



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL APPEAL NO. 42 OF 2016

P O.....APPELLANT

VERSUS

V N1ST RESPONDENT

A N.....2ND RESPONDENT

RULING

1. The appellant herein filed the notice of motion dated 7th July 2016 under certificate of urgency, seeking for orders that the court do issue a stay of execution of the decree and judgment issued by the **Children Court in Case No. 1009/2015** and all consequential orders pending the hearing and determination of the instant appeal. The application is brought under Order 12 (12), Order 40 rule 6 of the Civil Procedure Rules, 2010, section 3, 3A of the Civil Procedure Act, Cap 21 Laws of Kenya.

2. The application is premised on grounds that: the appellant has filed an appeal against the judgment and decree of the subordinate court; the appeal has high chances of success; that it is in the interest of justice that there be a stay of any execution of the judgment and decree from **Milimani Children Court Case No. 1009/2015** until the hearing and determination of the appeal herein; unless the orders of stay are granted, this application and the appeal herein will be rendered nugatory as the respondent will have no means of repayment if the execution proceeds; and, that it is in the interest of justice that the application be allowed.

3. The application was supported by an appellant's affidavit dated 7th July 2016 and a further affidavit dated 29th November 2016. His case is that after the breakdown of his relationship with the 1st respondent whom he cohabited with, he filed a matter at the Children court seeking custody of his son. The matter however proceeded without his participation and the court issued a judgment against him which he filed an appeal against and has high chances of success. He stated that he had been served with a warrant of arrest in execution of a decree which he was not informed of by notice to show cause, and that he was later wrongfully arrested and committed to civil jail for non-compliance with the terms of the judgment. He further states that he has since paid a lump sum amount of Kshs.270,000/= and has already covered his son with a medical insurance and education policy under Jubilee Insurance, and strongly believed it was in the interest of justice that the orders sought in the present application be granted. He also contested the minor's paternity during the hearing of the application and requested that a DNA be conducted to establish the same.

4. The 1st respondent opposed the application through her replying affidavit dated 27th October 2016 and a further affidavit dated 3rd May 2017. The summary of her case is that the applicant has refused to honour court orders issued by the Children Court on 16th October 2015 and 31st March 2016 requiring him to pay a monthly upkeep of Kshs.20,000.00 towards his son's upkeep. She argued that by failing to honor the judgment, the applicant has seriously prejudiced the rights of his child. She stated that a notice to show cause why execution should not issue was served upon the applicant to comply with the orders of the judgment but when he disobeyed and disregarded the notice, he was arrested and committed to civil jail for being in contempt of the said court orders, and that he only paid the sum of Kshs.260,000.00 to clear the accumulated arrears of the sum required of him to pay. She further argued that the respondent had at all times acknowledged the minor as his son and cannot purport to contest the minor's paternity at this point. She however indicated that she would not be opposed to a DNA test if the appellant meets the cost of the same. She prayed that the application be dismissed with costs as it has no merit.

5. I have read and considered the affidavits filed together with the oral submissions and the law. Order 42 (6) (2) provides that; *no order for stay of execution shall be made under sub rule (1) unless- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

6. The applicant is required to satisfy this court that he will suffer substantial loss if the order for stay is not granted. The judgment was delivered on the 31st of March 2016 and the memorandum of appeal filed on the 12th April 2016. The application therefore was brought without unreasonable delay. The applicant claims that he was not heard but it is evident that his counsel was in court. I note that the appellant has at all times declared under oath that the minor in question is his child. The paternity issue is therefore an afterthought intended to derail the fulfilment of his obligation towards the minor and dismiss his request for a DNA test. I note that the appellant neglected to pay further for the minor's maintenance despite the court orders having not been varied and only paid the lump sum after he was committed to civil jail. The applicant has failed to inform this court the substantial loss he will suffer if the stay order is not granted. The appellant has parental obligations towards his son. **Section 4 of the Children Act 2001 and Article 53(2) of the Constitution of Kenya 2010** empowers the Children's Court, and indeed this court, to treat the interests of the children as the first and paramount consideration in dealing with such an issue. The court has an obligation to safeguard and promote the rights and welfare of the child.

7. A stay of execution order is a discretionary order. The appellant's application lacks merit. The appellant must meet his part of the bargain. If stay is granted the appellant is likely to go into arrears again, that will substantially affect the rights of the child. I consequently dismiss the application with costs.

Dated, signed and delivered this **4th** day of **August 2017**

R. E. OUGO

JUDGE

In the Presence of:

Absent For the Appellant.

Mr. Ngugi For the Respondent.

Mr. Juma Court clerk