

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL CASE NO. 62 OF 2014 (OS)

T M O.....APPELLANT

VERSUS

E A.....RESPONDENT

RULING

1. The Motion for determination is dated 8th August 2014. It seeks stay of execution of orders made in Nairobi Children’s Court Case No. 339 of 2014 made on 31st July 2014, pending hearing and determination of the appeal filed herein.
2. The application is predicated on the grounds and facts set out in the supporting affidavit. The court had ordered on 5th March 2014 that the applicant provides maintenance for the child at the rate of Kshs.40,000.00 per month. He sought review of the amount but his application was dismissed on 31st July 2014, where it was ordered that he should continue to pay the monthly sum of Kshs. 40,000.00 failing which his salary would be attached. His case is that the child in question is very young and that the amount ordered was not justified. He pleads that he cannot afford the amount ordered and he would suffer substantial loss should execution proceed. He states that he is willing to pay a lesser amount which is affordable.
3. The respondent has replied to the application *vide* his affidavit sworn on 25th August 2014. She states that the applicant has not been complying with the orders of the lower court. She avers that in his affidavit of means, he put his income at Kshs.257,449.00 per month, yet his expenses stand at Kshs.458,800.00. She pleads that the applicant can afford the monthly payment of Kshs.40,000.00 from his various sources of income. She states that she is a student living with her parents.
4. The application was argued orally on 26th August 2014. Mr. Musyoka appeared for the applicant, while Ms. Muhanda urged the case for the respondent. Both articulated their respective client’s positions on the basis of the papers that they had filed for or against the application.
5. It emerged from the proceedings that the applicant had come to court without fully complying with the orders of the lower court. Indeed, at the hearing on 26th August 2014 counsel for the applicant came to court with a postdated cheque intended to clear outstanding arrears. It also emerged that he was at about the same time working on the processing of the child’s birth certificate as earlier ordered by the lower court. It cannot therefore be said that he came to court with clean hands.
6. The applicant complains that the lower court erred in fixing the monthly maintenance at the rate of Kshs.40,000.00.00. The Motion dated 8th August 2014 asks me to review this amount to some figure that is reasonable to or affordable by the applicant.
7. I have perused the memorandum of appeal filed herein, dated 8th August 2014 and filed herein on 11th August 2014. The grounds of appeal are that the lower court used the wrong principles of law in arriving of the figure of Kshs.400,000.00 per month. He argues that there was no basis for arriving at the said figure. The grounds set out in the memorandum of appeal are equally the same grounds set out in support

of Motion dated 8th August 2014.

8. I am mindful of the fact that this is a children's case. Stay is sought of an order for payment of money for the maintenance of a child. As a matter of principle stay orders are not always made in children's cases in respect of orders for maintenance, particularly in cases such as this where paternity is not an issue. I cannot therefore even contemplate staying the orders made by the lower court on the maintenance of the minor.

9. The applicant invites me to revise the amount to a figure that he can afford. I note that he has not suggested any figure of what he considers reasonable. My view is that I cannot revise the maintenance amount ordered by the court for doing so would be tantamount to determining the appeal at the interlocutory stage, for on what basis would I review the said amount without questioning the principles applied by the lower court in arriving at the figure in the first place.

10. I do not find material upon which I can order stay of the orders of the lower court. The application dated 8th August 2014 is for dismissal and I do hereby dismiss the same with costs. The lower court shall be returned forthwith to the children's court registry.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF January 2015.

W. MUSYOKA

JUDGE