



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**MISC. APPLICATION NO. 33 OF 2017**

**D I M.....APPLICANT**

**VERSUS**

**F W M.....RESPONDENT**

**RULING**

1. Through a notice of motion application dated 23<sup>rd</sup> March 2018 and filed on 28<sup>th</sup> March 2018 under certificate of urgency, the applicant sought leave to enlarge time to file appeal out of time and that the court if pleased to issue an order of stay of execution of the order of Thika Law Courts in CMCC No. 84/2016 delivered on 25<sup>th</sup> January 2018 pending hearing and determination of the application herein.
2. Application which is filed pursuant to Sections 1A, 3A, 65, 78G and 95 of the Civil Procedure Act, Orders 42, rule 6 (1) 56 and 51 rule (1) of the Civil rules 2010 is premised on grounds set out on the face of it and affidavit in support deponed on 23<sup>rd</sup> March 2018 by the applicant in person.
3. It is contended by the applicant that on 25<sup>th</sup> January 2018, the Principal Magistrate Thika Law Courts Hon. Ireri, dismissed his notice of motion application dated 24<sup>th</sup> April 2017 in which he sought orders to set aside and or review orders issued against him on 28<sup>th</sup> September 2016 in which he was seeking to pay Kshs.5000 per month as maintenance in respect to the minor herein instead of 25,000/= as directed by the court.
4. The applicant alleged that delivery of the impugned ruling was made without his knowledge or that of his counsel until 2<sup>nd</sup> March 2018. That despite applying for proceedings on 15<sup>th</sup> March 2018, the same could not be availed hence the delay in filing the appeal within the prescribed time. Consequently, he prayed for leave to file appeal out of time and that there be stay of execution in that he had no means of raising the 25,000/= ordered as the minor's maintenance per month .
5. The matter was placed before the duty judge on 29<sup>th</sup> March 2018 who certified the same urgent and directed for service upon the respondent and interpartes hearing scheduled for 5<sup>th</sup> April 2018. On this day, the respondent sought an adjournment on grounds that they were served late. By consent, the matter was adjourned to 17<sup>th</sup> April 2018 and the respondent directed to file a replying affidavit within five 5 days. Meanwhile, the court did allow stay of execution orders in terms of prayer two pending hearing and determination of the application.
6. On 13<sup>th</sup> April 2018, the respondent filed a replying affidavit deponed on 12<sup>th</sup> April 2018 by F W M in which she challenged the application referring to it as malicious, ill-advised and an abuse of the court process. She averred that notice of delivery of the ruling was duly issued to the applicant's counsel as evidenced by notice dated 16<sup>th</sup> January 2018 drawn by Mwihiya & Mutai Advocate (annexure FWM-1).
7. The respondent further contended that the applicant is a busy body who wants to waste court's time by delaying the payment of maintenance fees of the minor. She asserted that the applicant was in court on 28<sup>th</sup> September 2016 when the consent order was adopted as an order of the court requiring him to pay 25,000 as monthly maintenance which amount he has refused to pay to date thus attracting arrears to the tune of Kshs.352,456 culminating to the filing of the notice to show cause application which he now wants to defeat and or frustrate. She urged the court to dismiss the application terming it as ill motivated, mischievous and an abuse of the court process.
8. In response, the applicant filed a further affidavit deponed on the 16<sup>th</sup> April, 2014 and filed in court on 17<sup>th</sup> April 2018 claiming that his advocate was never served with the notice of delivery of ruling and that the consent order entered on 28<sup>th</sup> September 2018 was made without his pay slip annexed by his former advocate to prove his financial inability.

9. When the case came up for interpartes hearing on 17<sup>th</sup> April 2018, both counsels agreed to dispose the same by way of written submissions. Consequently, the firm of Ojienda appearing for the applicant filed their submissions on 23<sup>rd</sup> April 2018 relying on a list of authorities filed earlier on 17<sup>th</sup> April 2018. The firm of Mwhia & Mutai advocates representing the respondent filed theirs on 19<sup>th</sup> May 2018.

10. In their submissions, counsel for the applicant literally reiterated the averments contained in the affidavit in support of the application which I have highlighted herein above and urged the court to enlarge time to appeal out of time owing to the fact that they were not aware of the delivery of the ruling and the orders thereto until 2<sup>nd</sup> March 2018 and that the delay in securing proceedings was out of their control.

