REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 121 OF 2016

D K K.....APPELLANT/APPLICANT

VERSUS

C W N.....RESPONDENT

(Being an Appeal from the Ruling of the Hon. Ms. M.A. Otindo – Senior Resident Magistrate, at Milimani Children's Court delivered at Nairobi on 6th December 2016 in Children Case No. 198A of 2016).

RULING

1. The appellant D K K was dissatisfied with the ruling dated 6th December 2016 by the learned Senior Resident Magistrate at the Children Court and filed this appeal. The basic complaint in the appeal was that he was ordered to pay Kshs.25,000/= in April, August and December towards the upkeep of the child until the suit pending before the Court was heard and determined, and yet he did not have the means to meet the payment; that the paternity of the child had not been determined, and therefore he had asked for DNA test which had been declined; and that the court had failed to take into account the principle of equal parental responsibility. With the appeal was filed this application for an order of rectification of the names of the minor in the order issued on 6th December 2016, an order nullifying the order, an order staying the proceedings in the court until the appeal is heard and determined, and an order staying the execution of the orders of payment until the appeal was heard and determined.

2. The application was opposed by the respondent C W N who was represented by Mr. Kivumbi. The appellant was not represented in the application.

3. The history of this matter was that there was before the children court a matter filed by the respondent against the petitioner over the child A N (a minor). The respondent claimed that this was their child and sought orders of payment of school fees and upkeep. In the course of the cause the petitioner denied that this was not his child and sought a DNA test to be done to establish paternity. The court dismissed the request on the basis that it was an afterthought, the appellant all along having pleaded that he was the father of the child. This finding will be discussed during the appeal.

4. It was evident that the appellant was in arrears and there was a notice to show cause against him before the trial court. The application was scheduled for 29th June 2017.

5. The respondent asked that the application should not be granted because the appellant was in contempt of court, and therefore he was a contemnor who had no right of audience. The issue of failure to pay the ordered money, and whatever explanation the appellant may have for not paying, will be heard on 29th June 2017 in the trial court. It is not an issue before this court. It was further alleged, in defence to this application, that the matter was *res judicata*; that a similar application was heard before the trial court and was dismissed. It is, however, trite that the dismissal of application for stay of execution or proceedings before the trial court cannot bar the appellant from bringing a similar application in the court where he has filed the appeal.

6. Regarding the application, the trial court has the power to rectify or correct the names of the minor in the order issued on 6th December 2016. Under **section 99** of the **Civil Procedure Act**, clerical or arithmetical mistakes in judgments, decrees or orders arising thereof from any arithmetical slip or omission, can at any time be corrected by the court either of its own motion or on the application of any of the parties. The sought rectification is therefore not a matter for this court.

7. On whether or not stay of execution or proceedings should be granted, it should be borne in mind that under **Article 53(2)** of the Constitution and **section 4(2)** of the **Children Act (Cap. 141)** this matter concerns the welfare of a child. The court is commanded to bear in mind that the best interests of the child is the primary consideration **(Bhutt –v- Bhutt HCCC No. 8 of 2014 (OS) (MSA)).**

8. The power of this court to grant stay of execution is exercised under **Order 42 rule 6** of the **Civil Procedure Rules**. The application should be brought without undue delay; the applicant should show he will suffer substantial loss if stay is not granted; and he has to provide security for the due performance of the decree or order appealed against. In this case the application was brought timeously. There was, however, no security provided. The applicant stated that if the application is not granted he will suffer irreparable damage and that the appeal will be rendered nugatory. He did not substantiate the averment. He did not state in which way the appeal will be rendered nugatory. He did not state what damage he will suffer if the application is not granted. One would have expected him to indicate how much money would be comfortable and within his means. He did not, for instance, and as a mark of good faith, offer to deposit even a lesser sum into court. In this matter affecting the fundamental rights of the child, there was no attempt to explain what will happen, in the interim, to the welfare of the child as parties wait for the hearing and determination of the appeal.

9. In conclusion, I find the appellant's application not merited and dismiss it with costs.

DATED and DELIVERED at NAIROBI this 22ND day of JUNE 2017.

A.O. MUCHELULE

JUDGE