



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL APPEAL NO: 11 OF 2014

M NAPPELANT

VERSUS

T A N.....1ST RESPONDENT

P A S.....2ND RESPONDENT

RULING

1. A memorandum of appeal dated 6th February 2014 was lodged herein on 6th February 2014. In it the applicant appeals against an order made on 14th January 2014 in Nairobi Children’s Court Case No. 1743 of 2012. The lower court is said to have misdirected itself in dismissing the appellant’s application dated 9th September 2013, failed to address its mind to the facts of the case, arrived at a wrong decision, applied wrong principles, considered irrelevant issues and failed to accord the appellant an opportunity to be heard.

2. Subsequently, a Motion dated 27th June 2014 was filed by the appellant on 30th June 2014. It seeks one principal order – stay of execution of the orders issued by the lower court on 30th July 2013 and 19th June 2014 pending the ruling and determination of the appeal herein.

3. The grounds upon which the Motion is premised are set out on the face of the application and in the affidavit sworn on 27th June 2014 in support of the application. The appellant’s case is that the lower court proceeded with the case *ex parte* on 5th June 2013 and made orders on 30th July 2013 that were adverse to him. The matter was not in the cause list for 5th June 2014. The orders of 30th July 2013 replaced orders made on 25th April 2013. He filed an application dated 9th September 2013 at the lower court seeking to have the orders of 30th July 2013 set aside, but the application was disallowed on 14th January 2014, hence this appeal. He sought stay at the lower court of the said orders but the stay application was equally disallowed. He was served with a notice to show cause for non-payment of a sum of Kshs.410,200.00 allegedly accrued for non-compliance with the orders of 30th July 2013. He was ordered to pay the sum of Kshs.410,200.00 in fourteen (14) days.

4. He concedes to be the father of the child in question, and evinces willingness to contribute to her welfare, but pleads that he should have been heard at the trial on 5th June 2013. He states that he has been complying with the interim orders made on 25th April 2013, and is willing to continue paying the said amount pending appeal. After the order of 30th July 2013 he proposed to the respondent his willingness to pay a sum of Kshs.25,000.00 monthly but his offer was rebuffed. He states that his financial circumstances are such that he cannot meet the obligations imposed by the orders of 30th July 2013. He

claims to have another family which is also dependent on him. He complains that the orders of 30th July 2013 place the burden of parental responsibility solely on him.

4. He has attached copies several documents to his affidavit. There is the full cause list for the Children's Court for 5th June 2013, as evidence that the matter was not on the list of the matters that were to be heard on that day. There is also a copy of the formal order given on 30th July 2013 and issued on 6th August 2013. The appellant was ordered to pay Kshs.30,500.00 per month as rent and Kshs.12,000.00 per month for food and household expenses and medical expenses. The respondent was ordered to cater for clothes, diapers and half-household expenses. There is also a copy of the formal order made on 25th April 2013, where interim payment was fixed at Kshs.15,000.00 per month pending the hearing scheduled for 5th June 2013. Finally, there are copies of the applications dated 9th September 2013 and 14th February 2014.

5. The respondent's reply to the application is contained in her affidavit sworn on 31st July 2014. She accuses the appellant of failing to comply with the orders of 30th July 2013 in respect of monthly payment for the minor's maintenance. The accrued amount is said to stand at Kshs.521,200.00 as at 31st July 2014. She deposes that the appellant's various applications at the lower court to set aside and stay the orders of 30th July 2013 were dismissed by the lower court. The respondent argues that the appellant has not come to court with clean hands. She asserts that the minor's needs still require to be met. She submits that it would be in the best interests of the child that the orders of 30th July 2013 remain in force pending hearing and determination of the appeal.

6. She has attached to her affidavit copy of the formal order made on 30th July 2013, the notice to show cause dated 25th February 2014 and letter from her lawyers to the appellant's lawyers tabulating the accrued monthly maintenance as at April 2014.

7. There is on record a supplementary affidavit sworn by the appellant on 4th August 2014. His averments mirror those in his supporting affidavit. The only new thing is that he has attached evidence to support his assertion that he has been paying the Kshs.15,000.00 per month as ordered by the court on 25th April 2013. He has stuck to paying Kshs.15,000.00 monthly even after the court revised the figure upwards to Kshs.42,500.00. The other significance in the affidavit of 4th August 2014 is that the appellant avers that he cannot comply with the order of 30th July 2013 because he has appealed against them, adding that he cannot also afford the amounts in the said orders.

9. The respondent filed another affidavit on 11th August 2014, sworn on 11th August 2014. The principal averment in this affidavit is that she has been out of employment since 15th October 2011 when her employer became insolvent.

10. It was directed on 12th August 2014 that the application dated 27th June 2014 be disposed by way of written submissions. The appellant's written submissions are dated 11th August 2014, while the respondent's are dated 28th August 2014. The appellant has also filed a rejoinder to the respondent's submissions, in a document dated 3rd September 2014.

11. The appellant submits that he has satisfied the grounds set out in Order 42 rule 6(2) of the Civil Procedure Rules for grant of stay of execution pending appeal. He argues that the amounts set out in the orders of 30th July 2013 are not affordable and therefore if stay is not granted and he is required to pay the said amounts he would suffer substantial loss. He states that the application for stay was filed without unreasonable delay for although the impugned orders were made on 30th July 2013 he did not come to the High Court immediately because he sought stay first at the lower court. The lower court did not pronounce itself on the stay pending appeal until 19th June 2014, declining stay, whereupon the instant application was filed in court on 30th June 2014.

