



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 123 OF 2019

SM.....APPELLANT

VERSUS

PEN.....RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion application dated 27th May, 2020. The application is filed by **SM, (M)**. As I considered the said application I noted that the respondent **PEN (P)** has failed to file a replying affidavit and submission. It follows that the said application is unopposed.

2. By the said application M seek orders that:-

(a) this Court be pleased to grant leave to file an appeal against the subordinate court's order of 2nd August, 2019 in Kiambu Children's court case No. 27 of 2016; and

(b) That pending hearing and determination of this appeal there be stay of execution of the order made on 2nd August, 2019.

3. At the time M filed the subject application he had been committed to civil jail for his default in making payment for children's maintenance as ordered by the Children's Court. By 13th August, 2019 M was released from custody upon his signing a personal recognizance of Shs.30,000/=.

4. This Court by its ruling dated 12th May, 2019 noted that the memorandum of appeal filed by M was filed out of time. M was granted 90 days from the date of that ruling to regularise that appeal. It is as a consequence that M filed the subject application.

5. As stated before there is no objection filed by P opposing the prayers of that application. Accordingly M will be granted leave to file his appeal out of time.

6. On the prayer for stay of the order of the Children's Court of 2nd August, 2019 M stated in his affidavit that he was aggrieved with the said order which required him to pay maintenance for the children of Kshs.45,000/= per month and also required him to pay arrears of maintenance of Kshs.413,000/=. He stated that he was unable to make those payment because he was jobless and was ailing. As consequence of his non-payment of those sums M was committed by the children's court to civil jail until he was release by this Court, as stated above.

7. M has raised an issue which this Court cannot ignore and indeed it shows that if the order of 2nd August, 2019 is not stayed pending this appeal M may suffer substantial loss recognised by **Order 42 Rule 6** of the **Civil Procedure Rules**. Substantial loss is a basis of granting stay of execution pending appeal. In reaching this decision that stay of execution should be granted, I am guided by the case of **GEORGE ARAB MULI MWALABU VS. SENIOR RESIDENT MAGISTRATE KANGUNDO & 2 OTHERS; FESTUS MBAI MBONYE (INTERESTED PARTY)** where the court although recognizing that it is not contra constitution for committal to civil jail, proceeded to refer to another case, thus:-

*"The Learned Judge went ahead and stated in **BEATRICE WANJIKU CASE** (supra) that:-*

"The Civil Procedure Act and the Rules provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 of the Convention states that, "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." [Emphasis mine] I read the merely as used above to mean that one cannot be imprisoned for the sole

reason of inability to fulfil a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned.””

DISPOSITION

8. SM is granted the following orders:-

(a) Leave is granted to file an appeal out of time and to that end the Memorandum filed on 29th May, 2020 is hereby deemed as though filed with the leave of the court.

(b) The order of 2nd August, 2019 issued by Kiambu Children’s Court case No. 27 of 2017 is hereby stayed pending the hearing and determination of this appeal.

(c) The costs of the Notice of Motion dated 27th May, 2020 shall abide with the outcome of this appeal.

RULING DATED and DELIVERED at KIAMBU this 19TH day of April, 2021.

MARY KASANGO

JUDGE

Coram:

C/A : Kevin

For the Appellant..... Mr. Wachakana

For the Respondent..... N/A

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE