



JOO v AJM (Suing as Next Friend) (Miscellaneous Application 38 of 2017) [2017] KEHC 6040 (KLR) (11 April 2017) (Ruling)

J O O v A J M [2017] eKLR

Neutral citation: [2017] KEHC 6040 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION 38 OF 2017

JN ONYIEGO, J

APRIL 11, 2017

BETWEEN

JOO APPLICANT

AND

AJM RESPONDENT

SUING AS NEXT FRIEND

RULING

1. Before me is a Notice of Motion dated 13th March, 2017 but filed in court on 14th March, 2017. Application which is filed pursuant to Section 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Orders 43 and 51 rule (1) of the Civil Procedure rules 2010 sought for the following orders:
 - (a) That the application herein be certified urgent and service thereof be dispensed with at the first instance.
 - (b) That the honourable court be pleased to grant the applicant leave to appeal against the ruling/ order given on 3rd March, 2017 in Milimani Children’s Case No. 1259/2015.
 - (c) That pending hearing and determination of the intended appeal, this honourable court be pleased to grant a stay of execution of the orders of 3rd March, 2017 in Mililmani Children’s Case No. 1259/2015.
 - (d) That costs of this application be provided for.
 - (e) That the court be pleased to grant any other order and further orders it deems fit to grant.
2. Application is supported by grounds on the face of it and supporting affidavit deponed by the applicant herein J O O on the 13th day of March, 2015.



3. Briefly, the applicant herein was sued before Milimani Children's Court vide Children Case No. 1259/2015 by his wife seeking for court orders compelling him (defendant) to pay maintenance expenses in respect of their two children namely C.O. and J.M.
4. On 18/9/2015, the trial court made temporary maintenance orders thereby directing the defendant to pay Kshs.58,000/= per month towards maintenance of the two children pending hearing and determination of the main suit.
5. Upon conclusion of the main suit, the court delivered its judgment on 16th February, 2016 wherein the maintenance cost was reduced to 29,000/= per month which the defendant failed to honour hence prompting the application for notice to show cause dated 18th March, 2016.
6. Aggrieved by the said orders and the subsequent application for notice to show cause, the applicant allegedly filed an application for review on 22/7/2016. Before the review application could be dispensed with, the court directed for hearing of the notice to show cause application which culminated into delivery of a ruling dated 3rd March, 2017.
7. On the said ruling, the court ordered the applicant/respondent to honour the court's orders by paying a total of 261,000/= in three instalments in default a warrant of arrest to issue. It is these orders that the applicant is seeking to stay. The applicant averred that, the amount he was ordered to pay is unreasonable considering that he has three other biological children whom he is maintaining and paying school fees for.
8. He attached birth certificates of the said children namely A O B, J A O and A M (annexure J – 1). That besides maintaining those three children, he was also incurring medical expenses to the tune of 18,500 after every 3 months in respect of J A O who is a victim of Autism. He attached a letter from corn special interiors a special tutorial institution where J is attending occupational therapy.
9. It is the applicant's contention that he has been paying school fees for all his children including the subjects of this case. In an effort to prove his financial status, he attached a payslip indicating a monthly gross salary of 225,256 with a net pay of Kshs.120,000/=. That out of the net payment of 120,000/= he is currently servicing a loan of Kshs.2.6 million which he took on 26/8/2016 for purposes of constructing a house which he is currently in occupation.
10. In a nut shell, the applicant contended that, despite submitting necessary information and documentary evidence with regard to his financial status, the court did not care hence the need for stay orders. He attached a memorandum of appeal marked "JOO-9" arguing that the appeal has high chances of success. He expressed his willingness to pay school fees and provide medical cover for the minors.
11. On the other hand, the respondent filed a replying affidavit sworn on the 20th March, 2017 by A J M the respondent/plaintiff herein. The respondent termed the application herein as frivolous, vexatious and actuated with malice and ought to be dismissed.
12. She further contended that, the applicant is cunning and a liar as he last paid school fees for the schooling minor on 9th September, 2015 and that he neglected to deliver the medical cover for the minor. The respondent urged the court to dismiss the application as the applicant is seeking to obtain review orders through the back door having refused to prosecute his review application pending before the trial court.



