



COURT OF APPEAL

AT NAIROBI

CIVIL APPLI 284 OF 2009 (UR.196/2009)

P.K.A.....APPLICANT

AND

M.S.A.....RESPONDENT

(Application for stay of execution of the judgment and decree of the High Court of Kenya

at Nairobi (Onyancha, J.) dated 3rd July, 2009

in

MATRIMONIAL CAUSE NO. 122 OF 2006)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for two main orders, namely:

“1.

2. Court be pleased to issue an order staying the decree and judgment of the superior court issued on 3rd July, 2009 by the Honourable Justice D. A. Onyancha in Matrimonial Cause Number [....] pending the hearing and final determination of the intended appeal.

3. Court do issue an order restraining the respondent, his agents, servants employees companies and associates from evicting the applicant from the matrimonial home she currently occupies and further that he should continue to maintain the applicant as he used to previously do before he filed Matrimonial Cause Number [....] pending the hearing and final determination of the intended appeal”.

The application is made against the following background:

The applicant is a British citizen while the respondent is a Kenya Citizen. On 4th January, 1986, the applicant and one **I.S.P** were married in a civil wedding at the Registrar’s Office, Coventry in United Kingdom (UK). The applicant deposes that the marriage was forced; that it was not consummated and that the applicant subsequently lived with her parents in UK. Thereafter the applicant met the respondent

in London and after a short courtship they got married on 25th September, 1995 in a religious ceremony at a S[PARTICULARS WITHHELD] Temple in South Hall, London. The marriage was not, however, registered nor a certificate of marriage issued. The only documentary evidence of that marriage is a hand written note dated 17th August, 2006 on the letter head of “**Guru Granth Gurdwara**” which reads, thus:

“TO WHOM IT MAY CONCERN

This is to inform you that the Religious wedding of Mr. M. S. A and P.K.A was solemnized on 25th September, 1995. The wedding ceremony was performed by Mr. Satwinder Singh Sarb and party”.

The document was signed by the Secretary General, **Guru Granth Gurdwara** on 17th August, 2006.

The applicant relocated to Kenya after the marriage and started cohabitating with the respondent at Riverside Drive, Nairobi. The couple begot a son **A.S.A** on 18th June, 1996 and lived together until sometime in 2007 when they separated.

Meanwhile, the applicant filed divorce proceedings in the Coventry County Court for the dissolution of the first marriage between her and **I.S. P** and on 3rd June, 1998 the County Court issued a *decree nisi* which was subsequently made absolute on 16th July, 1998.

In August 2006, the respondent filed a petition in the High Court Nairobi; seeking the annulment of the marriage solemnised on 25th September, 1995 on the ground that at the time of the said marriage the applicant was still married to **I.S.P** as the marriage of 4th January, 1986 had not been dissolved.

The applicant filed an answer and cross-petition. Her case was that the marriage sought to be annulled did not exist as the religious ceremony of 25th September 1995 at the Sikh Temple did not amount to a marriage in law. She asserted, however, that there was a presumption of marriage between her and the respondent arising from long cohabitation and repute from 16th July, 1998 when the first marriage was dissolved which marriage should be dissolved on grounds of the respondent’s cruelty. The main reliefs sought in the answer and cross-petition was an order dismissing the petition for nullity; a declaration that a valid marriage be presumed by virtue of long cohabitation and repute; and, a dissolution of the presumed marriage on grounds of cruelty by the respondent.

By the agreement of the parties, the petition and cross-petition were tried, not by oral evidence, but on the basis of pleadings, affidavits and submissions which were subsequently filed. The superior court ultimately on 3rd July, 2009 allowed the petition and ordered a decree nisi to issue and dismissed the cross-petition with no orders as to costs. The superior court made four specific orders thus:

“1. The marriage entered between the petitioner M.S.A and the Respondent P.K.A on 25th September, 1995 is hereby declared to be null and void and hereby ordered nullified under Section 11 (1) (a) of the Hindu Marriage and Divorce Act, Cap. 157 of the Laws Kenya.

2. A decree nisi thereto shall issue for six months with liberty to either party to apply to make it absolute.

3. The respondent’s prayer for dissolution of the purported presumed marriage between the respondent and the petitioner, is hereby dismissed.

4. There will be no order as to costs in both petitions.”

The applicant being aggrieved by the judgment of the superior court filed a notice of appeal on 10th July, 2009 signifying an intention to appeal against the whole of the decision.

