



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISC. APPLICATION NO. 133 OF 2017**

**F G N.....APPLICANT**

**VERSUS**

**G W N.....RESPONDENT**

**RULING**

1. Pursuant to an ex parte Chamber Summons dated 24<sup>th</sup> October 2016 but filed on 25<sup>th</sup> October 2016 in Nairobi Children's Case No. 1331/16, Hon. Gitonga made the following orders on 28<sup>th</sup> October 2016.

- 1. That the application be certified urgent.**
- 2. That the respondent do pay a monthly maintenance of Kshs.20,000/= for the minor subject.**
- 3. That actual custody of the issue herein is hereby vested upon the plaintiff.**
- 4. That the defendant is hereby restrained from interfering with the child at school, [particulars withheld] Kindergarten.**
- 5. That the child be retained at [particulars withheld] Kindergarten.**
- 6. That the defendant do continue paying school fees and school related expenses for the child at the current school [particulars withheld] Kindergarten.**
- 7. The exclusion order is hereby issued against the defendant to vacate from the minor's house at [particulars withheld] in Kahawa West in the alternative the respondent pays rent to procure a rental house for the minor's housing needs of equal standard to the current house.**
- 8. That the defendant be served hearing notice on 24<sup>th</sup> November 2016**

2. Before canvassing the ex parte application of 24<sup>th</sup> October 2016, the respondent filed a notice of motion dated 5<sup>th</sup> December 2016 seeking review of the ex parte orders dated 28<sup>th</sup> October 2016. Meanwhile, the plaintiff now respondent in this case also filed an application for notice to show cause why the applicant could not comply with the ex parte orders issued on 28<sup>th</sup> October 2016. The court consolidated the two applications and on 13<sup>th</sup> September 2017 delivered a ruling now the subject of the appeal and application herein. In the said ruling, the court invoked Section 99 of the Children's Act and discharged orders relating to payment of alternative accommodation for the child as well as monthly maintenance at Kshs.20,000 per month to enable the defendant pay accumulative sum of Kshs.261,000/= then outstanding.

3. The court further directed the defendant to continue paying school fees and other related expenses for the minor pending hearing and determination of the suit. The court therefore particularized its orders as follows:

- 1. Payment of Kshs.35,000 on or before 5<sup>th</sup> day of October 2017.**
- 2. The balance of Kshs.225,000 shall be liquidated in 9 monthly instalments of 25,000/= per month by every 5<sup>th</sup> day of the month.**

**3. Incase of any default warrant of arrest to issue.**

**4. The defendant to continue paying school fees and related expenses for the minor as per the earlier order of 28<sup>th</sup> October 2016.**

**5. Notice of motion is marked as spent.**

**6. Hearing of the main suit on 28<sup>th</sup> November 2017.**

4. Aggrieved by the orders of 13<sup>th</sup> September 2017, the applicant vide a notice of motion dated 27<sup>th</sup> September 2017 but filed on 29<sup>th</sup> September 2017 pursuant to Sections 3, 3A and 63(e) of the Civil Procedure Act, orders 42 rule (6) and 51 and (1) of the Civil Procedure rules 2010, sought orders certifying the application urgent and stay of the said orders pending hearing and determination of the application and subsequent hearing and determination of the appeal.

5. Application is anchored on grounds on the face of it and affidavit in support Sworn on 27<sup>th</sup> September 2017 by F G N the applicant herein. The applicant basically argued that unless the application is allowed, execution proceedings which had commenced will be executed thus rendering the appeal which is arguable nugatory and that the applicant will suffer substantial loss.

6. According to the applicant, the amount he was directed to pay was far in excess of his monthly net income which stands at Kshs.35,000/= out of a gross income of Kshs.83,000/=. He claimed that he was condemned unheard and that he has been paying Kshs.46,000/= per term as school fees for the minor which he is willing to continue paying. He further claimed that he was also supporting another child (a daughter) whom he was paying school fees for besides supporting other dependants.

7. He contended that the respondent being a senior employee of [particulars withheld] Insurance Company should also meet the rest of the expenses. That from his affidavit of means submitted to the court, he is not in a position to pay the amount as directed. He therefore sought for the custody of the baby and offered to pay school fees at Kshs.46,000/= per term, provide shelter and medical cover.

8. In reply, the respondent filed a replying affidavit sworn by G W N on 15<sup>th</sup> December 2017 but filed on 21<sup>st</sup> December 2017 challenging the application. She contended that the applicant is a person of means and should therefore pay the amount as directed. In his further affidavit filed on 30<sup>th</sup> May 2018 the applicant attached a copy of NHIF card showing that the baby is covered under that medical scheme in his name.

9. When the matter came up for interpartes hearing on 7<sup>th</sup> June 2018, Mr. Benji appearing for the applicant reiterated the averments contained in the applicant's affidavit in support. Counsel submitted that his client was ready to pay monthly maintenance of 5,000/=, pay school fees and provide medical cover.

10. On the other hand, Mrs. Odia holding brief for Mr. Omari for the respondent also adopted the contents contained in the replying affidavit that the court cannot stop maintenance for the minor as the same will be prejudicial. Mrs. Odia submitted that the respondent has not endeavored to pay even for one month the amount he was directed to pay. Counsel urged the court to fast track the hearing of the appeal for the matter to be finalized once and for all.

