



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 14 OF 2018

M L O.....APPELLANT/APPLICANT

VERSUS

A A M.....RESPONDENT

RULING

1. Before me is a Notice of Motion dated 24th July 2018 filed by the appellant through S. K. Nzili & Co. Advocates, under Order 42 rule 6 of the Civil Procedure Rules (Cap. 21) and was brought under certificate of urgency. It has four (4) prayers two of them has been spent as follows-

1. (Spent)

2. (Spent)

3. That a stay of execution be granted pending hearing and determination of the appeal.

4. That costs be provided for.

2. The application was filed with an affidavit sworn by the appellant/applicant, in which it is stated that the appellant had filed a Memorandum of Appeal dated 19th April, 2018, and that though the Magistrate's Court ordered the appellant to pay Kshs.15,000/= per month, he was not employed and could only be able to pay Kshs.4000/= per month.

3. In response to the application, the respondent filed a replying affidavit dated 25th September 2018 stating that the appellant was still working as a Senior Head of Programmes with an organization called FAIDA, and complained that the appellant had not been paying the amounts ordered by the court since January 2017.

4. Though the application was filed by counsel, on the hearing date the appellant appeared in person and made oral submissions. He stated that he could not afford to pay Kshs.15,000/= and another Kshs.15,000/= as he had a family with children in Secondary School. He said also that his contract of employment with an NGO was terminated until March 2018 when he secured another employment contract for 11 months with a net salary of Kshs.58,000/=. He said he also maintained his wife, his aging mother and felt the child herein being young and not school going, paying Kshs.30,000/= was excessive.

5. In response to the submissions of the appellant, the respondent maintained that the appellant had a job but had not paid anything to her in compliance with orders of the trial court. She also stated that the appellant had abandoned the child since February and did not care about what the child ate or lived.

6. This is an application for stay of execution of a judgement or decree of a court. Such applications are governed by the provisions of Order 42 rule 6 (2) of the Civil Procedure Rules, and there are three conditions to be fulfilled by applicants.

7. The first condition is whether the application was brought without undue delay. The judgement herein was delivered on 6th April 2018, and the application was filed on 24th July 2018, which was a period of more than three months. However, knowing the transport challenges in this North Eastern region and the fact that Mr. Nzili Advocate operates from Mwingi town, I find that the application was filed without inordinate delay.

8. The second requirement to be fulfilled by the applicant is to show or demonstrate that he or she will suffer substantial loss or prejudice if

the stay of execution sought is not granted. Though the appellant/applicant states that he was ordered to pay Kshs.30,000/=, that is not true. The record shows that the respondent had asked for Kshs.30,000/= per month but the court ordered the appellant/applicant to pay Kshs.15,000/= per month. The appellant/applicant has also stated in oral submissions that he is only able to pay only Kshs.4,000/= per month and that his net pay is Kshs.58,000/= per month, but has not provided any particulars or documentary proof of his allegation. Again, though he has said that he can pay only Kshs.4,000/= per month, the respondent has maintained that he has not paid anything for the maintenance of the child since February, even though there is in existence of court order for him to pay for the maintenance of the child per month. In my view, the applicant has just been evasive in this matter of child care as a parent and in the process has failed to demonstrate that he will suffer substantial loss, if stay is not granted. For that reason, this application will not succeed as the applicant has not demonstrated honesty in what he has presented to this court.

9. The third condition to be fulfilled by the applicant is to provide or agree to provide security to justify the grant of stay. The application does not state anywhere that the applicant is willing or able to provide any security. He has instead shown bad faith in not paying even the Kshs.4,000/= per month which he claims he is able to pay. On that ground also, this application will fail.

10. In my view, the applicant should pursue the hearing and finalization of the appeal rather than dwell on preliminary applications. I note that the appeal has not yet been admitted by this court, and he is better advised to take steps to have the appeal admitted and listed for hearing.

11. As for the application herein for stay of execution of judgement or decree, the same is dismissed.

12. The costs of the application will follow the result of the appeal.

Dated and delivered at Garissa this 25th October, 2018.

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George Dulu

JUDGE