable.

We have considered the respective affidavits and submissions by the respective counsel. Now that the appeal has been filed, it would be preemptory to discuss the merits of the appeal in detail. Suffice to say that we are satisfied that the appeal is indeed arguable and the substantial sums of money being demanded from the applicant is indicative of the fact that the appeal raises reasonable grounds fit for consideration by the Court.

The applicant further states that, if stay of execution is not granted, he stands to suffer irreparable loss and damage and the appeal would be rendered nugatory in that the sum of Shs.14,864,000/= is quite substantial and if paid to the respondent would adversely affect the operation of his business.

The applicant is not seeking a stay of execution of the order granting the respondents interim custody of the two children nor is he seeking absolute stay of execution of the order for payment of maintenance and the order to pay school fees for N. Rather he is seeking a conditional stay of execution of the maintenance order and the order for payment of school fees for N. He has offered to pay a sum of Shs.30,000/= as monthly maintenance and school fees for B at the rate of Shs.255,000/= per term.

Mr. Ongicho, however, submitted that the children would suffer, if stay of execution is granted. Nevertheless, he submitted that, if the applicant pays school fees for both children even a sum representing 50% of the maintenance ordered will be acceptable to the respondent pending the determination of the appeal. Mr. Billing, however, contended that the respondent should continue to pay school fees for N.

The applicant disclosed in the superior court that he was totally against N studying in a boarding school in United Kingdom at her tender age but accepted to pay school fees for her if she joined a school in Kenya. In paragraph 26 of the applicant's further affidavit filed in respect of this application, the applicant deposed in part:

“As far as my daughter is concerned, I have always stated that I am ready to pay for her school fees as long as it is within my means. I never refused to pay her school fees. It was even suggested during the hearing by my advocates (sic) Billing that I would be willing to pay the equivalent fees as charged by International School of Kenya”.

The sum of Shs.14,864,000/= claimed covers the period upto 5th February, 2009 when the demand letter was written by the respondent's advocates. We have no doubt that that is a substantial sum of money and if withdrawn and paid from the applicant's business, his business will be affected adversely and thus the applicant is likely to suffer substantial loss. This Court has recognized that, if a party incurs substantial loss, that eventuality could render an appeal nugatory and that the essence of an application for stay of execution is to prevent a party from suffering substantial loss pending appeal. (See, for instance, **Mukuma vs. Abuoga** [1988] KLR 645 at page 647; **Reliance Bank Ltd. vs. Norlake Investment Ltd.** [2002] 1 EA 227 at page 231).

Nevertheless, it would be wrong to make any orders which would affect the best interest of the two children of the marriage. It is not wholly true that an order of stay would make the children suffer for the bulk of the claim of Shs.14,864,000/= comprises of past maintenance and past school fees for N which the respondent had already paid. It is apparent that the backdating of the order of maintenance and order for payment of school fees for N was intended to help the respondent recoup the money she had already expended.

It is clear from the application filed in the superior court that the Shs.350,000/= claimed as maintenance included maintenance for the respondent and the two children. The superior court however awarded Shs.200,000/= per month for “*family maintenance*”. The sum of Shs.200,000/= apparently includes maintenance for the respondent. The respondent admitted in the superior court that she earns a monthly salary of Shs.110,000/= as Manager of E. Services Ltd. which she asserts is owned by NS and other persons but which the applicant claims to be her own business. The respondent further admitted in the superior court that she cohabitates in the matrimonial home with the said NS who is alleged to be a director of an airline, but claimed that the applicant has also a mistress whom he maintains together with her children. Indeed, the superior court found that the parties have continued with their respective lives after the separation.

It is also a relevant consideration that although the applicant owns part of the matrimonial house, he has left the entire home for use by the respondent and the two children. This is a form partial maintenance.

Lastly, we would take into account the fact that **N** does not live with the respondent most times of the year as she is in a boarding school abroad. Nonetheless there is no justification why the applicant should not pay for her education abroad. She is just an innocent victim of her parents' acrimony.

Having taken into account all the above circumstances, we are of the view, that the application should be allowed albeit partially.

Accordingly, the application dated 5th February, 2009 is allowed to the extent, **FIRSTLY**, that we grant a stay of execution of the arrears of maintenance awarded and school fees for **N** accruing before the date of the ruling of the superior court, that is, before 21st January, 2009, and, **SECONDLY**, that the applicant shall pay maintenance for **N** and **B** at the rate Shs.50,000/= per month with effect from the date of the ruling of the superior court i.e. January, 2009 and also pay their respective school fees with effect from January, 2009 until the determination of the appeal or further orders of the Court.

We award the costs of this application to the respondent. Orders accordingly.

Dated and delivered at Nairobi this 17th day of July, 2009.

E. M. GITHINJI

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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