



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL APPEAL NO. 20 OF 2017

S K.....APPELLANT

-VERSUS-

C P.....RESPONDENT

RULING

By way of a Notice of Motion application dated the 24th day of October 2017 the appellant/applicant seeks the following orders:-

(1) Spent

(2) That there be a stay of execution of the decree and order of the court dated 11th October 2017 in Bomet Resident Magistrates court Maintenance Case No. 22 of 2015 and or any other subsequent orders of the court pending the hearing and determination of this application.

(3) That there be a stay of execution of the decree and or order of court dated 11th October 2017 in Bomet Resident Magistrates Court Maintenance Case Number 22 of 2015 and or any other subsequent orders of the court pending the hearing and determination of this appeal.

The grounds are that:-

(a) That a ruling in Bomet Resident Magistrates Court Case No. 22 of 2015 was delivered on October 2017.

(b) Applicant being dissatisfied with the ruling filed an appeal with overwhelming chances of success.

(c) That the orders were given in clear disregard of paternity issues raised concerning the minors.

(d) The applicant was condemned unheard.

(e) If no stay is granted, the appeal would be rendered nugatory.

(f) The applicant would suffer irreparable loss and damage.

(4) Order 42 rule 6 (2) of the civil procedure rules provides:- “No order for stay of execution shall be made under subrule (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”.

In the present application the stay orders sought are in respect of orders for custody and maintenance of two children.

(1) MC born on 11/10/2004

(2) FC born on 8/2/2010

Issued on 11/10/2017 in a judgment of even date delivered by Hon. Nyigoi – SRM

(5) It is observed that the proceedings in the lower court have not been annexed in this application apart from the Judgment.

I have perused the Judgement and in particular page 1 paragraph 3 whereby the learned trial magistrate noted that “the Defendant filed a defence admitting that he is the father to the two minors. He says that he has been providing more than half the needs of the children and has been maintaining them consistently”.

The main ground in this application is that the learned trial magistrate gave the orders sought to be stayed in clear disregard of the paternity issues raised by the appellant. Issue is if the applicant in his defence did admit paternity of the two minors, where did these other paternity issues arise from?

The applicant having admitted paternity of the two minors, no substantial loss would be occasioned to him in maintaining his two children. A payment of Kshs.1,500/= as rent is not unreasonable, nor is payment of school fees and uniform.

Article 53 (1) (e) of the constitution provides:- “Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”

In her Judgment the learned trial magistrate did order that the plaintiff do have the custody of the children and to buy food and clothes for them.

Section 4 (2) of the Children’s Act provides:-“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”.

In the present application which seeks stay orders in respect of maintenance, I find no substantial loss would be occasioned to the applicant. It would not be in the best interests of the children to grant the orders sought.

The application has no merit and its dismissed with costs.

Ruling delivered dated and signed in open court this 30th day of November,2017 in the presence of learned counsel for the applicant, Mr. Mugumya. The Respondent in person present, court assistant Rotich.

M. MUYA

JUDGE

30/11/17

Mr. Mugumya for the applicant

We apply for the records of appeal to be furnished.

Court

Deputy Registrar to furnish the defence and the plaintiff and the court with records of proceedings.

M. MUYA

JUDGE

30/11/17