11. Counsel urged that the intended appeal raises arguable grounds of appeal and that unless the orders sought are granted, the intended appeal will be rendered nugatory. To support his submissions, counsel made reference to the case of **Housing Finance Co. of Kenya vs Sharok Kher Mohamed Ali Hirji & Another (2015) e KLR** and **Reliance Bank Ltd (in liquidation) vs Norlake Investments Ltd – Civil Application No. Nairobi 93/02 (UR)** in which the court stated that an arguable appeal is that that is not frivolous, and that if an order of stay is not granted and the intended appeal were it to succeed will be rendered nugatory.

12. Further reference was made to the case of **R vs Kenya Anti-Corruption Commission and 2 Others (2009) KLR 31** and **Carter and Sons Ltd vs Deposit Protection Fund Board & two Others – Civil Appeal No. 291/1997** in which the court stated that:

**“.....mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. ....the applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security, and the application must, of course be made without unreasonable delay.”**

13. Learned counsel urged the court to find that there is a reasonable ground of appeal on the basis that the amount ordered is far beyond the means of the applicant. Counsel contended that proof of a single ground of appeal is sufficient to allow the appeal (**See Kenya Railways Corporation vs Enderman Properties Ltd, Civil Appeal No. Nai 176 of 2012 and Ahmed Musa Ismael vs Kumba Ole Ntamorua & 4 Others Civil Appeal Nai 256/2013.**

14. Regarding stay order, counsel urged the court to exercise its unfettered discretion to extend time and that the orders if executed will render the appeal useless. The court was referred to the case of **Fahim Yasin Twaha vs Timamy Issa Abdalla and 2 others (2015) eKLR** in which the court relied on Principles laid down in Nick Salat Case where it was held that:

**“.....it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant”.**

15. On the other hand, the respondent also adopted the respondent's averments in her replying affidavit. Counsel referred the court to the case of **Fahim Yasin Twaha Case (Supra)** urging that the principles laid out in granting stay had not been met by the applicant. Counsel further asserted that stay orders cannot apply in children matters. To fortify this position the court was referred to the case of **DM vs RW HCC Appeal No. 32 of the 2014 (OS).**

16. I have considered the application herein, supporting affidavit and further affidavits by the applicant, replying affidavit and rival submissions by both counsels. Issues for determination are; whether the intended appeal raises arguable grounds of appeal; whether the appeal will be rendered nugatory if the stay orders are not allowed and lastly whether the applicant has met the conditions for grant of stay orders.

17. The application herein emanates from a ruling of Hon. Bartoo issued on 25<sup>th</sup> January 2018 in which the learned magistrate dismissed the applicant's application dated 24<sup>th</sup> April 2017 seeking to set aside, vary and or review maintenance orders entered by consent in favour of the minor at a monthly sum of Kshs.25,000/= payable by the appellant. There is no dispute that there is a valid court order secured by consent of both parties. That aspect is admitted in Para 6 of the applicant's further affidavit.

18. The only concern here is that, the ruling dismissing the application for review of the orders was delivered without his knowledge or his lawyer hence causing the delay in filing an appeal to challenge the same. Is there reasonable cause for the delay in filing the appeal within 30 days from the date of delivery of the ruling or orders in question? Section 79G of CPA provides that appeals from subordinate courts to the high court shall be filed within a period of 30 days from the date of the decree order appealed against excluding from such period or any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. However, there is a proviso that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

19. In this case, the applicant has explained that the delay in filing the appeal in time was occasioned by lack of knowledge that the ruling had been delivered on 25<sup>th</sup> January 2018 until 2<sup>nd</sup> March 2018. Secondly, despite applying for proceedings in time, the same were delayed by the court. The respondent has stated that notice of delivery of the ruling was issued by her advocates Mutai & Co. on 16<sup>th</sup> January 2018 and served upon the appellant's counsel hence failure to attend court was deliberate. Since the advocate then on record for the appellant is no longer representing him, it was not possible to know whether such notice was ever received or not. A copy attached to the replying affidavit does not show any acknowledgement or receipt of that notice.

20. I am convinced that the appellant had no knowledge in good time that the ruling had been delivered on 25<sup>th</sup> January 2018. Secondly, the respondent has not challenged the fact that court proceedings were not supplied in time. Although the appellant ought to have filed a

certificate of delay from the court explaining the cause for the delay in supplying court proceedings, it is not denied by the respondent that such proceedings were not supplied in time hence that is a mere technicality.

21. It is my finding that the delay in filing the appeal out of time for a period of two months is not inordinate given the reason for the delay which was beyond the applicant's control. There will be no prejudice suffered by the respondent if leave is granted. The delay is therefore excusable. In the case of **Jai Engineering Works vs Valabi Patel Mombasa HCC Misc App. No. 4/1981** the court held that to allow leave to appeal out of time, a reasonable excuse for the delay and benefit of the applicant if the appeal is successful and length of delay as hardship to the other party must be taken into account.

