



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civ Appli 189 of 2005**

**S N K..... APPLICANT**

**AND**

**M S K .....RESPONDENT**

**(Application for stay of execution of the decree pending the hearing and determination of an appeal from a judgment and decree of the High Court of Kenya at Nairobi (Ang’awa, J) dated 10<sup>th</sup> May, 2005**

**in**

**H.C. Divorce Cause No. 6 of 1997**

**(Consolidated with Misc. C. Appl. No. 1606 of 1997 (OS))**

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**RULING OF THE COURT**

The applicant in this notice of motion, **S N K**, and the respondent, **M S K**, were married on 16<sup>th</sup> March, 1974 at the Shree Mombasa Lohana Mahajan temple. They then moved to Nairobi and lived at various places within Nairobi. Their marriage was blessed with three children, the first of whom was a son and is now an adult. The second child is deceased and the third child is a daughter now aged 17 years and still in school. Her name is M. The two lived as husband and wife till 15<sup>th</sup> July, 1997 when the respondent filed Divorce Cause No. 6 of 1997 in the superior court. The divorce cause was heard by the late Patel, J and on 18<sup>th</sup> February, 1999, a decree nisi was granted. About four months later, to be precise, on 14<sup>th</sup> June, 1999, a decree absolute was granted. The applicant cohabits with another woman whereas the respondent lives alone. The daughter is in school but otherwise she lives with the respondent. From the record, the learned Judge of the superior court (Patel, J) did not deal with the issues of maintenance and alimony *pendante lite* nor did he deal with the question of custody of the daughter who at that time was still to be under the custody of one of the parents in case of divorce as was the case here. Meanwhile, when the divorce cause was still pending before the superior court, the respondent filed originating summons dated 27<sup>th</sup> June, 1997 – HCC No. 1606 of 1997 (OS), being an application brought under **Married Women Property Act 1882** in which she sought six orders, namely that the properties and investments which she itemized and alleged were acquired through her efforts and the effort of the applicant during their marriage and which were registered in the name of the applicant herein be owned by her and the applicant in the ratio of 75% to her and 25% to the applicant respectively or in such portions as the court may deem just. The properties and investments, schedules of which were given in

that application, were NAIROBI/BLOCK *[particulars withheld]* at Gigiri, NAIROBI/BLOCK *[particulars withheld]* also at Gigiri and L.R. No. *[particulars withheld]* situated at South C Estate in Nairobi. The investments were 380,000 shares in *[particulars withheld]* Trading Co. Ltd. and L.R. No. *[particulars withheld]* situated in Industrial Area of Nairobi being one of the assets owned by *[particulars withheld]* Trading Company Ltd. together with several motor vehicles itemized in the same schedule. She sought three other assets owned by *[particulars withheld]* Ltd.; assets owned by *[particulars withheld]* Credit Limited which also included three vehicles; shares in *[particulars withheld]* Limited and assets owned by *[Particulars withheld]* Limited including three other vehicles and stock in trade and lastly, bank accounts in the name of the respondent both in Kenya and overseas including accounts in Trust Bank and Safe Deposit Box Number *[particulars withheld]* at Midland Bank in the United Kingdom. The other orders sought were that the applicant do execute all documents which were necessary to transfer the respondent's portion in the above properties or in default the same be executed by the court officials or in the alternative that the same properties be valued and be sold so that the proceeds be shared by the two in the ratio of 75% to her and 25% to the applicant. The remaining two orders sought were that the applicant do render an account for the rents and profits obtained from the above properties and investments; that all funds in bank accounts both locally and abroad in the applicant's name or aliases thereof be shared between the respondent and the applicant in the ratio of 75% to her and 25% to the applicant and lastly that all necessary directions be given. Apart from the two suits, namely Divorce Cause No. 6 of 1997 and the originating summons i.e. HC.C No. 1606 of 1997 (OS), the record shows that there were other suits in which the two parties were interested but those others are not before us. All we need to say here is that there seems to have been protracted litigation involving the two particularly on property matters. The record before us shows at page 8 of the judgment that:

**“The parties requested that the two suits dealing with maintenance (D.C 6/97) and distribution of estate (Hccc 1606/97) be consolidated and dealt with together. As a result directions was given by the court and at the request of the parties that “viva voce” evidence be taken. The applicant was given leave to amend the application for maintenance or alimony pending suit as the suit on divorce had been finalized.”**

The superior court, upon hearing the maintenance claim as part of the divorce cause and the application for the distribution of properties as indicated above delivered a judgment dated 10<sup>th</sup> May, 2005, a summary of which is as follows:

