



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL APPEAL NO. 215 OF 2013

(Being an appeal from the Judgment and decree of the subordinate

court (Hon. J. Nthuku, SRM) dated 22/10/2013 in Nakuru Chief

Magistrate's Court Children Civil Case No. 42 of 2011)

BEATRICE WANJA WANJOHI.....APPELLANT/APPLICANT

VERSUS

DR. JOHN MUCHIRE NDEGWA.....RESPONDENT

RULING

1. Beatrice Wanja Wanjohi is the mother of Mercy Njeri, a minor in Nakuru Chief Magistrate's Children's Case No. 42 of 2011. She had sued the Respondent herein Dr. John Muchire Ndegwa on behalf of the minor child, for an order for provision of maintenance as she alleges that he is the biological father of the said child. The parties are not married to each other. Pending full hearing of the Children's case, the court had ordered interim maintenance for the child at Kshs. 5,000/= per month, that the Respondent paid.

2. After a full hearing of the suit, the trial court dismissed the suit on the grounds that DNA results of parentage of the child from the Government Chemist that showed that the Respondent was 99.9% the biological father of the child could not be relied on, and accepted results from a private laboratory named Lancet Kenya that proved that a 3rd party Joseph Mathu was the child's father. The suit was dismissed with costs.

3. Being dissatisfied with the judgment of the Children's court, the Appellant filed this appeal to challenge dismissal of the case. In the meantime, the Respondent moved the Executive Officer of the said court to access costs for the dismissed children's case.

A sum of Kshs 338,355/= was assessed ex parte and a certificate of costs issued on the 9th July, 2014. By a Notice To Show Cause issued on the 11th November 2014, the Applicant was required to show cause why execution of the decree on costs should not be granted against her. This Notice To Show Cause prompted the Appellant to bring the application dated 1st December 2014 under Certificate of Urgency. Interim orders of stay of the hearing of the Notice to Show Cause in the Children's Case No. 42 of 2011 (*Nakuru*) were issued pending the hearing and determination of the application.

The application is opposed and the Respondent has filed a replying affidavit and relies on it entirely.

4. The Applicant seeks six orders in her application -

- (1) That this application be certified urgent, and be heard ex parte in the first instance.
- (2) That pending the hearing and determination of this Application, there be a stay of execution of the Decree, and there be a stay of all further proceedings, in Nakuru Chief Magistrate's Court Children Civil Cases No. 42 of 2011 and No. 156 of 2011 between the Appellant and the Respondent herein.
- (3) That pending the hearing and determination of this Application, the Respondent does continue to provide maintenance for the minor/child herein namely Mercy Njeri, in the sum of Ksh. 5,000.00 per month as previously ordered by the lower court, and the Respondent does also pay all the school fees due and as will continue to fall due for the said child.
- (4) That pending the hearing and final determination of this Appeal, there be a stay of execution of the Decree, and there be a stay of all further proceedings, in Nakuru Chief Magistrate's Court Children Cases No. 42 of 2011 and No. 156 of 2011 between the Appellant and the Respondent herein.
- (5) That pending the hearing and final determination of this Appeal, the Respondent does provide adequate maintenance/money for the minor child herein namely Mercy Njeri, in such sum as shall be ordered by the court, to adequately cater for the child's needs including but not limited to food, shelter, clothing, education, health-care, grooming and entertainment.
- (6) That this matter Nakuru High Court Civil Appeal No. 215 of 2013 be consolidated with Nakuru High Court Civil Appeal No. 99 of 2012, and the two matters be heard and disposed off together.
- (7) That this court, in exercise of its constitutional supervisory jurisdiction over the subordinate courts, do call for the entire court file/record of proceedings in Nakuru Chief Magistrate's Court Children Civil Case No. 156 of 2011 Dr. John Muchire Ndegwa -versus- Beatrice Wanja Wanjohi & Samuel Wainaina Karanka, and do proceed to make such orders or give such directions as would be appropriate for the fair administration of justice and to prevent abuse of the court process.
- (8) That costs of this Application be borne by the Respondent.

5. Prayer No. 2, 4, 6 and 7 are related and shall be dealt with together, while prayers No. 3 and 5 shall be taken together.

On the first cluster, this court has been urged to stay all proceedings in Nakuru Children's Court Case No. 42 of 2011 and No. 156 of 2011 between the Appellant and the Respondent herein. I have looked at pleadings in both cases. CMCC Children's Case No. 156 of 2011 involves the two parties hereof, and a 3rd party namely Samuel Wainaina Karanja, and in the matter of the subject child hereof. It was taken to court by the Respondent against the Appellant and the 3rd party named Samuel Wainaina Karanja. The Plaintiff claims that the said 3rd party is the biological father of the subject hereof and prayed that a DNA test be ordered conducted to confirm the paternity of the subject.