22. In the instant case there is reasonable excuse for the delay and the same is not inordinate in the circumstances. Save for extreme situations where the applicant is guilty of failure to exercise due diligence in processing the appeal within the prescribed time limitation, and where a reasonable steps and effort have been made to realize the filing of the appeal, a litigant should be given an opportunity to exhaust the legal redress that is constitutionally and statutorily provided for without undue hindrance. **(See Edward Kamau & Another vs Hannah Mukami Gichuhi & Another HCC Misc Appl. 78/2015).**

23. However, it must be borne in mind that leave to appeal out of time is not a matter of right. The applicant must satisfy the court that the application is worthy exercising its unfettered discretion in allowing the same. I am convinced and satisfied that the delay is justified and excusable in the circumstances. For those reasons prayer one is allowed as prayed.

24. Regarding stay orders under Order 42 (6) rule (2), it is incumbent upon the applicant to prove that he is likely to suffer substantial loss if the appeal is not allowed; that the application for stay has been filed within reasonable time and where appropriate security in satisfaction of the decree has been furnished. As regards the second limb of the delay in filing the appeal within reasonable time, the same has been addressed above.

25. The orders being challenged are those affecting the best interest of a minor in which the appellant by consent agreed to be paying Kshs.25,000/= monthly towards maintenance of the baby (his child). The applicant has not honored the order thus accumulating a sum of over Kshs.325,000/=. In his application which the honourable court dismissed, he claimed that he was unable to pay the amount ordered arguing that when the court made the order, he had not attached his payslip to show that the amount ordered was far beyond his means.

26. What substantial loss will the applicant suffer if he were to continue paying the amount he consented to be paying towards maintenance of his child? The orders were never adjusted upwards to insinuate inability to pay. I am not convinced that the applicant will suffer substantial loss as compared to the best interests of a child.

27. Before any decision affecting the affairs of a minor are made by anybody, organization or institution, the best interests of a baby must be considered (see Article 53 (2) of the Constitution and Section 4 (2) (3) of the Children's Act). What will happen if the court were to stay the orders to pay maintenance for the baby based on a consent order? The court is mindful of the best interests of the baby and to issue stay orders will be prejudicial to the voiceless and innocent baby who must eat, have shelter, clothing, medical care, education and food. These are not luxuries that must be suspended or be compromised. The best interests of the baby must be guarded by the court in fulfillment of its constitutional mandate.

28. In the case of **Chebutul Rotich & 2 Others vs Emirates Airlines Civil Case No. 368/2001 J. Musinga** held that:

**“...Substantial loss is a relative term and often than not can be assessed by the totality of consequences which an applicant is likely to suffer if stay of execution is not granted and that the applicant is therefore forced to pay decretal sum”.**

29. Accordingly, in my assessment and considering that the orders being challenged affects the livelihood of the baby and having not been convinced that the applicant will suffer prejudice by paying what he promised to pay pending determination of his appeal, there is no need to interfere with the orders. Having held as such, the need to direct for security is automatically not necessary.

30. Has the applicant demonstrated an arguable appeal? The intended appeal is not utterly frivolous as circumstances may have changed to warrant review of the orders although granted by consent. The orders he is challenging are consent orders to which he does not claim that they were obtained through fraud, coercion, misrepresentation of facts or information. He can argue his appeal based on changing circumstances based on his present payslip.

31. Will the appeal be rendered nugatory? As stated in the case of **Carter & Sons Ltd vs Deposit Protection Fund Board & Two others (Supra)**, the mere fact that there is a strong ground of appeal would not in itself justify an order for stay. The appeal will not be rendered nugatory merely because a court declines to grant stay. The applicant which still have an opportunity to argue his case to justify variation or review of the orders being challenged.

32. For the above reasons stated, the application dated 23<sup>rd</sup> March 2018 fails and succeeds partially with orders as follows:

**(a) That the applicant be and is hereby allowed to file an appeal out of time challenging the orders of Thika CMCC No. 84/2016 delivered on 25<sup>th</sup> November 2017 within 14 days.**

**(b) That temporary stay orders issued on the 5<sup>th</sup> April 2018 be and are hereby lifted.**

Order accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY 2018.**

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

In the presence of:

Mr. Kiongera holding brief for Ojienda.....Counsel for the applicant

N/A.....Counsel for the respondent

Edwin ..... Court Assistant