### **“83. Summary**

#### **Maintenance**

- i) Applicant/wife                      Ksh.10,000,000**
  
- ii) Applicant Minor**
  - daughter subject to investment   Ksh.10,000,000**

#### **Division of Properties Declaration**

- (i)      Gigiri estate L.R.**
  - Nbi / *[particulars withheld]* outright to the applicant/**
  - Petitioner based on trust.**
  
- (ii) Nbi/Block *[particulars withheld]*    50%**

(iii) Nbi/Block *[particulars withheld]* 50%

(iv) LR *[particulars withheld]*

South C 50%

#### Married Women Properties Act and Trust

(vi) Share held in companies: declaration

**The Petitioner to forego interest in the companies *[particulars withheld]* Credit Trading Co. & any other company on condition she is paid Ksh.80,000,000.**

**Exception of the company *[particulars withheld]* Co. Ltd, the matrimonial home.**

**84. I award interest in the two causes to the Petitioner/Applicant. I award costs for three advocates to the Applicant/petitioner.”**

The monetary awards were in lump sum to take care of the respondent and their daughter for life. The applicant feels aggrieved by the same judgment and intends to appeal against the same. He filed notice of appeal on 11<sup>th</sup> May, 2005. In the meantime, he has brought this application by way of notice of motion and is seeking the following orders.

**“1. That this Honourable Court be pleased to stay execution of the Judgment/Decree of the superior court (Honourable Lady Justice Mary Ang’awa) dated 10<sup>th</sup> May 2005 in the High Court Divorce Cause No. 6 of 1997 M S K VS S N K as consolidated with Miscellaneous Civil Application No. 1606 of 1997 (OS) M S K vs. S N K pending the hearing and final determination of the intended appeal herein.**

**2. That the applicant be at liberty to apply for further orders and/or Directions as the Honourable Court may deem fit and just to grant.**

**3. That the costs of and incidental to this application do abide the outcome of the intended appeal.”**

Two grounds are given for the application and these are that the intended appeal is arguable and that if the stay orders sought are not granted and the intended appeal eventually succeeds, the results would be rendered nugatory. It was supported further by an affidavit and there is a draft memorandum of appeal containing forty two grounds of appeal annexed to the application.

The respondent in her affidavit opposes the application stating in what we put in a summary, that the intended appeal is not arguable and the application is brought merely to buy time to enable the applicant dispose of the subject properties. The respondent states further that the applicant is financially well off and can easily settle the judgment award.

At the time this application was heard however, Mr. Sheth, the learned counsel for the respondent, informed the Court before Mr. Ochieng Oduol, the learned counsel for the applicant, could address us, that he concedes that the intended appeal is not frivolous and thus is arguable. That being the case, the learned counsel on both sides addressed us only on the issue as to whether, if the stay sought is not granted and the intended appeal eventually succeeds, the fruits of the success would be rendered nugatory. Mr. Ochieng’s contention is that, as the awards made were made without jurisdiction, and arbitrary, if the awards proceed to execution, the applicant would be rendered a destitute and might be declared bankrupt for what is legally untenable awards. Mr. Sheth on the other hand submitted that as the applicant had not disclosed to the court his entire means, he cannot benefit from the discretionary jurisdiction of the court.

On our own perusal of the record before us and the legal principles obtaining, we agree that the first principle to be considered in an application like the one before us, which was brought under **rule 5(2) (b)** of this Court's Rules, is that the applicant has to satisfy the court that the appeal or the intended appeal is arguable – see the case of **J.K. Industries Ltd. vs. KCB (1982-88) 1 KAR 1088**. That principle, we agree, has been satisfied. In our view, there are more than one arguable point in the intended appeal which we are told has been filed and is Court of Appeal Civil Appeal No. 277 of 2005. If some are required here, then we state that the question as to whether the award conformed with the pleadings in the originating summons and whether the maintenance which was not dealt with in the divorce cause should have been dealt with by the learned Judge when considering the application under the **Married Women Property Act of 1882** i.e. whether the learned Judge had jurisdiction to deal with maintenance matters raised in the divorce cause but which were not dealt with at the hearing of the divorce cause are matters that are arguable.

