



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 42 OF 2016

M M M.....APPELLANT/APPLICANT

VERSUS

J K K.....RESPONDENT

RULING

1. By a Notice of Motion dated 21.12.16 the Appellant/Applicant seeks that he be allowed to pay Kshs. 4,500/= as monthly maintenance for his child with the Respondent. He also seeks stay of execution of the orders granted in Tononoka Children's Case No. 453 of 2015 (the Children's Case) on 29.11.16 pending the hearing and determination of an Appeal filed on 21.12.16.

2. The parties herein though not married were in a relationship from April 2013 to late 2014 when they separated. They were blessed with a daughter. It would appear that since the separation, the Appellant/Applicant has not contributed towards the upkeep of the child prompting the Respondent to file the Children's Case. The Children's Court made the orders which the Appellant/Applicant now seeks to be reviewed and stayed.

3. The Application is founded on the grounds set out on the face thereof and on the facts set out in the affidavit of the Appellant/Applicant sworn on 21.12.16. The Appellant/Applicant claims that on 29.3.16 the Respondent obtained *ex parte* orders in the Children's Case requiring him to pay monthly upkeep of Kshs. 10,000/= for the child. He contends that he is unable to pay the said sum as his net pay as a judiciary clerk, his only source of income, is Kshs. 11,400/=. The monthly amount was later reduced to Kshs. 7,000/= on 29.11.16 following an application by the Appellant/Applicant. He was also required to pay the arrears for the period 29.3.16 to September 2016 at the rate of Kshs. 10,000/= per month. In total he was expected to pay Kshs. 17,000/= per month until payment of the arrears in full. According to him, the learned Magistrate did not consider his net pay. He was willing to pay Kshs. 4,500/= per month until 2022 when he shall have completed repayment of the loans that he has. The Appellant/Applicant further claims that his advocate had, without his instructions, entered into a consent to pay off the accrued arrears of maintenance at the rate of Kshs. 8,000/= per month. If the orders sought are not granted the Respondent will execute the order by applying for attachment of his salary or committal to civil jail. This would render his appeal nugatory, which in his view has high chances of success. He is willing to contribute towards the upkeep of his daughter but within his means.

4. The Respondent in her Replying Affidavit sworn on 23.5.17, avers that the Appellant/Applicant is not deserving of the orders sought as he is in contempt of the orders of 29.11.16. The Respondent asserts that the Appellant/Applicant was duly served but chose not to attend Court when the orders were made and subsequently. According to her, it is not true that the consent order was entered into without his knowledge or instructions to his advocate. The Appellant/Applicant was directed to clear the arrears which as at 11.11.16 stood at Kshs. 104,000/= in monthly instalments of Kshs. 10,000/= of which he has not paid anything. The Respondent further states that the Appellant/Applicant was directed to pay the monthly sum of Kshs. 4,500/= but only paid for January, February and March 2017. In the Respondent's view, the Appellant/Applicant being a senior clerk in the [particulars withheld] is able to provide for the upkeep of the child who requires physiotherapy. The Application should be dismissed as the Appellant/Applicant has shown disrespect for Court orders.

5. Oral submissions were made before me by the Appellant/Applicant's counsel and the Respondent who was unrepresented. Both parties reiterated their respective positions as set out in their affidavits.

6. It is the duty of every Court when dealing with a matter concerning a child as I am in this Application, to bear in mind the provisions of Article 53(2) of the Constitution of Kenya 2010, which provides:

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

The best interest of the child imperative is also stipulated in Section 4(2) of the Children Act which provides:

“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. It is trite law that grant of stay of execution of an order pending appeal is discretionary. A party seeking stay of execution must satisfy the Court that he is deserving of the orders sought. The Court must give prominence to the best interests of the child which are paramount. That parents have a statutory and moral duty to provide for the needs of their children cannot be gainsaid. The paternity of the child herein is not disputed. Suspension of a maintenance order is not in the best interests of such children. This is as was stated by Musyoka J in Z M O v E I M [2013] eKLR

“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.”

8. The Appellant/Applicant has made a prayer that he be allowed to pay the reduced sum of Kshs. 4,500/=. The Appellant/Applicant filed an affidavit of means in the lower Court. This notwithstanding, the learned Magistrate declined to review the consent of 7.9.16 and directed that the decretal amount be paid off in monthly installments of Kshs. 10,000/=. I have not had the benefit of the lower Court file to enable me make an informed decision on the prayer for review of the amount payable downwards. This issue will best be considered at the hearing of the Appeal which is pending before this Court. I am also persuaded by Musyoka, J. in the Z M O v E I M case (supra) where he observed:

“The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”

9. In view of the foregoing, I consider that a stay of execution would militate against the best interests of the child herein. Accordingly I dismiss the Application date 21.12.16 but with no order as to costs. In accordance with the general principle under section 76(2) of the Children Act and in order to meet the justice of the case, I direct that the Appeal herein be fixed for hearing on priority basis, for the expedited hearing and disposal of the same.

DATED, SIGNED and DELIVERED in MOMBASA this 13th day April 2018.

M. THANDE

JUDGE

In the presence of: -

..... for the Appellant/Applicant

.....for the Respondent

.....Court Assistant