



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 37 OF 2016

LOCAL AUTHORITIES PENSION TRUST

REGISTERED TRUSTEESAPPELLANT/APPLICANT

VERSUS

C A O RESPONDENT

AND

J M M..... 1ST INTERESTED PARTY

AND

RA M K.....2ND INTERESTED PARTY

RULING

1. By a Notice of Motion dated 7.12.16 the Appellant/Applicant seeks the following orders:

1. THAT the Application be and is hereby certified as urgent, be heard ex-parte on a priority basis and service upon the Respondent be dispensed with in the first instance.

2. THAT there be an order for stay of execution of the Ruling made on 8th November, 2016 in TCC NO. 136 OF 2014, C A O VERSUS J M MAND LOCAL AUTHORITIES PENSION TRUST REGISTERED TRUSTEES (LAPTRUST & RHODAMUNYIVA KITIVI together with the execution process and/ or all consequential orders emanating therefrom pending the hearing and determination of the applicant's Civil appeal NO. HCCA of 2016, LOCAL AUTHORITIES PENSION TRUST REGISTERED TRUSTEES (LAPTRUST) VERSUS C A O & R M K

3. THAT THAT (sic) there be an order for stay of execution of the Ruling made on 8th November,, 2016 in TCC NO. 136 OF 2014, C A O VERSUS J M M AND LOCAL AUTHORITIES PENSION TRUST REGISTERED TRUSTEES (LAPTRUST & R M K together with the execution process and/ or all consequential orders emanating therefrom pending the hearing and determination of this Application interparties or until further orders.

4. THAT all orders and actions consequential upon the Ruling made on 8th, November, 2016 in TCC NO. 136 OF 2014, C A O VERSUS J M M AND LOCAL AUTHORITIES PENSION TRUST REGISTERED TRUSTEES (LAPTRUST & R M K be set aside.

5. THOSE (sic) costs of this application be in the cause.

2. The facts giving rise to the matter herein are that the Children's Court granted maintenance orders for 2 children. The orders were not complied with prompting the Respondent to seek execution of the same vide a notice to show cause dated 22.4.16. The matter could not proceed as the Interested Party was said to be ill and bedridden. By an application dated 24.3.16, the Respondent filed an application seeking orders that 60% of the Interested Party's lump sum benefits be paid to her to cater for the children's upkeep. Following their respective applications, the Appellant/Applicant and the 2nd Interested Party respectively were enjoined in the suit in the Children's Court. The 2nd Interested Party claimed to be the 1st Interested Party's wife. In its Ruling, the Court directed that ? of the Interested Party's benefits be attached and paid to the Respondent. Being aggrieved by this Ruling, the Appellant on 23.11.16 filed a memorandum of appeal and on

9.12.16 the present application.

3. It is the Appellant/Applicant's case that if stay is not granted, execution of the orders of the lower Court will proceed against the Appellant/Applicant's fund and the Interested Party's retirement benefits which will result in the Appellant/Applicant's substantial loss. Execution would also amount to an illegality and the Appeal will be rendered nugatory. No prejudice will be suffered by the Respondent if stay is granted as the Appellant/Applicant is ready to abide by whatever conditions are imposed by this Court. The Appellant/Applicant avers that the Application was filed without unreasonable delay.

4. In her Affidavit sworn on 6.1.17, the 2nd Interested Party avers that she is the wife of the 1st Interested Party and together they have 3 children. The 1st Interested Party is seriously ill and requires urgent medical care which requires finances which cannot be sustained due to the Respondent's claim. His condition is so serious that he cannot attend the proceedings herein. She further avers that the Respondent has refused to go home at the farm and has also refused to take the children there so that they could be taken to school or training they require. According to the 2nd Interested Party, the 1st Interested Party's brothers are willing to assist the children pursue their education if only they went home. The Interested Parties and their children will suffer irreparable damages if the orders sought are not granted.

5. The Respondent opposes the Application in her Replying Affidavit sworn on 6.2.17. She contends that the Application violates the best interests of her 2 children with the Respondent. The 1st Appellant/Applicant has come to Court with unclean hands having failed to comply with the order to pay her ? of the 1st Interested Party's benefits and has not done anything to demonstrate any intention of complying with the order. Her apprehension is that if the orders sought are granted it will jeopardize the best interests of the 2 children since they will be denied their basic needs. She prayed that the Appellant be compelled to pay the maintenance as ordered by the Court pending the hearing and determination of the Appeal.