Although the jurisdiction of the court to grant a stay of execution; an injunction or a stay of proceedings under **Rule 5 (2) (b)** of the Court of Appeal rules is discretionary, nevertheless, an applicant in order to be entitled to the order is required to show 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.

The applicant has both in the draft memorandum of appeal and in the supporting affidavit to the application enumerated some of the grounds on which the appeal would be based. In addition, Mr. Ahmednassir, learned counsel for the applicant has elaborated on the merits of the proposed grounds of appeal.

The superior court made findings of fact and law, inter alia, that the applicant and the respondent were legally married through a Sikh religious ceremony at Sikh Temple in South Hall, London on 25th September, 1995; that the religious ceremony was a complete and proper Sikh marriage between the two parties; that the applicant and the respondent intended and accepted the religious ceremony to be a binding ceremony conducted in accordance with Hindu Law, customary and religious rites; that the Hindu Marriages in Kenya are governed by *Hindu Marriage and Divorce Act Chapter 157* Laws of Kenya as read with the *Matrimonial Causes Act, Chapter 152* thereof; that although the marriage was not registered in accordance with **Section 6** of the *Hindu Marriage and Divorce Act* nor a marriage certificate issued, such a marriage can be proved by other admissible evidence; that by 25th September, 1995 the first marriage had not been lawfully terminated and the second marriage was thus illegal, void and a nullity; that the illegal marriage was still persisting until it is declared null and void and was not terminated by the decree absolute on 16th July, 1998; that the cross-petition for presumption of marriage was based on a contract which was illegal, immoral and contrary to public policy.

It is evident that Onyancha J. also heard *Civil Case No. 6 of 2009* which originated from the Children Court regarding the custody of **A.S.A** which had been filed by the respondent herein and that the custody of the child was granted to the respondent in a judgment delivered on 1st July, 2009, two days before the judgment in the nullity cause was delivered.

Although the appeal will be based on several grounds including mistrial and bias it is manifest that the principal issue is whether or not the religious ceremony of 25th September, 1995 in a Sikh Temple in South Hall, London constituted a binding marriage in the absence of a Certificate of Marriage and registration. It is manifest from the judgment of the superior court that in deciding that issue the court applied the Kenya Law. Mr. Ahmednasir strenuously contended that the court erred in applying Kenyan Law when the marriage was conducted in UK and that the applicable law was the Matrimonial Causes Act, 1973 and the Marriage Act of 1949 both of England. He contended further that it is the law of England which governs the validity of the marriage; that in England a civil marriage must precede a religious marriage and that a religious ceremony in a Sikh Temple was not a marriage according to English Law. On his part, Mr. Ochieng Oduol, learned counsel for the respondent contended, among other things, that the issues raised are not arguable and that the applicable law is the Laws of Kenya as both parties are domiciled in Kenya. Mr. Ahmednassir further contended that the decree absolute given by the Coventry County Court on 16th July, 1998 dissolving the first marriage between the applicant and **I.S.P** was retrospective, a submission vehemently controverted by Mr. Ochieng Oduol.

It is manifest that the appeal will raise issues of both fact and law which will be disputed. This is not, of course, the forum for resolving those issues. Suffice it to say at this stage that upon our consideration of the respective, affidavits, documents and submissions we are satisfied that the intended appeal raises both issues of fact and law which are not frivolous.

On the question whether the appeal, if ultimately successful, would be rendered nugatory by refusal to grant the orders sought, learned counsel for the applicant urged us to stay part of the judgment of the

superior court which found the applicant guilty of bigamy and nullified the marriage. He also asked us to stay the order granting the respondent custody of the child of the marriage made in inter-related custody proceedings.

According to the respondent's counsel, however, the effect of granting stay is not only to create a marriage in a case where the court has already declared that there was no marriage but also to sanction an illegal and immoral act.

We respectfully agree with the view of the learned counsel for the respondent. Moreover, the first prayer in the application which seeks an order, "*staying the decree and judgment of the superior court issued on 3rd July, 2009*" is misconceived as **Rule 5 (2) (b)** does not give this Court the jurisdiction to stay a judgment or a decree. The rule only authorizes the Court to order stay "*of further proceedings*" or to order stay of execution (of a judgment, decree or order). The judgment of the superior court dated 3rd July, 2009 is not capable of execution in whole or in part as the superior court did not order any party to do anything or to refrain from doing anything or to pay any sum of money (see **Western College of Arts and Applied vs. Oranga** [1976] KLR 63; **Hon. Peter Anyang' Nyongo & 2 Others vs. The Minister for Finance & Another** – *Civil Application No. Nai. 273 of 2007* (unreported).