11. I have considered the memorandum of appeal dated 25<sup>th</sup> September 2017, and filed on 25<sup>th</sup> September 2017, application herein, affidavit in support and replying affidavit thereof. Issues for determination are:

**a. Whether the applicant has an arguable appeal.**

**b. Whether the appeal will be rendered nugatory if the appeal is not allowed.**

**c. Whether the applicant has met the conditions necessary for grant of stay orders.**

12. It is trite that before a court would exercise its unfettered discretionary powers in granting stay orders besides the conditions set under order 42 rule (6) (2), it is incumbent upon the applicant to prove that he or she has an arguable appeal that is not frivolous and that if a stay is not granted appeal will be rendered nugatory (**see Reliance Bank Ltd (in liquidation) vs Norlake Investment Ltd Civil Appeal No. 93/02 (UR)**).

13. In this case, the applicant was on 28<sup>th</sup> October 2016 ordered to pay school fees for the minor at Kshs.20,000/= monthly maintenance and Kshs.20,000/= as rent accommodation per month besides other expenses like inclusion of medical cover. The order for payment of rent was suspended and even monthly maintenance to give the applicant an opportunity to pay the arrears amounting to Kshs.261,000/= within a period of 9 months and thereafter continue paying Kshs.20,000/= as maintenance fee.

14. A perusal of the applicants payslip attached to the application shows that the applicant's gross pay is 83,000/= which when subjected to statutory deductions plus 27,000/= loan recovery inclusive of interest leaves him with a net of 31,383 as at July 2016. Although the respondent stated that the applicant has other sources of income no evidence was tendered. In the absence of any other evidence to the contrary, I am left with a sum of 35,000/= net income as the monthly income of the applicant who besides the minor herein has another family he is supporting. How will he raise 20,000/= per month as maintenance, 20,000/= rent, 46,000/= school fees per term and other expenses. The applicant has been kicked out of his home on account of exclusion clause without being heard. These are arguable grounds of appeal which cannot be thrashed or dismissed on the face value. If the application is dismissed the appeal will automatically be rendered

nugatory.

15. In the case of **Kenya Tea Growers Ass. & Another vs Kenya Planters and Agricultural Workers Union Civil Appeal No. 72/2001** the court of appeal had this to say:

**“He (the applicant) need not show that an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the court should pronounce its decision.”**

The court further held that:

**“It is trite that demonstration of existence of even one arguable point will suffice in favour of the applicant.**

**(See Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji and Another (2015) eKLR quoting the case of Kenya Railways Corporation v Ederman Properties Ltd Civil Appeal No. 176 of 2012 and Ahmed Musa Ismael V Kumba Ole Ntamourua & 4 Others Civil Appeal No. Nai 256/2013).**

16. For the above reasons stated, it is my finding that the appeal herein has raised an arguable ground of appeal and the same if not allowed will render the appeal nugatory. However, proof of existence of arguable appeal alone would not justify grant of stay (**See Carter and Sons vs Deposit Protection Fund Board & 2 Others – Civil Appeal No. 291/1997**).

17. It therefore follows that for one to obtain a stay, conditions set out under order 42 (6) (2) of the civil rules must be met. The applicant is alleging that he will suffer substantial loss by being committed to civil jail simply because he has no means of paying the amount ordered.

18. The applicant is duty bound to prove that he is likely to suffer substantial loss, that the application was filed without unreasonable delay and that where a decree is involved, security has been provided. The application herein was filed 17 days after delivery of the ruling hence the same was filed within reasonable time.

19. Is the applicant likely to suffer irreparable loss? As I said above, the applicant has demonstrated by way of payslip and affidavit of means that his monthly net income is Kshs.35,000/=. No other source of income has been proved. Where will he get the balance from? Since that will be a matter of evidence when the main suit is heard before the trial court, the applicant should not suffer prejudice by being committed to civil jail for an amount he cannot afford considering that he is paying school fees, provided medical cover and there is already shelter being a family home.

20. The daily upkeep can be provided in the meantime by the applicant paying the outstanding arrears of Kshs.261,000/= only as directed by the lower court pending determination of the appeal herein. Indeed the best interest of a child must be taken into account without compromising the interest of the parents. Children should be viewed as a blessing rather than a curse or a source of frustration.

21. No parent should be subjected to suffer pain and lose interest in life because of unattainable children’s demand or needs. The best interest of a child must be calculated and accommodated within the reasonable means of the parents.

22. Upon payment of Kshs.261,000/= being the outstanding arrears, further monthly payment shall await final determination of the appeal herein which must be fast tracked.

23. Regarding exclusion orders, the impugned ruling has not mentioned the issue of exclusion order. This ground will be dealt with during the appeal. Accordingly, the application herein is allowed with orders as follows:

- a. That the applicant shall pay the outstanding accumulated sum of Kshs.261,000/= payable as at 13<sup>th</sup> September 2017 within 45 days in default execution to issue before the children court.**
- b. That further monthly maintenance shall await the outcome of the main appeal.**
- c. That parties to fast track appeal herein and fix it for hearing within 60 days.**
- d. That each party to bear his or her own costs.**

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2018.**

**J.N. ONYIEGO (JUDGE)**

In the presence of:

N/A.....Counsel for the applicant

Mr. Mogikoyo h/b for Omari.....Counsel for the respondent

Edwin ..... Court Assistant