6. As to Nakuru High Court Civil Appeal No. 99 of 2012 Nakuru, this court has not been furnished with the pleadings for it to ascertain for itself what it is all about.

7. Without going into the details and merits of the three cases sought to be consolidated with the matter at hand and stayed, I find no grounds advanced for such action. The Applicant may make a substantive application to court for such consolidation and stay of proceedings where full details may be furnished to the court. An order for consolidation and stay of the proceedings is therefore disallowed.

8. On the matter at hand, the Applicant has already filed an appeal against dismissal of the Children's case. The memorandum of appeal was filed on the 21st November, 2013 and on time. It is however noted that the Record of Appeal is yet to be filed, reasons advanced that the proceedings have not been furnished to the Applicant despite requesting for them on the 30th October, 2013. A perusal of the grounds of appeal shows that the appeal raises numerous issues of law and fact with high chances of success and that if stay of the proceedings in the Children's Case No. 42 of 2011 is not granted, the appeal may be rendered nugatory. It is instructive to note that the order sought to be stayed is basically on the certificate of costs issued against the Applicant. It is urged that a big share of that sum in the tune of shs 207,600/= represents monies paid towards the maintenance of the child and therefore not part of the costs, and that there was no order for the refund of the said maintenance money from the Applicant.

9. The Applicant has also sought an order that the Respondent continue to maintain the subject during the pendency of the appeal as the subject is being deprived of her father's support and she will continue to suffer.

10. The Respondent in opposition to the application has argued that the Judgment of the Children's Court is incapable of being stayed as it is only on costs, the suit having been dismissed. It is submitted that the Applicant, if not satisfied with the certificate of costs would have applied to set it aside or for re-assessment of the costs and that no such attempt has been undertaken, and is only made to frustrate the Respondent. It has been urged that since no application for re-assessment or setting aside of the certificate of costs has been made to date the application ought to be dismissed.

11. The Respondent submits that continued maintenance of the subject when the Children's court found that she is not a biological child of the Respondent would in effect be determining the appeal before hearing, and that such an order would ordinarily apply to very rare and special circumstances. It was further submitted that the Applicant has not being vigilant in the prosecution of her appeal and only awakened by the Notice to Show Cause. This court is urged to decline to grant the orders sought.

12. I have carefully considered the pleadings, written submissions and oral arguments by both counsel for the respective parties. I have looked at the Judgment of the Children's court where the trial magistrate dismissed the case with costs on the grounds that there was no proof of paternity of. In effect, the Respondent was and is entitled to the costs of the suit as costs follow the event. But then, I ask myself, money paid by the Respondent towards maintenance of the child during the pendency of the Children's case, should it be construed as costs, or a refund to the Respondent, and if so, should the Applicant be condemned to pay the said money that was basically not paid for her benefit but for the child's maintenance? Further, in the interim, and pending the hearing of the appeal, should the Respondent continue to maintain the who the court found is not a biological child of the Respondent? No doubt these are difficult questions to answer, but for now, the court hearing the appeal will have to deal with them, bearing the best interest and welfare of the child in mind. To allow the Notice to Show Cause Why the assessed costs, that include monies paid for the maintenance of the child to proceed would cause the Applicant not only loss and damage, but would also prejudice her, not to mention that the same would render the appeal nugatory should it be allowed. Reference is made to the principles upon which orders of stay of execution are hankered on.

13. **In High Court Civil Appeal No. 32 of 2014 (OS) DM -vs- RW** the court faced with similar circumstances in a child's case observed that orders of stay of execution in children's matters are not suitable remedies, and ought to be bend to the overriding principle of the paramountly of the child's welfare. Further, to interfere with the children's court's finding or altering it would amount to determining the appeal before the hearing.

However, in this matter, the orders sought to be stayed are only on the costs of the dismissed case. Having made my observations on whether the costs as assessed ought to be paid and by who, then, it follows that I find the application meritorious and I am persuaded to allow the application, but on the following terms -

(1) That prayer No. 4 is allowed, to the extent that the decree on costs only, and all other proceedings in

Nakuru Chief Magistrate's Children Case No. 42 of 2011 are hereby stayed pending the hearing and determination of the appeal.

(2) That prayers No. 5, 6 and 7 are disallowed.

(3) That costs of this application shall abide the outcome of the appeal.

Dated, signed and delivered at Nakuru this 21st day of May 2015

JANET MULWA

JUDGE

In the presence of:

Ms. Gatu Magana - for Plaintiff

Waiganjo - for the Respondent

Lina - Court clerk