

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 93 OF 2016

S M W.....APPELLANT/APPLICANT

VERSUS

S W.....RESPONDENT

(An Appeal from the decision/ruling of the Learned Judge High Court, Nairobi in Civil Appeal No. 93 of 2016)

RULING

1. By a ruling dated 27th September 2016, the learned Chief Magistrate at the Children Court in Case No. 126 of 2016 ordered the appellant to provide Kshs.25,000/= per month for maintenance as per the Parental Responsibility Agreement dated 26th October, 2015. He was also to meet the costs of medical care when they arise and education and related expenses. Being dissatisfied by the said ruling, the appellant filed an appeal. On 17th November 2016, he filed an application for stay of execution of the lower court's order pending the hearing and determination of the appeal.
2. The application was heard and the ruling delivered on 12th May 2017 dismissing the application on the basis that the order which the appellant sought to stay touches on the interest of a child, and the best interest principle would be in favour of the order remaining in force to await the outcome of the appeal. Being dissatisfied with the ruling of 12th May 2017, the appellant brought the present application seeking the court to grant him leave to appeal to the Court of Appeal against the ruling and order made on 12th May 2017.
3. There is no dispute that under Order 43 rule 2 of the Civil Procedure Rules, the appellant requires leave to appeal against the ruling that was delivered on 12th May 2017. Under Order 43 rule 3 an application for leave shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within 14 days from the date of such order. In this case, the appellant did not make an oral application at the time of the order, and therefore within 14 days made application for leave. It is material that the present application was filed on 17th May 2017. This was five days following the order complained of.
4. It has to be appreciated that the court cannot stand in the way of a party who seeks to exercise his rights of appeal, and more so a party who is exercising that right timeously. It is further considered that the appellant is seeking to challenge this court's refusal to grant him stay of the orders given against him by the subordinate court in a matter that deals with maintenance, upkeep, medical care and education of two minor children. It is not a frivolous matter.
5. The respondent took issue with the fact that, upon filing this application, the appellant on 19th May 2017 filed a Notice of Appeal at the Court of Appeal. It was submitted on behalf of the respondent that this was an illegal act as there was no leave, and therefore the appellant should be punished by the refusal to grant the present application. I will leave to the Court of Appeal to determine the value of the Notice

of Appeal. What is of value, however, is the present application.

6. I allow the appellant's application dated 17th May 2017 for leave to appeal. Such leave shall be for 14 days. He will pay costs of the application as he has been indulged.

DATED and DELIVERED at NAIROBI on the 20TH day of NOVEMBER 2017.

A.O. MUCHELULE

JUDGE