



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 101 OF 2016**

**G M M.....APPELLANT**

**VERSUS**

**K M M, N M M**

**AND N M M (suing through**

**mother and next Friend**

**D M N.....RESPONDENT**

**RULING**

**The Application**

The Appellant has made an application by way of a Notice of Motion dated 24th October 2016 seeking orders that this Court stays proceedings in **Machakos Chief Magistrate's Court Child Case No . 1 of 2016** pending the hearing and determination of the appeal herein. The grounds are stated in the said application and in the supporting affidavit sworn on the same date by Elizabeth K. Isika, the Appellant's Advocate. The legal arguments on the application were made in submissions dated on 24th January 2017 by Mulwa Isika & Mutia Advocates, the Applicant's Advocates.

In summary, the Appellant states that he has filed an appeal challenging the orders issued by subordinate court on 20/9/2016 denying the Applicant a hearing, which appeal is arguable with high chance of success. Further, that the Appeal shall be rendered nugatory if the proceedings in the lower court are not stayed , and it is in the best interest of the children who are the subjects of the proceedings for the same to be stayed

It was averred by the Appellant's Advocate that the Respondent herein filed a Children's Case against the Appellant on 21/1/2016 in Machakos Chief Magistrate's Court Child Case No . 1 of 2016, which proceedings relate to the three issues of marriage between the Appellant and the Respondent. Further, that the Appellant filed a defence, list of documents and list of witnesses, and the case came up for hearing on 20/09/2016. The Respondent thereafter closed her case, whereupon her counsel submitted that the Appellant did not have audience for want of witness statements .

According to the Appellant, the trial court proceeded to uphold the objection and closed the defence case with only the evidence of the mother of the children on record, and the case was scheduled for submissions on 2nd November 2016. Therefore, that the refusal by the trial magistrate to take his evidence and that of the children means that the Appellant will be condemned unheard, and it is not possible in a children's case for the court to reach a fair finding on issues of maintenance and custody

without hearing all the parties concerned.

The Applicant submitted that the criteria for grant of stay of proceedings is set out in **Chris Munga Bichage vs Richard Nyagaka Tongi & 2 Others, (2013) e KLR** in that it has to be demonstrated that the intended appeal is arguable, and that if the application is not granted the appeal will be rendered nugatory. Further, that it is common ground that the appeal arises from the lack of access to justice and of the right to be heard which the defendant was denied by the trial court. Therefore that if the matter proceeds further without the Appellant being heard, the court will proceed to deliver judgment and the Appellant will have been condemned unheard and will have no grounds to challenge the judgment so arrived at.

Reliance was placed on the principles of natural justice that no one should be a judge in his own cause and no one should be condemned unheard in any decision that affects the rights of an individual; on the provisions of Article 48 of the Constitution that state offices and organs should ensure access to justice for all; and on the decision in **Union Insurance Company of Kenya Limited vs Ramzan Abdul Dhanji, Nairobi Civil Application No. 179 of 1998** that parties in a case should be given a reasonable opportunity to be heard.

### **The Response.**

The application was opposed by a replying affidavit sworn on 2<sup>nd</sup> November 2016 by the Respondent, and submissions dated 31st January 2017 filed by Kamolo & Co Advocates, the Respondent's Advocates. The Respondent states that law requires that all witness statements and written submissions be exchanged during pretrial to offer parties a fair playing ground and avoid ambush at trial. Further, that the case proceeded to be heard and she closed her case, which is when the Appellant chose to call witnesses who had not recorded a statement.

Therefore, that it would be unfair and against the spirit of the Civil Procedure Act and Rules to allow the Appellant to testify without filing statements which would highly be prejudicial, since the Respondent would not have had an opportunity to respond in her testimony. It was also contended that the Appellant was ordered by the lower court to pay interim maintenance of Kshs. 8,000/- per month, but has refused to comply and is therefore not entitled to any orders.

Lastly, that the Appellant has not met the set criteria in law for grant of stay of stay pending appeal, and therefore the application is unmeritorious and an abuse of the court process, as the Appellant has not demonstrated what loss and substantial prejudice he may suffer and has not offered any security. In addition that the lower court acted in the best interests of minors in the circumstances of the case, and that was the reason for ordering for a social assessment report, hence there is no need for the minors to be heard.

The Respondent's Advocates in their submissions urged that under Order 42 Rule 6 of the Civil Procedure Rules, the pillar stone for grant of stay is whether the applicant will suffer substantial loss, and that the Appellant has not demonstrated what loss he is likely to incur if the orders sought are not granted. Reliance was placed on the case of **United Builders 7 Contractors (Africa) Limited -vs- Standard Chartered Bank Ltd, NRB HCCC No. 41 of 1995** in this regard.

