

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.8 OF 2012

P A K.....APPELLANT

VERSUS

S A K.....RESPONDENT

RULING

The Appellant, P A K was aggrieved by the decision of the subordinate court delivered on 27th February 2012. That decision had directed the Appellant to pay the Respondent a monthly maintenance of Kshs.40,000/-. The Appellant filed an appeal to this court. Contemporaneous with filing the appeal, he filed an application pursuant to **Order 42 Rule 6** of the **Civil Procedure Rules** seeking to stay the execution of the decision of the subordinate court pending the hearing and determination of the appeal. The application was opposed. This court heard the application. In its considered Ruling delivered on 2nd July 2014, the court dismissed the application with costs.

Undaunted, the Appellant filed an application on 14th October 2014 pursuant to **Order 45 Rule 1** of the **Civil Procedure Rules** seeking to have the said decision reviewed and set aside on the grounds that, on the face of it, the Ruling contained an error apparent on the face of the record. In particular, the Appellant argued that the court delved into the issue of maintenance of the children of the parties to the appeal, yet the issue that was before the court was the payment of monthly alimony to the Respondent. The Appellant was of the view that the court made an error in the Ruling when it decided the case on the basis of the fact that the Appellant should pay the sum ordered by the subordinate court because the best interest of the children was in issue. On her part, the Respondent opposed the application. She was of the view that the Appellant had not established any ground for this court to review its decision.

During the hearing of the application, this court heard oral rival submission made by Mr. Arusei for the Appellant and by Mrs. Wambugu for the Respondent. This court has carefully considered the said submission. This court agrees with Mr. Arusei that for this court to review a decision on the basis that there is an error apparent on the face of the record, that error must be so glaring that it will literally stare at the court that the particular court need not enter into an intellectual exercise to reach the determination that indeed such an error exists. In that regard, this court is wholly in agreement with the Court of Appeal decision in **Pancras T. Swai – v- Kenya Breweries Limited [2014] eKLR**. The Appellant's case is that this court erred when it considered the issue of the maintenance and upkeep of the children in determining whether it should grant stay of execution pending the hearing of the appeal. The Respondent on her part argues that the issue of her alimony and that of the maintenance of the children are so intertwined that the court correctly took into consideration the fact that the Appellant had failed to pay maintenance for the children and thereby it affected the alimony to be paid to the Respondent.

Having carefully considered the rival submission made by the parties to the application, it was clear to the court that the Appellant failed to establish that there exists an error apparent on the face of the record that is amenable to be corrected by this court granting the application for review. The underlying issue that this court took into consideration in refusing to grant the application for stay of execution pending the hearing of the intended appeal is the fact that the Appellant had refused to pay either the maintenance for the upkeep of the children or the alimony of the Respondent. The court was of the view that the Appellant was using the legal process to frustrate the Respondent and the children hence the invocation by the court of **Section 4(3)** of the **Children Act**. There is no error apparent on the face of the record as the court correctly assessed that the Appellant was determined not to pay a penny for the maintenance and the

alimony. It appears that the Appellant is determined in his quest not to pay any amount to the Respondent despite the existence of a court order. The present application for review of the earlier decision made by this court should be looked at in that light.

The application therefore lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 29TH DAY OF JANUARY 2015

L. KIMARU

JUDGE