



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 35 OF 2015**

**C M .....RESPONDENT/APPLICANT**

**VERSUS**

**I N M .....APPELLANT/RESPONDENT**

**R U L I N G**

1. Before this Court for determination is a Notice of Motion dated 9<sup>th</sup> June, 2015 and taken out under **Orders 39 Rule 1, 40 Rule 2 and 42 Rule 14 the Civil Procedure Act** and all other enabling **Provisions** of the **Law**. The Appellant/Applicant seeks orders that:

1. ....spent

2. ....spent

3. That the appellant/respondent be ordered to pay a sum of Kshs.1,128.770.00 and USD1,800 or provide security for payment thereof together with monthly payments of USD800 from July 2015 as deemed appropriate by this court.

4. ....spent

5. That the Officer Commanding Police Division (OCPD) Kilimani be ordered to immediately execute the warrant of arrest and arrest the appellant/respondent at his (former) place of work *Particular withheld* or at his residence at *Particulars withheld* Mbaazi road, off Gitanga road, Valley Arcade or wherever he may be found, located or traced.

6. That the passports of the subject children I I N and I I N be returned to her by the Appellant, since she is the one who was granted their care control and custody by the Children's Court at Nairobi on 31<sup>st</sup> March, 2015.

The Respondent also seeks orders of court that the Appellant do give security for costs on his pending appeal in the sum of Kshs.1,000.000/=.

2. The application is predicated upon grounds that on 31<sup>st</sup> March 2015 the Children's Court in Case No. 1606 of 2014, ordered the Appellant/Respondent to pay the Respondent/Applicant the sum of USD 800 per month. That by an application dated 10<sup>th</sup> April 2015 and filed on 22<sup>nd</sup> April 2015, the Appellant/Respondent applied for stay of execution pending determination of his Appeal. Lastly, that on 8<sup>th</sup> May 2015 by a recorded consent order, the appellant agreed to effect some payment as a condition for interim orders, for stay pending hearing of the application to issue, but is now saying that that was only to

dupe the court, advocates and the Respondent/Applicant.

3. The application is supported by the affidavit of **C M**, the Applicant herein, sworn on even date, in which she deponed that in a meeting with the Appellant at the Olive Garden, Hurlingham, he told her the following:

a) He had just returned from Geneva having handed in his final report at the end of his contract in Kenya and was a waiting tickets for himself and the family so as to leave the country.

b) He had taken care of the court and the Applicant could do nothing about the case since the court has no power over him anymore.

c) He had instructed his advocate not to appear in court anymore and indeed on 4<sup>th</sup> June 2015, his advocate did not appear in court for an application dated 17<sup>th</sup> April, 2015 which they had fixed for hearing on that date in Children's Court Case No. 1606 of 2014 from which this appeal arose.

d) He would pay the decreed amount whenever he wanted and in the amount he chose and not as earlier agreed. That, that is why he had only paid USD 617, instead of the sum of USD1600 that was recorded in court on 8<sup>th</sup> May, 2015.

e) The consent order to pay the amount together with a monthly sum of USD400 was meant to dupe the court and the Applicant to stop bothering him.

4. I note that although served on the 17<sup>th</sup> July 2015, neither the Appellant/Respondent nor his Advocate honoured the hearing Notice to attend the hearing for the Notice of Motion dated 9<sup>th</sup> June, 2015. None the less this court has assessed the grounds of the application to establish whether there was merit therein

5. Upon perusal of the record I observe that on 8<sup>th</sup> May, 2015, a consent was recorded in which the Appellant/Respondent was to pay USD 400 per month to the Respondent/Applicant, commencing on 1<sup>st</sup> June 2015. It was this consent order which enabled the Appellant/Respondent to obtain orders staying the execution of the orders the Children's court to pay maintenance. By the orders of the Children court the Appellant/Respondent was to pay to the Respondent/Applicant Kshs.2 million in arrears, together with USD 800 in monthly maintenance.

6. At the time of making the submissions in this application on 4<sup>th</sup> February 2016, the arrears stood at Kshs.1,678,770/= and USD 7730 respectively. This is because beyond making payments for two months only, the Respondent/Applicant did not comply with the orders of the court which had been arrived at by the parties' own consent.

7. More importantly, the Appellant/Respondent has not obeyed the said orders. Court orders have to be obeyed as soon as they are issued and it matters not whether the recipient agrees with them or not. In ***Hadkinson vs. Hadkinson (1952) All ER 567***, the court maintained that court:

***“Orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up”.***

This point was emphasized in *Kanchanben Ramniklal Shah vs. Shamit Shantilal Shah & 6 Others (2010) EKLK* by Njagi, J (as he then was) as follows:

**“A Court Order is valid and effective from the moment it is made. It is born mature and has no period of infancy, and therefore commands obedience forthwith.”**

8. At the time of this application the children who were still in the country and in school, were in the

custody of the Respondent/Applicant. The court was told that the Appellant/Respondent had however, retained their passports and was out of the country. The court was also told that being a UN employee, his tour of duty in the country had come to an end and he was likely to leave the control any time, hence the prayer for security for costs in the sum of Kshs. 1 million, in the event that he lost the intended appeal.

9. It is noteworthy that the Appellant/Respondent had also filed application dated 10<sup>th</sup> April 2015, for stay of execution pending appeal and a second application dated 7<sup>th</sup> July 2015. In the second application he sought residence and custody orders for the minors to reside with him, pending the hearing and determination of the appeal. These two applications had been argued together on 31<sup>st</sup> July, 2015 and in the ruling dated 15<sup>th</sup> September 2015 this court had declined to grant them.

10. Indeed the orders of the Children court which are at the centre of the dispute were issued for the benefit of the children of the two litigants. The said children came to Kenya together with the Respondent/Applicant, at the behest and invitation of the Appellant/Respondent. The Appellant/Respondent set them up for accommodation in hostels where they ran up the bills which are now part of what the Appellant/Respondent has been called upon to pay up.

11. It is worth repeating once more, that the children's interests and welfare are paramount and superior to the rights and wishes of their parents and their welfare must be considered in its widest sense. This is in line with **Article 53(2)** of the **Constitution** which provides that "a child's best interests are of paramount importance in every matter concerning the child". This also finds expression in **Section 4(2)** of the **Children Act** which provides that:-

***"In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."***

12. The Respondent/Applicant has given this court sufficient cause to enable the court to exercise its discretion in her favour and grant the orders sought. In view of the foregoing, this court finds that the application dated 9<sup>th</sup> June 2015 has merit and is allowed in terms of prayer No. 3 and 6 respectively. The process of execution to follow the usual course.

**SIGNED DATED and DELIVERED** in open court this **19<sup>th</sup> day of July 2016**.

.....

**L. A. ACHODE**

**JUDGE**

**In the presence of .....Advocate for the Respondent/Applicant**

**In the presence of .....Advocate for the Appellant/Respondent**