12. The respondent argues, on substantial loss, that the orders relate to discharge of parental responsibility. She submits that the issue of substantial loss should not arise in children's cases. She cites the decisions of the High Court in *DKN .vs. EWM Murang'a HCCA No. 1 of 2013*, *ZMO –vs- EIM Nairobi HCCA No. 13 of 2013* and *Ngatia Muriuki –vs- Ursula Susan Wambui Muriuki Nairobi HCCA No. 26 of 2013* where that issue was addressed. She further submits that the appellant has not complied with the orders of 30th July 2013 nor offered security for due performance. She points out that the amounts outstanding stood at about Kshs.800,000.00 as at the date of her submissions. Finally, it is submitted that his misconduct of disobeying the order of 30th July 2013 should disentitle him to the orders sought in the instant application.

13. In his response to the submissions of the respondent, the appellant cites the constitutional provisions on the right to a fair trial and argues that the proceedings of 5th June 2013 violated his rights. He further submits that parental responsibility ought not have been imposed as the parties were not married. He concludes by submitting that the trial court ought to have considered his ability to pay the amounts set out in the order of 30th July 2013.

14. I have considered the documents filed herein by both sides, the memorandum of appeal, the rival affidavits and submissions; and it is my view that the only issue for me to consider at this stage is whether or not I should grant stay of the orders made on 30th July 2013 pending appeal.

15. I am cognizant of the fact that these proceedings relate to the maintenance of a child. The guiding principle on the handling of children's matters is set out in Article 53(2) of the Constitution and Section 4(3) of the Children Act, Cap 141, Laws of Kenya. These provisions underline the principle that the best interests of the child should be the most paramount consideration in all cases touching on children.

16. The orders of 30th July 2013 directed the appellant to pay certain sums of money monthly to cater for the needs of the child in question especially as it concerned provision of shelter, food and medical care. The appellant has applied to this court asking that the said orders be stayed pending appeal. The issue is whether there can be stay of a child maintenance order, especially in cases where paternity is not disputed.

17. The High Court has determined, in several decisions where this issue has come up, that stay would not be available. The duty to maintain a child is imposed on a parent by statute. It is mandatory. A stay order would have the effect of suspending the duty, which would be unconscionable. It has also been stated that the stay of execution relief provided for in Order 42 rule 6 of the Civil Procedure Rules is designed for pure civil cases, and it is not suitable in children's cases. It is only in very rare circumstances that an appellate court would order such stay. I doubt whether that this is one such circumstance.

18. I note from the record that the appellant has insisted on effecting payments on the basis of the orders made on 25th April 2013. To my understanding that order was made pending the *inter partes* hearing of the matter on 5th June 2013. There was a hearing on 5th June 2013 which culminated in the orders of 30th July 2013. To my mind the orders of 30th July 2013 had the effect of overtaking and superseding the orders of 25th April 2013. This therefore means that the orders of 25th April 2013 ceased to be effective on 30th July 2013 as they were substituted with the orders made on that day. Whether or not the proceedings of 5th June 2013 were valid is a matter for determination at the hearing of the appeal. The appellant is clearly complying with orders that are no longer valid.

19. It is quite clear that the appellant has altogether ignored the orders of 30th July 2013 and has proceeded since that date to treat the said orders as non-existent preferring to comply with the earlier orders of 25th April 2013. He gives two reasons for disregarding the orders of 30th July 2013. Firstly, he says that he "*cannot comply with the said order as I have already lodged an appeal.*" Secondly, he says that the amounts given in the said order are unaffordable.

19. Let me start with the second reason, the unaffordability. I note from the material placed before me that the appellant did not make any single effort after 30th July 2013 to comply with the order by making even one single payment of the amounts the subject of the said order. He alleges unaffordability of the amounts, but I note that he has not disclosed his monthly income nor his monthly expenses. There is therefore nothing on record to demonstrate unaffordability. The only explanation he offers is that he is married and therefore there is another family to take care of. With respect, that is not good enough.

20. On the question of the appeal, it is quite evident from his affidavits that the appellant has chosen to disregard the orders of 30th July 2013. He brazenly states on oath that he cannot comply with the said orders because he has filed an appeal against the orders.

21. It is trite law that the filing of an appeal does not operate as a stay of the order appealed against. The appellant has to move the court to have the order stayed. The grant of stay is at the discretion of the court. No doubt the appellant is aware of this legal position hence the filing of the application dated 27th July 2014. The orders of 30th July 2013 are still in force for they have not been stayed. They are available for obedience or compliance by the appellant.

22. A valid court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of law. It is not a mere wish or proposition. Disobedience or non-compliance with it attracts severe consequences. It would appear to me that the appellant believes that the orders of 30th July 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them.

23. The appellant has applied to the court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law.

24. The conclusion that I have come to is that the orders sought in the application dated 27th July 2014 are not for granting, for the reasons that I have stated above. The application is dismissed. The respondent shall have costs thereof.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF January 2015.

W. MUSYOKA

JUDGE