



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 612 OF 2015

A N SAPPELLANT/APPLICANT

VERSUS

R M O.....RESPONDENT

(Being Appeal against the judgment of Hon. Kuto (Senior Resident Magistrate) delivered on 2nd December, 2015 in the Children's Court at Nairobi Children Cause No. 899 of 2013)

R U L I N G

1. The Appellant/Applicant approached the High Court by way of Memorandum of Appeal dated 10th December, 2015. Contemporaneously with the Appeal the Applicant filed a Notice of Motion dated 10th December, 2015 and taken out under **Order 50 Rule 6, Order 22 rule 22**, of the **Civil Procedure Rules 2010** and **Section 1A, 1B** and **Section 3A** of the **Civil Procedure Act 2010**.
2. In the application he seeks orders of stay of execution of enforcement of the Orders of the court in **Nairobi Children's Case Number 899 of 2013, R M O vs A S**, pending inter parties hearing of this application and the intended appeal. The orders are contained in the Ruling of Hon. Kuto, Senior Resident Magistrate dated 2nd December, 2015.
3. The application is premised on grounds that the Applicant was ordered to pay Kshs.148,251/= despite the fact that the Applicant had questioned the authenticity of the receipts constituting the said expenditure by the Respondent. That the said figure was merely a refund to the Respondent for school related expenses allegedly incurred in maintaining the children of the marriage, and monies required for the future, or to be spent for that purpose.
4. The Applicant complained that the court failed to apportion the responsibility of the children's school fees to both parties notwithstanding that the Respondent earns more than the Applicant. That the Applicant's circumstances have changed substantially since his salary was reduced after he was demoted owing to the present case. That L A N. is already employed and F A N is now married and that means the Respondent has no parental responsibility to maintain them.
5. The Applicant also complained that the Respondent presented fake receipts including ATM receipts in the term school fees and related expenses, thus inflating the money she claimed by Kshs.122,258/=. That the Respondent transferred D S N to [Particular withheld] School without the Applicant's knowledge, and which transfer caused a loss of Kshs.55,000/= which had earlier been paid to [Particulars withheld] High School as fees and related expenses.

6. The Applicant further alleged that the Respondent is also planning to transfer the child G M from [Particulars withheld] Primary School to [Particulars withheld] Academy whose School fees is way above what the Applicant can afford. The Applicant said that unless the prayers sought are allowed, warrant of execution will certainly be issued against him.

7. The Applicant in his affidavit in support dated 10th December 2015 reiterated what was stated in his application. He deposed that since the time the suit was filed, he has been paying school fees, maintenance and school related expenses but such gesture has been abused by the Respondent who has been going for shopping sprees and presenting such shopping receipts as genuine and necessary expenses for maintenance of the children.

8. The Applicant averred that he had overpaid maintenance money by Kshs.100,000/= as he used to pay Kshs.10,000/= for both D S N and G M That he ought to have paid Kshs.5,000/= per month to cater for G.M. only, considering that D S N was in boarding school. He tabulated the amount he paid while D S N. was away in boarding school as follows:

- a. September – November 2013 - 3 months = Kshs.15,000/=
- b. January - March, 2014 - 3 months = Kshs.15,000/=
- c. May - July 2014 - 3 months = Kshs.15,000/=
- d. September - November 2014 - 3 months = Kshs.15,000/=
- e. February - March 2015 - 2 months = Kshs.15,000/=
- f. May – July 2015 - 3 months = Kshs.15,000/=
- g. September – November 2015 - 3 months = Kshs.15,000/=

9. The Applicant argued that since the order was made on 8th July 2013 to date, he has paid a total of Kshs.342,406/= as maintenance to the Respondent, her Advocate, and directly to the adult dependant children. The Applicant asserts that the said sum has not been disputed if computed at the rate of Kshs.10,000/= per month. That he ought to have paid Kshs.290,000/=.

10. The Respondent has opposed the application, in her Replying Affidavit dated 9th February, 2016. She avers that the appeal contains untrue, exaggerated and scandalous allegations which attempt to impute conduct of a criminal nature on her part when the Appellant alleges that the Respondent produced false documents and gave false evidence purportedly to get favourable orders from the court.

11. The Respondent denied that the Appellant has been paying school fees, school related expenses and maintenance faithfully as alleged. She also denied that she has taken advantage of the order of school related expenses to exploit the Appellant by purchasing non-essential items in place of school related items. That the court's orders of the 8th July 2003 do not include directives that the Appellant do take out a medical cover as the Appellant seems to allege.

12. The Respondent further averred that the school fees at Donholm Primary School is about Kshs.30,000/- per term and not Kshs.66,000/= as alleged by the Appellant.

