



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.94 OF 2016

IN THE MATTER OF P K

E W M.....APPLICANT

E M K alias J N.....RESPONDENT

RULING

1. The application coming for determination is the Notice of Motion dated 29/9/2016. The application is based on Section 1B, 3A, 75(1) of the civil procedure Act & Orders 40, 42, Rule 6 & 43 of the Civil Procedure Rules and the Children's Act (2001).

The applicant seeks the following orders;

- i. That pending the hearing of this application the applicant/appellant be granted leave to file the intended appeal herein being dissatisfied with the orders of the Hon. Z. W. Gichana given on 22nd September in Children's case No. 894 of 2012.
- ii. That pending the hearing and determination of the filed appeal the respondent, his advocate, agents, relatives, assigns or anybody acting on his authority be restrained from accessing, requesting, applying for, demanding, pursuing or in any manner interfering with the safe custody of the full amount held in the Judiciary Account in respect of the execution of the decree in the Children's case no. 894 of 2012 and in particular Kshs. 5,614,420 stated by the Hon. Magistrate on 22nd September 2016 as due to the respondent.
- iii. That pending the hearing and determination of the appeal now filed herein the respondent his advocate, agents, relatives, assigns or anybody acting on his authority be restrained from accessing, requesting, applying for demanding, pursuing or in any manner interfering with the safe custody of the full amount held in the Judiciary Account in respect of the execution of the decree in the Children's case no. 894 of 2012 and in particular Kshs. 5,614,420 stated by the Hon. Magistrate on 22nd September 2016 as due to the respondent.
- iv. That this honorable court do give such and further orders in the best interest of the minor and in particular pertaining to the skewed apportionment of money done in the lower court and now who risk being deprived of his future
- v. That costs be provided for.

2. The application is based on grounds that the respondent is the runaway father to P K whom he deserted 14 years ago and has not been providing for his maintenance or upkeep forcing the applicant to file the Children case no. 894 of 2012, which gave rise to a ruling herein against the respondent. That the

respondent has refused to comply with the said court orders for maintenance hence leaving the minor to total neglect and in pursuit of the execution of the said court orders the court ordered the public auction of property no. **Kiambaa/Ruaka/[particulars withheld]** to cater to the minor. The sale proceeds were to cater to the minor's education, shelter, food, clothing and future needs as may be. The sale proceeds of the said property was 9,000,000 which amount the applicant was assured would ensure the minor's life is on the right track incase his father never materialized from his hideout abroad. That upon learning of the said property the respondent resurfaced and approached court seeking that the said amount held in custody for the minor be released to him. The court on 22nd September 2016 denied to grant the orders sought and added that a sum of Kshs. 5,614,420 be released to the respondent. She avers that the said orders failed to acknowledge that the minor still had 4 years to go to attain age of majority and who also has a long way to go before he completes his Secondary and University education and it would be in his best interest that a substantial amount be apportioned for this purpose. Adding that without doubt should the respondent get the said amounts of money he will disappear without consideration of the minor's welfare and she will be left to struggle to maintain the minor alone. That when the time come she will apply for the minor's age to be enlarged to enable him get proper education through his parents and which application will be in futility unless the money currently held at the Judiciary account is kept safely for this purpose. That the Kshs. 483,187 left for the minor with conditions is insufficient to offer him meaningful or proper life noting that the respondent has left for abroad leaving his advocates to wire him the money. That the magistrate failed to take into account that the respondent came to court for the sole purpose of getting money and leaving the minor at the mercy of the gods and his future insecure despite the uphill task she had to endure in forcing the respondent to support the minor adding that the Magistrate misdirected herself in finding that the respondent will participate in the upbringing of the child while he does not stay or reside in Kenya. That it is fair and in the interest of justice that the amounts held in the judiciary account continue to be held there until the hearing and determination of the appeal for purpose of increasing the amount apportioned to the minor for maintenance. That the court will not do justice to the minor if it releases the money without proper and adequate apportioning for the minors upkeep.

3. The respondent in opposition to the application filed his replying Affidavit dated 2nd November 2016. He avers that the application is fatally defective and bad in law and is aimed at denying the respondent the fruit of the court ruling as the same amounts to fresh litigation of issues already heard and determined by the lower court. That the applicant seeks injunctive orders but has not established existence of any prima facie case or established any reasonable grounds for orders sought. He avers that the application is aimed at delaying the execution of the lower court orders adding that the same cannot stand unless the same is based on an existing suit seeking injunctive orders. That the applicant's appeal is based on the ruling of Z. W. Gichana delivered on 22nd September 2016 which he claims is frivolous and has no merit. The said decision is based on two applications dated 21st April 2016 by the appellant and application dated 4th July 2016 by respondent where he sought the applicant to render true account of how she spent Kshs. 2,000,000 paid as deposit for the sale of the said parcel of land. That the ruling had ordered that he pays Kshs. 12,000/- every month from 15th October 2015 and pay school fees and related expenses for the minor and also arrange medical insurance scheme for the minor and also provide shelter with the applicant having actual custody of the minor as both parties enjoy joint legal custody of the minor. He avers that all along he has been residing in the UK and was not aware of the suit in the children's court. Adding that the sale of his parcel of land **Kiambaa/Ruaka/[particulars withheld]** was done behind his back as the applicant mislead the court that he had been served with suit papers and lower court orders. That despite the matter having proceeded ex-parte he agreed to comply with the court's decision and denies the applicant's allegations that he would disappear and not consider the minor's welfare.

