



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION, MILIMANI LAW COURTS**  
**CIVIL APPEAL NO.79 OF 2014**

**J I .....APPELLANT/RESPONDENT**

**-VERSUS-**

**S K .....RESPONDENT/APPLICANT**

**RULING**

1. The Notice of Motion before me is brought under **Article 53(2) & 159(2) (d) & (e) of the Constitution, Section 4(2) & (3) and 117 of the Children’s Act, No. 8 of 2001, Section 3A and 63 (e) of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules.** It is dated 12<sup>th</sup> March 2015 and was filed under certificate of urgency. It mainly seeks for orders that there be a stay of execution of the order of this court issued on 27<sup>th</sup> November 2014, pending the hearing and determination of this application and set aside its ex parte orders made on the same day.
2. The application relies on the grounds that the Respondent/ Appellant’s application dated 2<sup>nd</sup> October 2014 proceeded ex parte on 7<sup>th</sup> November 2014 and orders were made in the absence of the Applicant/Defendant. That the Applicant was not properly served with the application and hence her absence in court. The Applicant asserts that it would be in the interest of the justice of the minors for the said orders to be set aside and the Applicant be allowed to respond to that application, as the Respondent/Appellant misrepresented and concealed material facts to the court. She states that there has been no delay in making this application and no prejudice will be suffered by the Respondent.
3. In her supporting affidavit filed on 6<sup>th</sup> March 2015, the Applicant avers that on 7<sup>th</sup> November 2014, she found court documents which had been slipped under the door of her house and they required her to attend court on the same day. That she went to court the same day arriving at 1 p.m. and learned from the clerk of the court before which the case had been cause listed that the matter had been reserved for ruling on 27<sup>th</sup> November 2014. That a ruling was duly delivered on the said date staying the orders of the lower court which had the effect of prejudicing the interest and general welfare of the minors without the Applicant being heard.
4. At the hearing of application, the Applicant reiterated what she had set out in her affidavit. She also told the court that it took her long to file this application because she is an unemployed single mother of two children. She therefore could not afford to retain the services of a lawyer and has difficulty getting money to file applications in court.

5. The Applicant stated that she finally brought an application to court on 14<sup>th</sup> January 2015, but was told to go and serve it and come back for the hearing, only to be told at the hearing that it was the wrong application and that she should first file an application seeking to set aside the orders complained of. She also stated that the person mentioned in the affidavit of service as having received the notice on her behalf, is a mentally sick neighbour who could not call to inform her of the service since she was away in Nyeri.
6. Learned counsel, Mr. Olonde opposed the application on behalf of the Respondent on grounds that the court satisfied itself that there was proper service and a return of service had been filed in court on 16<sup>th</sup> November 2014 before it proceeded *ex parte*. The return of service shows that the Applicant was served. Mr. Olonde contended that it was the Applicant's own evidence that she was aware of the application in question by 7<sup>th</sup> November 2014 and nothing stopped her from appearing before the court to say that she had just received the notice, or to come to court on the date of ruling when she could have been given a chance to respond.
7. That instead, on 14<sup>th</sup> January 2015 the Applicant filed an application for maintenance which was heard on 4<sup>th</sup> February 2015 and at no point did she tell the court that she had not been served with the earlier application. Mr. Olonde also stated that there has been inordinate delay in bringing the application for setting aside of the court's ruling if the Applicant was aware of the matter on 7<sup>th</sup> November 2014. That even if the Applicant is unemployed, it costs very little to file an application. He urged the court to find that the Applicant is undeserving of the orders she is seeking as there is no material before the court to warrant the issuing of those orders.
8. I have considered the application, the supporting affidavit and the rival submission placed before me. The principles governing the exercise of the judicial discretion to set aside an *ex parte* judgement, or ruling, or indeed orders obtained in default of either party to attend the hearing are firstly, that there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. See the case of **Maina v Mugiria (1983) KLR pg. 78**.
9. It has been stated that the Applicant was seen in the court precinct on the date of the hearing of the application dated 2<sup>nd</sup> October 2014, yet she did not present herself before the court. The Applicant however explained that she arrived in court at 1 p.m. and was told that she was too late as the application had already been heard and reserved for ruling on 27<sup>th</sup> November 2014 as indeed it had.
10. The Applicant has also given the reason for what appears to be delay on her part in filing the application to set aside. In my view, and in the face of the circumstances as she has explained them to the court I find that she did what was within her powers to access the court and be heard.

In any case what the court cannot lose sight of is the best interest of the children at the centre of the dispute. There is no evidence that the Applicant has deliberately sought to delay or obstruct the course of justice.

For the foregoing reasons I find that the application dated 12<sup>th</sup> March 2015 has merit and order that:

- i. The execution of the orders of this court dated 7<sup>th</sup> November be and is hereby stayed.
- ii. The said orders of 7<sup>th</sup> November 2014 are set aside.

iii. Leave is granted to the Applicant to file and serve her response to the application dated 2<sup>nd</sup> October 2014 within 21 days of today.

iv. The application dated 2<sup>nd</sup> October 2014 shall be heard *inter partes* on a date to be given in court on the date of the delivery of this ruling.

**SIGNED DATED and DELIVERED** in open court this **18<sup>th</sup> day of March 2015.**

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**L. A. ACHODE**

**JUDGE**