

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 32 OF 2016

J N N.....APPLICANT/APPELLANT

Versus

W W M (Suing As A mother).....RESPONDENT

RULING

1. The appellant/applicant has applied for stay of execution of the magisterial orders issued on 9th May 2016 in the Children's Court Case No. 20 of 2015 pending the hearing and determination of the intended appeal herein. The application is brought by way of notice of motion and is supported by the grounds on the face of the motion and the applicant's supporting affidavit.

2. In his grounds in support of the application, the applicant has stated that he was ordered to pay Kshs 4,000/- every month towards the maintenance of the children. He further states that the order was made despite early orders requiring the applicant to meet other expenses such as school fees and medical expenses. Additionally, he has stated that the orders were made despite the fact that the applicant's pay slip shows that he only earns Kshs 9,851.60/- per month. And finally, he has stated if stay of execution is not granted, the applicant will remain unnecessarily vexed.

3. In his supporting affidavit, the applicant has stated that he was ordered to pay Kshs 4,000/- monthly for the food of the children and this was to be done on or before the 9th of every month with effect from June 2016. The applicant has further stated that the court appreciated that in making the order, he was paying fees for the children. Additionally, the court observed that the applicant had sufficient income which he asserts is not correct, because it had been established that the applicant earns only Kshs 9,851.60/-. He annexed his pay slip for May 2016 in support thereof.

4. The applicant has further stated that unless the orders of the magisterial court are stayed, he risks being committed to civil jail, because he does not have sufficient income to cater for the children. According to him, he has always taken care of school fees, medical and all school related expenses. And finally, he has stated that if the orders are not stayed pending the hearing and determination of the intended appeal, the same may be rendered nugatory. And it is for these reasons that he now prays that stay be granted.

5. The respondent has opposed the application for stay of execution in support of which she has filed a replying affidavit dated 14th June 2016. She has stated that the applicant has sufficient income, because he has other sources of income in addition to his salary of Kshs 9,373.45/-. She has also stated that if the orders of 9th June are stayed, he should be committed to civil jail since the applicant has not complied with the orders. She further states that the applicant has been responsible for the payment of school fees in the sum of Kshs 3,500/- and other expenses. According to her, an order for stay of execution should not be issued because the same will not be rendered nugatory. Finally, she urges the court not to grant the stay of execution.

6. Both parties made short oral submissions in support of their positions in this application.

7. The law governing stay of execution is found in Order 42 Rules 6 (1) (2) and (2) of the 2010 Civil Procedure Rules. According to Order 42 Rule 6 (2) stay of execution shall not be made if the following criteria is met:

(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.

8. I have considered the affidavit evidence of both parties and their short oral submissions in court. I find that the appellant/applicant has an arguable appeal. I also find that unless stay of execution is granted the intended appeal may be rendered nugatory. In the circumstances I hereby grant an order of stay of execution in terms of prayer 3 of the notice of motion, pending the hearing and determination of the intended appeal.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **23rd** day of **JUNE 2016**

In the absence of the applicant and his counsel and in the presence of the respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

23.06.16