4. That the applicant has not appealed against the said judgment or adduced any evidence to prove change of circumstances as the magistrate decision in allowing 2 years advance payment of Kshs. 483,187 to her. He avers that the said judgment set out responsibilities of each party towards the minor and the amount of maintenance payable as long as the judgment remains uncontested, reviewed or un appealed against there is no plausible reason to warrant the high court to disturb the said ruling issued on 22nd September 2016 which is based on the judgment as doing so will be tantamount to appealing against the said judgment.

5. That the judgment had ordered as follows;

i. The plaintiff to render an account on how she has spent the Kshs. 2,000,000 paid to her within 45 days

ii. A sum of Kshs. 483,187/-being computation for two years in advance for the year of 2016 and medical cover be paid to applicant/appellant upon her rendering an account.

iii. A sum of kshs.1, 000,000 be held in court to be invested in interest earning account in the name of the chief magistrate children's court. That the entire sum and interest accrued as per above or part remaining thereon the account upon the child's coming of majority age or such other older age as may be prescribed by the court shall be released alongside the interest earned to the defendant less any maintenance arrears. That the balance of the monies held in judiciary account in the sum of Kshs. 5,614,420 be released to the respondent.

6. That the Magistrate struck a balance with the two applications and in particular granting the applicant orders that request for release of the upkeep and maintenance for two years in advance $12000 \times 75000 \times 12 \times 2 = 288,000$. That request for the release of funds Annual school fees Kshs. $25,000 \times 3 = 75,000$. That medical cover expenses amount to Kshs. 100,000

7. That the applicant is being less than candid as the court went out of its way to make provisions for the future of the minor. She had also received 2,000,000 plus 483,187 two years maintenance and Kshs. 1,000,000 which is to be held in court for the benefit of the minor all which sums up to 3,483,187 which he avers translates to Kshs. 870,796.75 per year and Kshs. 72,566.40. He avers that the applicant is only entitled to the award as contained in the judgment delivered on 15th October 2015 and the same ordered that the net balance of Kshs. 5,614,420 should be released to the respondent to enable him invest and continue paying for the maintenance of the minor. Adding that the applicant is yet to offer an account of the Kshs. 2,000,000 he received. He denied being married to the applicant stating that the said land did not form part of matrimonial property as alleged by the applicant.

8. The applicant filed an answer to the replying affidavit dated 16th November 2016. The same reiterates her averments in the supporting affidavit and highlights the issue raised in her intended appeal.

9. Having considered the applicant's application and parties affidavits. In essence the applicant is seeking a stay of the orders issued by Hon. Z.W. Gichana on 22nd September 2016. Order 42 provides that, "6. (1) *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

(2) *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."*

10. The applicant is seeking a stay of the orders by the said court in order to enable her pursue her appeal on the said ruling. In ***Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.)***, the court in determining an application for stay of execution in cases involving children stated that the general principles for the grant of stay of execution Order 42 rule 6 of the Civil Procedure Rules, must be complemented by an overriding consideration of the best interest of the child in accordance with the injunction of Article 53 (2) of the Constitution - "6. *In exercising its jurisdiction to grant stay of execution, the High Court is*

required by Order 42 rule 6 (2) of the Civil Procedure Rules to be satisfied that –

The applicant will suffer substantial loss if stay is not granted;

The application for stay has been brought without undue delay; and

The applicant has provided security for the due performance of the decree or order appealed against.”

11. The applicant seeks to stay the orders of the lower court to prevent the release of monies obtained from the sale of the respondent's property to him as she pursues an appeal on basis of the monies allocated to her for maintenance of the minor as she argues the same is not adequate. This court in exercising its discretion, notes that the applicant was asked by the Children's Court to account for monies she received. She has not yet done so. This court notes that the child's best interest must be taken into account. The applicant too has a parent responsibility towards the minor. Asking the court to hold on to the entire sum is not fair and just. The respondent has undertaken to comply with the court orders. Thus pending the hearing and determination of the appeal only a sum of Kshs. 2,000,000 shall be retained in court. The balance out of the Kshs.5, 614.420 shall be released to the respondent. The sum of 2 million shall be retained in the Judiciary Account in respect of the execution of the decree in the Children's case no. 894 of 2012. The balance and interest earned shall be released to the respondent. Parties shall go back to the Children's Court to finalize the pending application or hearing. Costs be in the cause.

Dated, signed and delivered this **23rd** day of **June 2017**.

Ruling Amended and signed on the **16th** day of **November 2017**

R. E. OUGO

JUDGE

In the presence of;

Applicant in person E M

Mr. Mwangi For the Respondent

MS. Charity

Court Clerk