Furthermore, a judgment of a court is valid and effectual unless and until it is set aside by the court granting it on review or set aside by an appellate court. By its very nature "*a stay*" does not reverse, annul, undo or suspend what has already been done but merely suspends the time required for performance of the particular mandate in order to preserve the status quo pending appeal. (See **Kileshwa Service Station Ltd. vs. Kenya Shell Ltd.** – *Civil Application No. Nai. 84 of 2008* (unreported). It follows that the first relief is not for granting.

The second prayer in the application in essence seeks both an order of injunction to restrain the respondent from evicting the applicant from the matrimonial home and a mandatory injunction ordering the respondent to continue maintaining the applicant as he used to do before he filed *Matrimonial Cause No.[...]*

In her cross-petition, the applicant claimed, among other things, half share of the matrimonial property and provision of financial support for herself and the child of the marriage. We have no information about the fate of the two claims but it is clear from the judgment of the superior court that the two claims were not adjudicated upon. However, documents filed in court show that the applicant made an application in the superior court for *alimony pendente lite* seeking a monthly maintenance of Shs.177,000/= a fully furnished and maintained 4 bedroomed house and motor vehicle maintained and fully serviced by the respondent.

The application was allowed ex parte on 13th October, 2006. Thereafter the respondent filed an application on 17th October, 2006 for setting aside the ex parte order. The affidavits and the documents filed herein do not show what happened to the application. All the applicant deposes in support of the application is that, after the judgment was delivered, the respondent has ordered her to vacate the matrimonial property and has suspended paying any allowance to her. The respondent denies threatening to evict her from the matrimonial house adding that he has no proprietary interest in house in which she lives and that he had no obligation to maintain the applicant after the judgment of the superior court.

Dealing with the provision for maintenance first, the applicant seeks an order that the applicant do continue maintaining her as he used to before he filed the petition for nullity of the marriage, that is before 30th August, 2006. She is not seeking the continuation of the order for *alimony pendente elite*, if any was made.

Firstly, the claim lacks specificity as the applicant does not disclose how much she claims as maintenance. If the claim is allowed in its present form and the respondent defaults, disputes will arise which will render the order incapable of execution. The Court cannot act in futility. Secondly, this is a new claim made in this Court and which the superior court has not adjudicated upon. The *Matrimonial*

Causes Act (MCA) Cap 152 of the Laws of Kenya is applicable to Hindu Marriage by virtue of **Section 9** Hindu Marriage and Divorce Act. **Section 25 (2)** of MCA provides:

“The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum or money or annual sum of money for a term, not exceeding her life, as, having regard to her fortune, if any, to the liability of her husband and to the conduct of the parties, the court may deem to be reasonable”.

Further, by **Section 25 (3)** of MCA the court may, in addition to, or instead of an order under **Section 25 (2)** direct the husband to pay to the wife reasonable weekly or monthly maintenance.

Thus, if the applicant has not made or prosecuted a claim for future alimony or maintenance after the decree of nullity of the marriage was pronounced, she is entitled to pursue those claims in the superior court and the superior court, no doubt, would make appropriate decision. It seems to us that we have neither the jurisdiction to award alimony or maintenance at this stage nor do we have any material on the basis of which a reasonable sum can be assessed.

Lastly, as regards the application for an order of injunction to restrain the respondent from evicting the applicant from the matrimonial home, it is evident that the respondent and the applicant had established a matrimonial home at Riverside Drive, Nairobi and that even after the couple separated sometime in 2007 the applicant continues to live in the matrimonial home. The applicant’s continued occupation of the matrimonial home is inter-linked with the marriage which was nullified by the superior court.

The applicant is appealing against the decree of nullity of the marriage. In our view, it is just that the *status quo* relating to the occupation of the matrimonial home should be maintained pending appeal. However, the order of injunction in so far as it refers to respondent’s “*employees, companies and associates*” is too wide in scope and we restrict it to such “*employees, companies and associates*” as may be acting on behalf of the respondent or with his authority.

The custody order is not the subject matter of this application and we say no more about it.

In the final analysis, we allow the application to the extent that, we grant an order of injunction restraining the respondent **M.S.A**, his agents, servants and such employees, companies and associates as may be acting on behalf of or with the authority of the respondent from evicting the applicant from the matrimonial home, she currently occupies at Riverside Drive, Nairobi pending the hearing and determination of the intended appeal or further orders of the court.

We make no orders as to the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of November, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR