



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO 10 OF 2016

S CAPPELLANT

VERSUS

M J R.....RESPONDENT

RULING

By a way of notice of reaction application dated the 29th day of April 2016 and which is expressed to be brought under Order 51, Order 42 Rule 6(1) (2) of the Civil Procedure Rules, the applicant seeks the following orders.

1. Spent

2. That there be a stay of execution of the order made by the Resident Magistrate Bomet on 20th April 2016 in Maintenance Cause No 46 of 2014.

The grounds are that the appellant risks being arrested as there is a warrant of arrest in force.

It's instructive to note that there are two similar applications before the court. There is the one dated 7th June 2016 and the other dated 29th April 2016 both seek and pray for orders of stay of execution of the order made by the Resident Magistrate on 20/4/2016.

It's therefore not clear which one the applicant would want to pursue for purposes of his application. There ought to be withdrawal of one of them for reasons of clarity and proper intent and to ensure that the respondent is not prejudiced. Be that as it may, I will still try to endeavor to try to decipher the applicant's case. The order subject matter of these stay proceedings has not been extracted and annexed to the affidavits in support of this application so as to form part of these proceedings.

What is annexed is a Notice to Show Cause dated the 4th day of March 2016 but this one is in respect of an application dated 29th April 2015.

I have had the opportunity of perusing the lower court file Bomet PM's Court Maintenance Cause No 46 of 2014, the proceedings, the judgments and subsequent rulings. I do not want to comment on them as they could be subject to an appeal.

I have perused the memorandum of appeal dated 29th April 2016 which is against the ruling delivered on 20/4/16. It's noted that there is no draft memorandum of appeal on the main judgment itself. This is a maintenance cause which revolves around the maintenance of a child where the trial magistrate ordered the defendant to pay school fees, clothing and medical expenses to the tune of Kshs 6000/= per month.

This application is expressed to be brought under Order 42 rule 6(1)(2) of the Civil Procedure Rules which provide:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order for stay of execution of such decree or order, and whether the application for such a 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 orders 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 appellant.

As argued supra the order appealed from has not been extracted and or made a part of these stay proceedings. Secondly, apart from stating that there is a warrant of arrest in force, no attempts have been made on how the applicant will suffer substantial loss if the stay orders are not granted.

Thirdly, there is no security given by the applicant on the due performance of suit order or decree that the court may grant.

The upshot is that the applicant has not brought himself within the required confines of the law.

This application has no merit and it's dismissed with costs to the respondent.

It is noted that the respondent had chosen two modes of execution

(1) Attachment of the applicant's salary

(2) Arrest.

The respondent has to choose one mode of execution. She cannot go for attachment of the applicant's salary and at the same time ask for his arrest and committal to civil jail.

This matter touches on the issue of maintenance of a child. The interests of a child are paramount.

Same to be mentioned before the trial court within seven days from today.

Ruling delivered dated and signed in open court this 22nd day of September 2016 in the presence of learned counsel for the applicant holding brief Mitey for applicant.

The respondent in person

Court Assistant- Mercy

M.MUYA

JUDGE

22/9/2016

Mention on 29.9.2016 before the lower court for further directions / orders.

M.MUYA

JUDGE

22/9/2016