As we had stated hereinabove, the question of arguability of the appeal having been conceded, the learned counsel addressed us on the second principle of whether or not the appeal, if it eventually succeeds, would be rendered nugatory if this application is not granted. Part of the decree that was issued was monetary decree namely that the respondent be paid a lump sum of Ksh.10,000,000/= for her maintenance and the daughter be paid Ksh.10,000,000/= for her maintenance, subject to investment. The next part of the decree was composed of an order for transfer of Gigiri Estate L.R Nbi / **[particulars withheld]** outright to the respondent based on trust, equal division of the other three properties Nbi/Block **[particulars withheld]**, Nbi/Block **[particulars withheld]** and LR **[particulars withheld]** South C and the last part of the award was that upon payment of Ksh.80,000,000/= to the respondent, she would forgo her interest in **[particulars withheld]** Credit Trading Co. and any other company except **[particulars withheld]** Co. Ltd. which is the matrimonial home. The applicant says the amount ordered to be paid is large and if execution proceeds, he will be rendered bankrupt so that even if his appeal eventually succeeds, the same success will be no more than a pyrrhic victory. The respondent on the other hand says the applicant is rich and would be able to pay the amounts ordered without any problem, and as to the properties, the respondent says the purpose of the whole appeal is to enable the applicant dispose of the properties the subject of the originating summons and maintenance application.

We think the convenient start is the case of Kenya **Shell Limited vs. Benjamin Karugu Kibiru and Ruth Wairimu Karuga (1982-88) 1 KAR** where Hancox, J.A (as he then was) stated *inter alia* as follows:

**“As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause.”**

This Court has on several occasions accepted that in order to do justice to the parties before it and to the law, the Court must balance the interests of the respondent, who must also not be deprived of the fruits of a judgment he has obtained, and at the same time ensure that the eventual success of the appeal, if arguable as we have found here, is not rendered nugatory particularly in money decrees such as part of the decree before us is. Each case must depend on its merits but much as we agree with Mr. Sheth on the case of **Richard Kemoli and others vs. Kenya National Capital Corporation and another** that - **“It is not enough to say that the applicant will be burdened financially - that is a natural consequence of a judgment entered against him”** subsequent cases such as the case of **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya – Civil Application No. Nai. 358 of 1999** - have made it clear that where the amount awarded is too large and might bring the applicant's business to ruins, the Court may interfere to ensure that a stay is granted till the appeal is heard. There is no hard and fast rule on the issue except that each case must depend on its own facts and justice must be done to both parties before the court.

In this case, the amounts awarded were awarded in lump sum payment mainly to stop the parties from having to deal with each other in the future (See page 24 of the judgment). Otherwise there would have been no reason stopping the court from awarding maintenance payment on monthly basis. As to the transfer of the properties and division of others, it is necessary to appreciate that once those orders are

executed, the respondent may have no reason to stop her from disposing of the same properties and her shares to other third parties before the appeal is determined and thus putting the same beyond the applicant's reach after the appeal is finalized in case it succeeds. Against those arguments, the applicant, as appears from the record, is not a person of straw. Further, his daughter needs maintenance and his wife also needs the same during the period before the appeal is determined. At the same time, there is also need to allay the fears of the respondent that the applicant may dispose of the properties the subject matter of the appeal before the matter is determined. Considering all these circumstances of the case, what commends itself to us is to grant payments to the respondent and to the daughter on monthly basis till the appeal is heard and determined. Further, we would need to ensure that the properties in issue will be there when the appeal is determined. We therefore make the following orders:

**(a) That subject to the applicant complying with the following conditions, the execution of the judgment/ decree of the superior court dated 10<sup>th</sup> May, 2005 in the High Court Divorce Cause No. 6 of 1997 as consolidated with Miscellaneous Civil Application No. 1606 of 1997 (O.S) shall be and is hereby stayed pending the hearing and determination of Civil Appeal No. 277 of 2005.**

**(i) The applicant shall pay to the respondent a monthly sum of Ksh.200,000/= with effect from the 1<sup>st</sup> day of November, 2006 and thereafter on the first day of each succeeding month till the intended appeal is heard and determined.**

**(ii) The applicant shall pay for the maintenance of their daughter a sum of Ksh.100,000/= per month with effect from the 1<sup>st</sup> day of November, 2006 till the appeal is determined.**

**(iii) The applicant shall pay all the school fees payable in respect of their daughter till the appeal is determined.**

**(iv) The applicant shall not sell, alienate, transfer or in any way dispose of the property Gigiri Estate L.R NBI/[particulars withheld], NBI/BLOCK [particulars withheld], NBI/BLOCK [particulars withheld] and L.R [particulars withheld] or any of his interests or shares in the companies owning the same properties**

**(v) That the applicant shall not sell, transfer or in any way dispose of shares in [particulars withheld] Credit Trading Co., [particulars withheld] Co. Ltd. and any other company.**

**(b) The costs of and incidental to this application shall abide the outcome of the appeal.**

Those are the orders of the Court.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of October, 2006.**

**R.S.C OMOLO**

.....

**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**