6. I have considered the submissions filed by the parties. The Ruling was delivered on 8.11.16 and this Application was filed on 9.12.16. I am therefore satisfied that the Application has been brought to court in a timeous manner. I am mindful that Article 53(2) of the Constitution of Kenya 2010 and Section 4(2) of the Children Act enjoin the Court to give priority to the best interests of the children which interest are of paramount importance. The provisions are reproduced below:

Article 53(2)

“A child's best interests are of paramount importance in every matter concerning the child.”

Section 4(2)

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

7. The main thrust of the Appellant/Applicant's submissions is that execution of the impugned order against the Appellant/Applicant's fund and the 1st Interested Party's retirement benefits will result in the violation of the provisions of Section 36 of the Retirement Benefits Act No. 3 of 1997 (RBA) thereby inviting regulatory sanctions against the Appellant/Applicant under the said Act. The 1st Interested Party is a member of the Appellant/Applicant which holds his pension.

8. Section 36 of the RBA protects pension from attachments as follows:

“Notwithstanding anything to the contrary contained in any other written law, where a judgement or order against a member of a scheme is made, no execution or attachment or process of any nature shall be issued in respect of the contributions or funds of the member or his employer except in accordance with the scheme rules and such contributions shall not form part of the assets of the member or of his employer in the event of bankruptcy.”

9. The 1st Interested Party is the father of the Respondent's children and paternity is not disputed. The 1st Interested Party failed to comply with the aforesaid maintenance with the Result that the Respondent instituted execution proceedings. The Children's Court attached ? of the net pay due to the 1st Interested Party from the Appellant/Applicant. The learned Magistrate did note that the 1st Interested Party has been unwell and required treatment. She therefore balanced the needs of all and attached ? of the amount due from the Appellant/Applicant. Although pension is protected under the RBA Act, the best interests of the child overrides all other interests.

10. Section 101(5) of the Children Act provides as follows:

(5) Where the court is satisfied that the respondent has failed to make payment of any financial provision under a maintenance order or a contribution order, the court may—

(a) ...

(b) ...

(c) issue a warrant for distress on the respondent's property forthwith or postpone the issue of the warrant until such time as the court may direct, or on such conditions as the court may deem fit and order the attachment of the respondent's earnings including any pension payable to the defaulter if the court is satisfied that—

(i) the failure to make payment was due to the wilful refusal or culpable neglect of the respondent; and

(ii) the respondent is gainfully employed or is engaged in some business enterprise or undertaking or owns property from which he derives an income.

11. Under the foregoing provision, where the Court is satisfied that a party has wilfully refused or culpably neglected to make payment of any financial provision under a maintenance or a contribution order, the Court may order the attachment of the party's earnings including any pension payable to the party. When it comes to the enforcement of the best interests of the child, Parliament in its wisdom found that nothing is sacred, not even that party's pension.

12. It would appear that the default on the part of the 1st Interested Party is not wilful or culpable. Indeed the learned Magistrate observed that the default was as a result of his illness. Nevertheless the obligation to maintain his children remains. The constitutional imperative in Article 53(2) of the Constitution is that in every matter concerning children, their best interests are of paramount importance. This is the overriding consideration. Further of the Constitution of Kenya 2010 lays down the supremacy of the Constitution over all other laws. Article 2(1) and (4) provide:

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

13. In view of the foregoing constitutional provisions, I do find that Section 36 of the RBA is consistent to Article 53(2) of the Constitution to the extent that it militates against the best interests of the subject children herein.

14. It is has been restated by Courts times without number that parents have a statutory and mandatory duty to provide for the needs of their children. Suspension of a maintenance order can never be in the best interests of children. This was the holding of Musyoka J in Z M O v E I M [2013] eKLR where he stated:

“as a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable.”

15. In view of the foregoing, I am not persuaded that declining the orders sought will result in the violation of the law and subject the Appellant/Applicant to regulatory sanctions. My view is that a stay of execution would cause substantial loss to the subject children herein. Accordingly I dismiss the Application date 7.12.16 but with no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 27th day April 2018.

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant/Applicant**

.....**for the Respondent**

.....**Court Assistant**