Further, that the Appellant at the pre-trial stage was given an opportunity to comply so that he can be heard but failed to do so, and he cannot now complain in an appeal. Lastly, that the net effect of the stay order will be to prejudice the Respondent's case which has been closed, and the subject minors are in dire need of the money the Appellant has not bothered to pay.

### **The Determination**

I have read and carefully considered the pleadings and submissions filed. The issue for determination is whether the proceedings of the trial Court in **Machakos Chief Magistrate's Court Child Case No . 1 of 2016** should be stayed pending the hearing of the appeal herein.

The legal considerations to be applied in an application for stay of proceedings have been laid down in various judicial decisions, and particularly by **Ringera J.** (as he then was ) in ***Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*** wherein it was held as follows:

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously***

The courts discretion in deciding whether or not to grant stay of proceedings is thus to be guided by the main principle of the interest of justice, as determined by three main factors;

- a) Whether the applicant has an arguable appeal.
- b) Whether the application was filed expeditiously, and
- c) The need for expeditious disposal of the cases and optimum utilization of judicial time.

The Respondents have in this respect argued that the Appellant has no arguable appeal as he was given the opportunity to present his case in the pretrial procedures in the trial Court and failed to do so. Further, that he is not deserving of the orders sought as he has failed to comply with the orders of the trial Court as to payment of maintenance for the children who are the subject of the trial Court proceedings.

I note in this regard that the proceedings in the children court are governed by various regulations. The Children (Practice and Procedure Parental Responsibility) Regulations, 2002 in this respect provide in regulations 3 and 4 thereof that an applicant proceeding under the regulations should file a Plaint which shall be served on the Defendant, who shall file his or her answer within 14 days. Further, that once the defendant has filed his answer as required or the time prescribed for doing so has elapsed, the court shall set the case down for hearing with notice to the parties. No specific procedure is provided for the hearing, and under regulation 11, the court is given discretion to extend the time limited by the regulations for doing any act or taking any step.

In addition Rule 1 of the General Rules and Regulation under the Children Act provides that all civil matters under parts III, VIII and XIII of the Act shall be conducted in accordance with the said rules and regulations, but the court shall have power and discretion to decide all matters with due speed and dispatch without undue regard to technicalities of procedure. Under Regulation 5, certain provisions of the Civil Procedure Rules shall apply to the proceedings under the Children Act with such exceptions as the court may deem appropriate, including the Order on hearing of the suit and examination of witnesses.

The gist of these provisions is that the Children Court has discretion as to the procedure it applies in hearings before it, subject to the requirements set out in section 4 (2), (3) and (4) of the Children Act which provide as follows:

**“ (2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.**

**(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—**

**(a) safeguard and promote the rights and welfare of the child;**

**(b) conserve and promote the welfare of the child;**

**(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.**

**(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."**

It is thus not cast in stone that in children matters witness statements should be filed before a witness can testify, however once such directions are given the parties should comply within the set timelines. I am of the view that the Respondent will have the opportunity to challenge any such new evidence in the trial Court in the event that the Appellant's appeal succeeds, and will not be prejudiced in this regard. In addition, any prejudice that may be caused by the late filing of witness statements can be adequately addressed by way of payment of costs, and by the opportunity being availed to the Respondent to file any further statements or documents, and to reopen her case if need be.

Furthermore, if the proceedings in the trial Court are not stayed, the Appellant's appeal will be rendered nugatory as the case therein may be heard without his evidence. This eventuality would not only prejudice the Appellant, but would also militate against the promotion of substantive justice that is now required to be dispensed by Courts under Article 159 of the Constitution.

These findings notwithstanding, I note that as regards the requirement that any decision made by this Court should be in the subject children's best interests, the Appellant did not dispute the averments that he has not paid the amount ordered by the trial Court as interim maintenance, and if the stay orders are granted as sought it may cause hardship to the subject children pending the hearing of his appeal. This Court also notes that the proceedings in the trial Court were at an advanced stage, and it is in the interests of justice that no undue delay is caused in the finalization of the said case. The necessary conditions will be therefore be imposed by the Court to avoid any prejudice to the subject children and Respondent in this regard.

The order that accordingly commends itself to me is that the Appellants' Notice of Motion dated 24th October 2016 is allowed as follows:

(1) There shall be a stay of proceedings in **Machakos Chief Magistrate's Court Child Case No . 1 of 2016** pending the hearing and determination of the Appellant's appeal, on the following conditions:

(a) The Appellant shall pay the Respondent the entire balance of interim maintenance due to the Respondent as at the date of this ruling and as ordered by the trial Court within 30 days of the date of this ruling, and

(b) The Appellant shall prosecute his appeal within six (6) months from the date of this ruling.

(2) If any of the above conditions are not met by the Appellant the stay orders herein shall stand vacated.

(3) The Appellant shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 2<sup>nd</sup> day of August 2017.

**P. NYAMWEYA**

**JUDGE**