



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

Civil Appeal No 53 Of 2014

EM..... APPELLANT

VERSUS

AG.....RESPONDENT

R U L I N G

1. The appeal herein is against a decree of the lower court passed on 18th June 2014. The said decree was –

“(a) Custody of the children is granted to the Plaintiff and the Defendant shall have unlimited visitation rights.

(b) Both parents agree on a reasonable school for *EK* which shall not exceed school fees of KShs 5,000/00 per month, which fees shall be paid by the Defendant.

(c) The medical expenses be provided for by the Defendant’s medical cover which is both in and out-patient.

(d) The Defendant to provide for food and utility expenses of KShs 6,000/00 per month payable directly to the Plaintiff on or before the 6th day of the month.

(e) Any party be at liberty to apply.”

2. The Appellant was the defendant while the Respondent was the plaintiff in the lower court. They are husband and wife. It is not clear if they are formally separated. Apparently there are more than one child of the marriage.

3. Pending hearing and disposal of the appeal the Appellant has applied by **notice of motion dated 05/03/2015** seeking the main order of stay of execution of the decree. The application is brought under **Order 42, Rule 6** of the **Civil Procedure Rules, 2010** (the **Rules**). It is predicated upon the grounds (stated on the face thereof) –

(i) That the appeal raises triable issues and stands the risk of being rendered nugatory if the orders sought are not granted.

(ii) That it will be in the best interest of the children for the stay of execution sought to be granted.

4. In his supporting affidavit accompanying the application the Appellant has deponed, *inter alia* -
- (a) That the total sum of KShs 11,000/00 per month is more than his net salary, and he cannot therefore reasonably afford to pay the same. He has annexed a copy of his pay slip for November 2014.
 - (b) That the Respondent unilaterally chose the school for the school-going child and did not consult the Appellant as per the decree.
 - (c) That on 13/02/2015 the lower court committed him to civil jail for 30 days for being in arrears of payment. However he was able to pay KShs 13,000/00 with the assistance of friends, and the committal order was suspended.
 - (d) That if he is committed to civil jail he may lose his job (he is a police constable), and that would not be in the best interest of the children.
 - (e) That maintenance and school fees at the level ordered in the decree would mean that he will no longer afford the medical insurance cover mentioned in the decree, and that would not be in the best interest of the children.
 - (f) That the children should be educated in public schools as he cannot afford the private schools that the Respondent prefers.
 - (g) That he is ready to pay Kshs 5,000/00 per month for up-keep of the children, an amount that he was paying even before the court proceedings.
 - (l) That the Respondent and the children should live at the matrimonial home at [Particulars Withheld] instead of other towns to mitigate costs.
5. The Respondent opposed the application by a **replying affidavit filed on 16/03/2015** in which she deponed *inter alia* -
- (a) That the Appellant's payslip shows that he unilaterally committed himself to loans while knowing that he had responsibilities to his children.
 - (b) That in any case his salary is not his only income as he has a motor vehicle (a **Probox**) that he uses in a transportation business. The Respondent knows the vehicle well as it was jointly owned by both of them when relations between the couple were good.
 - (c) That the Respondent invited the Appellant to assist in getting an affordable school for the school-going child.
 - (d) That it was the Respondent who requested the court that the Appellant be released when he paid KShs 13,000/00 towards the arrears and undertook to send money for food, but he did not send such money.
 - (e) That the Kshs 5,000/00 per month offered by the Appellant will not be adequate.
 - (f) That the Respondent is contributing shelter and clothing expenses for the children – not to mention cooking, cleaning, security, etc. – notwithstanding that she is currently unemployed.
 - (g) That the Appellant chased away the Respondent and the children from the matrimonial home at [Particulars Withheld].
 - (h) That the decree having been passed on 18/06/2014 and the appeal filed on 03/07/2014, there has been unreasonable delay in applying, the application having been filed on 06/03/2015.

6. In response to the replying affidavit the Appellant filed a **supplementary affidavit on 16/04/2015**. He denied chasing away the Respondent and the children from the matrimonial home. He has also deponed that the delay in applying was occasioned by his **“attempt to seek legal representation to challenge the decree”**, and that he was also let down by his former advocate.

7. The Respondent filed another **replying affidavit on 12/05/2015** in response to the Appellant’s supplementary affidavit. This was without leave of the court and was totally unnecessary. It states nothing new and is merely argumentative and a re-cap of the earlier replying affidavit. But I note that she is unrepresented.

8. I have considered the submissions of the learned counsel for the Appellant and those of the Respondent. I do not have the proceedings or judgment of the lower court. I therefore do not have the advantage of knowing how the lower court arrived at the amounts it awarded for the education and maintenance of the children.

9. In all matters involving children, the primary consideration is their welfare. The children in this case appear to be very young, the eldest apparently now starting school (nursery?). One thing is clear, though. The children must eat and drink; they must be clothed and sheltered. One of the children is attending school and must continue to do so. Their welfare demands all these. It is in their best interest.

10. It appears that the Respondent (their mother) is providing shelter, clothing and personal care, apparently with some difficulty as she says she is not in steady employment. The Appellant (their father) is in steady employment. The decree of the lower court required him to provide school fees for the one school-going child at the rate of KShs 5,000/00 per month, and food for the children at KShs 6,000/00 per month. He says these amounts, particularly the school fees, are too much and he cannot afford them. He was also required to provide medical care through his medical insurance policy.

11. The Appellant has exhibited his payslip for November 2014 to show that he had a net pay of only KShs 10,656/20. The payslip shows that he was servicing one Sacco loan and interest at the rate of over KShs 10,000/00 per month. The Respondent has stated that the Appellant has other sources of income, including a car that is used for a transportation business. He has not denied in express terms that he has such a motor vehicle; he has only pointed out that the Respondent has not provided any particulars.

12. Many of the issues raised in this application can only be resolved satisfactorily when the appeal is heard and determined. Those issues include the respective incomes of the parties. I do not have before me the evidence placed before the lower court in this regard.

13. I also note that the Appellant applied for stay of execution only after execution issued – nearly nine (9) months after the decree was passed. The explanation for the delay given – that the same was occasioned by his **“attempts to seek legal representation to challenge the decree”** – is not credible at all. He had already filed the appeal against the decree on 03/07/2014!

14. I am not satisfied that the welfare of the children will be best served by granting the orders sought. On the contrary stay of execution of the decree pending disposal of the appeal will be positively inimical to the interests of the children. The application is dismissed with costs to the Respondent. It is so ordered

DATED AND SIGNED AT MURANG’A THIS 19TH DAY OF MAY 2015

H. P. G. WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 22nd DAY OF MAY 2015