13. The Respondent pointed out that the Appellant had lodged applications for leave to appeal and for review of court order directing him to clear his decretal sums but the applications have failed for lack of merit. She attached to her affidavit copies of Notice of Motion application by the Appellant dated 28th November 2014 seeking leave to appeal and Notice to Appeal dated 3rd December, 2013.

14. The Respondent also indicated that the Appellant failed to produce any important evidence in

demonstration of his case. The Appellant failed to produce his latest pay slip in demonstration that he took any loans which he is servicing to date and which has made his salary to reduce to kshs.25,000/=, he failed to produce any copy of any receipt he alleged are false and fake. He also failed to demonstrate that he was demoted as a result of this case among other instances.

15. The Respondent averred that if the order of stay of execution of the said warrant of arrest would be granted, the subject children are bound to suffer great prejudice as they may lack provision for education and maintenance. She urged the court to hold as paramount, the welfare and best interests of the children involved.

16. From the rival arguments advanced before me I find that the issue for determination is whether the Applicant has made a case to warrant the grant of the orders sought. That is, whether there are sufficient reasons for the court to stay the execution of the orders issued by the Children's court on the 3rd December, 2015 and the warrants for the arrest of the Applicant.

17. The principles to be considered by the court in determining whether or not to grant an application for stay of execution are to be found in Order 42 rule 6(2), which provides that no order for stay of execution shall be made unless the court is satisfied that;

- a. Substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay, and;
- b. The applicant must be prepared to give security for the due performance of such decree or order as my ultimately be binding on him.

18. The conditions for granting a stay of execution pending appeal are therefore well settled. These are that the application should be made without undue delay; show that substantial loss may be suffered by the applicant unless the order is made and finally that the applicant should offer such security as may be ordered by the court.

19. The orders which the Applicant seeks to stay execution thereof were made on 2nd December, 2015, while the instant application seeking stay was filed on 15th December, 2015, 13 days after delivery of the said orders. In the circumstances, this court is satisfied that the application was made timeously and therefore has satisfied the first limb of **Order 42 Rule 6** of the **Civil Procedure Rules**.

20. On the second limb as to whether the Applicant has shown what substantial loss he stands to suffer, the decisions which lend themselves to the circumstances of this case are to be found in the case of **Adah Nyabok -vs- Uganda Holding Properties Limited (2102)**, in which Mwera J (as he then was) stated that:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”

and in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, in which **Musinga, J** (as he then was) explained substantial loss in the following terms:

‘...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.’

The provisions of the law are very clear and couched in mandatory terms: the Court shall not issue any stay orders unless the two grounds set out in sub-rules (a) and (b) of Order 42 Rule 6 are satisfied.

21. The Applicant has not in his grounds or the supporting affidavit specifically stated that he stands to suffer substantial or irreparable loss and damage if the orders of stay do not issue as prayed. He has also not specifically demonstrated in what manner the substantial or irreparable loss will be occasioned. What

pains him is the payment of arrears of Kshs.148,251.00 contained in the order of 3rd December 2015, which in his view arose out of questionable expenditure and double claims.

22. The Applicant has indicated that pending the hearing and determination of the application he is willing to continue with the payment of the school fees and maintenance at the earlier rates prescribed by the court. His plea to the court is that the Respondent be made to account for the monies the Applicant has so far paid to her as maintenance, school fees and school related expenses.

23. An order for stay is a discretionary remedy. The discretion is however, circumscribed by the conditions set out under **Order 42, Rule 6** of the **Civil Procedure Rules**. The court must therefore exercise its judicial discretion in the interests of justice, considering the special circumstances of this particular case, which is a matter concerning children. It is the welfare of the children in issue which is of paramount consideration in this application.

24. It is observed that the Applicant states that his lot has since changed for worse, that the Respondent is in better financial standing than he is and that some of the children in issue have since attained the age of majority and need not be maintained. In view of the foregoing, this court finds that the interests of justice would be best served with the granting of the orders sought in the application dated 10th December, 2015 with conditions.

25. For the foregoing reasons it is therefore, ordered that the warrant of arrest be and is hereby stayed on the following conditions:

1. That the Applicant shall continue to comply with the orders of the court issued on 16th July 2013.
2. The Applicant do deposit Kshs.148,251.00 in court as security within 60 days of this ruling.
3. Failure to comply with 1 or 2 above within the stipulated time the warrant of arrest do issue without further notice to the Applicant.
4. That the main suit in the magistrate's court be fixed for hearing within three months of this date.

SIGNED DATED and DELIVERED in open court this **8th day** of **December, 2016**.

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondent