



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISCELLANEOUS CIVIL APPLICATION NO. 149 OF 2015
IN THE MATTER OF J M (MINOR)

P.K.M APPLICANT

VERSUS

J.W RESPONDENT

RULING

1. The applicant has filed an application under Section 3A of the Civil Procedure Act Laws of Kenya seeking the following orders;
 - i. *That pending the hearing and determination of the application an order do issue for stay of execution of the warrants of arrest issued on the 16th of October 2015 in Children’s case No. 1020 of 2012 J.K.-vs- P.K.M.*
 - ii. *That an order do issue setting aside the warrants of arrest dated 16th of October 2015 in Children’s case No. 1020 of 2012 J.K.-vs- P.K.M.*
 - iii. *That an order do issue for rehearing of the application dated the 24th of September 2015 inter-parties and the hearing of the case before another Magistrate other than the Hon. Ms. F.K. Munyi*
 - iv. *That costs of the application be provided for.*
2. The application is supported by the affidavit of the applicant P.K.M together with the grounds on the face of the application. This is the applicant’s case in brief; he is the respondent in **Children’s case No. 1020 of 2012 J.K.-vs- P.K.M.** On the 16th of October 2015 the matter was slated for hearing before the Children’s court for hearing of the application dated the 24th of September 2015 which sought review orders , an order for notice to show cause and an order seeking to have the defendant declared as the minor’s father. By the 16th October 2015 they had his affidavit ready, but his counsel didn’t attend court as he was indisposed. His counsel sent a lawyer to hold his brief who informed the court that his counsel was unwell and sought another date. That the Learned Magistrate on learning that he was not in Court issued that warrant of arrest notwithstanding that he was represented by counsel and that application in court did not require his personal attendance.
3. That he was never served as stated by the process server and that the affidavit filed is false as there is no road in Gigiri called “Red soil Road”, neither does he have a day guard nor does he

have a daughter who stays at home. That he is apprehensive that if the warrants of arrest are not lifted he is likely to suffer great prejudice including being confined in civil jail. That his has moved to the Court of Appeal seeking a stay of the proceedings in the lower court as well as appealing against the Judgment and order of Hon. Justice Lenaola which decision upheld the decision of the lower court that he be subjected to a DNA test, which application is awaiting a hearing date. That his application and the intended appeal have high chances of success, if the warrants are not lifted his application for stay before the Court of Appeal and the intended appeal shall be rendered nugatory and mere academic. That he is willing to abide with any conditions granted by the court to allow him stay execution.

4. This application was served on the Respondent, though served there was no response. The matter proceeded ex parte and was unopposed. I have considered the facts as deposed together with the documents attached by the applicant together with the oral submissions .I have also perused the lower court file, **Children’s case No. 1020 of 2012 J.K.-vs- P.K.M** to enable me find out what happened in the lower court on the 16/10/2015 as the applicant alleges bias on the part of the learned Magistrate. From the proceedings of 16/10/2015, Mr. Wafula held brief for Mr. Onyancha, he informed the court that Mr. Onyancha was not ready to proceed as he was indisposed and he sought another hearing date. The plaintiff who was in person didn’t object to the adjournment but sought another near date for the NTSC, she then informed the court that the paternity test was not done and that the summons was served on the defendant. Thereafter the learned magistrate made an order ***that she was satisfied that the defendant was properly served with the summons to appear as the affidavit as per the affidavit of service sworn on 14/10/15, that in his absence a warrant of arrest shall issue and to be executed by the OCS nearest police station.***
5. The warrants were signed on the 16/10/2015. The application dated the 24/9/2015 sought orders of review of the figure in the warrants of arrest, an order for an early hearing date for the NTSC as the minor was at risk of being chased from school and a declaration that the defendant was the after of the minor. The defendant has denied that he was served with the summons. The NTSC was not for hearing on the 16/10/2015. It was therefore wrong for the learned Magistrate to issue a warrant of arrest. The defendant was not given a chance to defend himself; he has a right under the Constitution to defend himself (**see Article 50 (1)**). I find that the appellant’s application has merit, the warrants of arrest issued on the 16th of October 2015 in **Children’s case No. 1020 of 2012 J.K.-vs- P.K.M** are set aside. The application dated the 24th of September 2015 may be heard before any other Magistrate in the Children Court. Costs shall be in the cause. It is so ordered.

Dated, signed and delivered at Nairobi this 28th day of January 2016.

R.E.OUGO

JUDGE

In the presence of;

.....**For the Applicant/ Appellant**

.....**For the Respondent**

.....**Court Clerk**