



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 71 OF 2017

M N M.....APPELLANT/APPLICANT

V E R S U S

N W K.....RESPONDENT

R U L I N G

1. This is a ruling on an application dated 11/12/2017 seeking for orders that *this honorable court be please to order a stay of execution of the Ruling/Order issued on 15/11/2017 in Embu Children's case No. 13 of 2013 pending the hearing and determination of the appeal herein.*

2. The law – Order 42 Rule 6 provision/conditions:-

(1) Application must be filed without undue delay.

(2) That the applicant must demonstrate that he/she will suffer substantial loss unless the orders sought are granted.

(3) The applicant is duty bound to offer security for the due performance of the decree.

3. The applicant was dissatisfied by the ruling of the trial magistrate M.N. Gicheru chief magistrate in Embu CMCC No. 39 of 2013 which he has challenged in this appeal. Several grounds have been set out in the memorandum of appeal filed on 17/12/2017.

4. The respondent opposed the application on grounds that it is similar to an earlier one in HCA No. 33 of 2016 for stay of execution of the same orders of maintenance and which was refused by the court. The amount has now accumulated to Kshs.290,00/= which the court ordered the respondent to pay.

5. I have perused the annexures to the application and to the replying affidavit. I note that there are two appeals arising from Embu Children's case No. 39 of 2013. HCA No. 33 of 2016 challenging the orders of the learned trial magistrate made on 11/05/2016 for purpose of enforcing payment of maintenance for the same child.

6. This second appeal that challenges orders made by a different magistrate in the same case committing the respondent to civil jail for failure to pay the accrued maintenance of Shs.290,000/=. He now seeks for stay of execution pending hearing and determination of this appeal.

7. I make the observation that the two appeals are challenging different orders of the court in the same case. The application for stay pending appeal in HCA 33 of 2016 which has already been determined does not render this appeal *res judicata*.

8. However, the refusal or the granting of the orders in any one of them have a similar effect. If the orders sought are allowed in this application, it will put on hold the payment of the accrued arrears of Kshs.290,000/= pending the determination of the appeal. The orders in HCA No. 33 of 2016 dealt with the monthly repayment of Kshs.10,000/=.

9. I find that this application is not *res judicata* and it is properly before the court.

10. In regard to the first condition, it is noted that the ruling by the trial court was made on 15/11/2017. This application was filed on 11/12/2017 which is a period of 26 days after the ruling. In my view, the application was filed within a reasonable time thus fulfilling the legal requirement as regards time.

11. As for the second condition, the applicant deponed that he is a retiree with no reliable income. The court gave orders that pending the determination of the the suit the applicant pays Kshs.10,000/= per month for maintenance of the child.

12. It followed that the applicant failed to make the monthly payment which had accrued to Kshs.290,000/=. He was issued with a notice to show cause why he should not be committed to civil jail. The trial court ordered that he be committed for failure to show cause. The applicant in this appeal alleges that he was not given a fair hearing by the learned magistrate.

13. The issue that arises herein is whether the applicant has demonstrated that he will suffer substantial loss if the orders are not granted. Of course, the applicant fears that he may be committed to civil jail in the event that the orders are not granted.

14. In his replying affidavit, the applicant has dwelt at length with his alleged denial of the right to fair hearing in the notice to show cause and omitted to a great extent evidence to support the requirements of Order 42 Rule 6 which is the basis of this application.

15. In the last paragraph of his affidavit the applicant deposes that he is staring at civil jail yet he has offered all what he could. To come to his aid, this court takes judicial notice that being committed to civil jail whereas there are allegations of being denied a fair hearing by the party concerned would result in suffering substantial loss.

16. As for the third requirement, the applicant has not offered to give security for the due performance of the decree. Although this court has power to make orders for the security, the applicant has a duty to offer the security which demonstrates seriousness to his cause. It is not disputed that arrears of the maintenance remain unpaid and have now accrued to Kshs.290,000/=.

17. It was intimated that the applicant resumed the payment of the monthly maintenance after a long legal battle to put it on hold. The orders for for payment are still in force and the child is entitled to its right of maintenance. The applicant has his right of fair hearing which must be considered in the appeal based on the facts and the law.

18. It is my considered opinion that this application is merited and is allowed on the following terms:-

(a) That prayer 3 of the application is hereby granted on conditions that the applicant deposits Kshs.290,000/= in court within twenty one (21) days in default of which the orders will be vacated.

(b) That costs of this application be in the cause.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF FEBRUARY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Fatuma for respondent

Mr. Guantai for Wambugu Kariuki for Appellant