13. In submission, both counsels basically adopted and reiterated the averments contained in their respective affidavits. I have considered the application herein, supporting and replying affidavit, plus submissions by both counsels.
14. There is no dispute that there are lawful orders made against the applicant/defendant before the trial court directing the applicant to pay 29,000/= per month to meet maintenance expenses of the minors. Admittedly, the applicant has not honoured a single payment arguing that he is financially constrained due to other responsibilities among them paying school fees for three other biological children, payment for medical expenses for Jerome who is suffering from Autism and general maintenance expenses.
15. Principles for award of stay of execution orders pending appeal (O 42 rule 6 of Cap 21 Laws of Kenya) need not be over emphasized. The applicant is under obligation to prove and or demonstrate that unless the orders sought are granted, he is likely to suffer substantial loss, that the application has been filed without inordinate delay and that such security as the court may order has been given by the applicant.
16. To grant or refuse an application for stay of execution pending appeal is discretionary in that the court when granting stay has to balance the interests of the applicant/appellant with those of the respondent. (see *Portreitz Maternity vs James Karanja Kabia Civil Case No. 63/1997 Mombasa*).
17. What substantive loss is the appellant likely to suffer by paying the amount ordered for in maintaining the minors. His argument is that, he has heavy responsibility to undertake against an net income of 120,000/=.
18. There is no dispute that he has three other children who also depend on him. He is paying school fees and other expenses like medical plus servicing a loan he took for construction of a home. Cumulatively on the face of it, one would require to balance the expenditure versus the income. I do not have the advantage of the trial court's proceedings as they were not available. I may not therefore be able to assess what other responsibility was the mother to the children given so as to meet the requirement of equal parental responsibility.
19. Equally, I am not able to ascertain whether all the material and documentary evidence presented before this court was also presented before the trial magistrate so as to assess how the court arrived at the payment of 29,000/= per month
20. If this court was to force the appellant to pay the amount ordered before even ascertaining the extent of parental responsibility by both parents and their financial sustainability, it would easily push the appellant into defaulting in repayment of his loan and also abdicating his parental responsibility in respect of three other biological children who equally have the right to parental care just as the subjects herein. In the event he defaults in loan repayment, the applicant will risk being committed to civil jail or the property sold hence likely to suffer substantial loss.
21. The application was filed within reasonable time and the claim herein is not perse a monetary claim hence security may not be appropriate. I am alive to the best interest of a child principle as captured in Article 53(2) of the Kenyan constitution and Section 4 (2) (3) of the Children's Act. Before a court makes an order affecting a child or children, the best interest of a child should be treated with the utmost importance it deserves. (See *ZWN vs MWN Civil Appeal No. 15/2011 Embu (2015)eKLR*). However, what amounts to the best interest principle has greatly been overblown to unprecedented proportions to the extent that lavish lifestyle of a child has been equated to the best interest of a child and a source of income for the other parent.



22. The best interest of a child principle should be construed to mean provision of the basic needs of a child interalia shelter, food, clothing, medical care and education. To meet this requirements, both parties have an equal role to play and it should be sustainable and within their means.
23. The appellant/applicant having set forth a prima facie case regarding his financial strength and considering that he is ready to pay school fees and provide medical cover, it will be prudent to award him an opportunity to convince the court that the amount he was ordered to pay is far beyond his means and that responsibility has been shared out equally between both parents without compromising the other biological children's rights.
24. Accordingly, I do allow the applicant's application with orders as follows:
- (a) That leave to appeal against the ruling and order given on 3rd March, 2017 in Milimani Children's Case 1259/2013 be and is hereby allowed in terms of prayer 2.
 - (b) That pending hearing and determination of the intended appeal, an order of stay of execution of the orders of 3rd March, 2017 Milimani Children's Case 1259/2015 do issue in terms of prayer No.4.
 - (c) That the applicant/appellant do file the intended appeal within 30 days from today in default the orders herein shall lapse.
 - (d) That the applicant shall continue paying school fees for the minors who are subjects of this matter in default the orders of stay herein shall automatically lapse.
 - (e) That the applicant shall continue paying for medical expenses as and when it arises pending processing of a full medical cover.
 - (f) That the respondent shall furnish the appellant with all necessary documentation to facilitate processing of a full medical cover.
 - (g) Each party shall bear his or her own costs.

DATED AND DELIVERED IN OPEN COURT THIS 11TH DAY OF APRIL, 2017.

J.N. ONYIEGO

JUDGE

In the presence of

.....counsel for the applicant

.....counsel for the respondent

