



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 69 OF 2010

A K K.....APPELLANT

VERSUS

J K WRESPONDENT

RULING

1. The Motion for determination is dated 21st November 2011. It seeks, in the main, stay of execution of an order made by the Children's Court in a suit that is not disclosed in the Motion and its supporting affidavit, but is said to be the subject of the instant appeal.
2. The application is at the instance of the appellant. The grounds upon which it is predicated are set in the certificate of urgency, on the face of the Motion and in the supporting affidavit sworn on 21st November 2011.
3. It is averred that an order was made by the lower court on 10th December 2010 commanding the appellant to be paying monthly maintenance to the respondent at the rate of Kshs.8,000.00 for the upkeep of the minor the subject of the proceedings. There was a further order that the appellant solely pays school fees and school related expenses excluding the respondent from those responsibilities. He asserts that the figure of Kshs.8,000.00 is on the higher side and beyond his means. He proposes to pay Kshs.5,000 instead.
4. To his affidavit, he has attached a memorandum of appeal dated 16th December 2010 as evidence that he has filed appeal against the said order. There is also copy of a payslip dated August 2011 as proof that he only earns a net pay of Kshs.31,940.00 per month and a copy of the affidavit of means filed in the lower court. It can be gleaned from the memorandum of appeal that the appeal herein relates to orders made in Nairobi Children's Case Children's Cause No. 345 of 2008.
5. Upon being served, the respondent entered appearance and filed an affidavit in reply. The same was sworn on 8th March 2012. She concedes that the lower court did order the appellant to pay school fees and school related expenses, but that was after it was noted that she caters for all the other basic needs of the minor. She states that the payslip and the affidavit of means gave an exaggerated picture of the appellant's state of finances. She discloses that the appellant has not been paying the sum of Kshs.8,000.00 ordered by the court instead she has been paying the Kshs.5,000.00 that he proposes in his affidavit of 21st November 2001 to be fair and reasonable.
6. The said reply was filed on 8th March 2012, when the matter had come up for hearing and it was directed by GBM Kariuki J. that the appellant had liberty to file a further affidavit. No further affidavit was filed despite leave being granted.

7. The matter was placed before Muchelule J. on 19th September 2014 for hearing. The respondent was granted leave of fourteen (14) days to file and serve a response to the application. The parties were further directed to file written submissions. The matter was then given the date of 24th October 2014 for mention. The same was mentioned on 24th October 2014 before me when I reserved ruling for 21st November 2014.

8. Both sides filed written submissions. The applicant's submissions were filed on 23rd October 2014. The principal argument by the appellant is that this application is unopposed for no reply had been filed to the Motion as at the time the submissions were filed. On the law he relies on Order 42 of the Civil Procedure Rules, Sections 24, 90 and 94 of the Children's Act and Order 51 rule 14 of the Civil Procedure Rules. He asserts that the responsibility as between the parents of a child should be joint, especially where the two were married.

9. The respondent's submissions were filed on 24th October 2014. The respondent submits that the order of 10th December 2010 was not oppressive to the appellant for he was ordered to only cater for school fees and school related expenses, while she was burdened with providing for the child food, shelter, clothing and entertainment which are more costly than the responsibilities bestowed on the appellant. The monthly allowance of Kshs. 8,000.00 made payable to her was meant to supplement her own expenses toward the child's food, shelter clothing and entertainment.

10. In addition to the submissions, the respondent filed another replying affidavit to the application. The said affidavit was sworn on 22nd October 2014. She avers to be shouldering a greater burden than the appellant and further that the appellant had not been fully complying with the orders of the lower court. He was said not to have had paid the school fees in full and to have been paying Kshs.5,000.00 monthly instead of the sum of Kshs.8,000.00 ordered by the court. She has attached documents to support her assertions. I have noted from the record that leave had been granted to the respondent to file the affidavit.

11. The principal prayer in the Motion of 21st November 2011 is for stay of execution of an order made on 10th December 2010. The respondent concedes that such order was indeed made, and I am persuaded that the same does indeed exist. However, I do note that neither the appellant nor the respondent attached a copy of the said order or of the ruling where the order was made. I note too that the lower court file is yet to be made available.

12. Without a copy of the order or ruling before me, I am unable to tell with certainty the exact orders that were made by the lower court. I find myself therefore unable to exercise discretion one way or the other as concerns the order that I am being called upon to stay. It was incumbent on the appellant to place before me the order that he wants me to stay. I cannot act blindly. The order sought to be stayed should be placed before the court being invited to interfere with it.

13. The affidavit in reply sworn on 8th March 2012 alleges that the appellant has not been fully complying with the said orders – specifically that he has only been paying Kshs.5,000.00 per month instead of the Kshs. 8,000.00 per month ordered by the court. The said affidavit must have been served on the appellant, for it was the subject of the proceedings before GBM Kariuki J. on 8th March 2012, when the appellant sought and obtained leave to respond to the replying affidavit. Although leave was granted, the appellant did not file a further affidavit and therefore the averment that the application has not been complying with the orders of the lower court has not been controverted.

14. Court orders must be complied with, even where a party is dissatisfied with them. They must be complied with fully until such time that they are either vacated or varied. It is not open to a party to comply with the orders selectively or as he considers fit. The order must be complied with in full or according to its terms.

15. I am not satisfied that a case has been made out for a stay of the order appealed against. I reject the Motion dated 21st November 2011, and dismiss the same with costs to the respondent. The order made

herein on 1st December 2011 for maintenance of *status quo* is hereby accordingly vacated. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF MAY, 2015.

W. MUSYOKA

JUDGE

In the presence of advocate for the applicant.

In the presence of advocate for the respondents.