



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 84 OF 2014**

**C K S .....APPELLANT**

**VERSUS**

**L C .....RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Chief Magistrate, Hon. Ms. F. K. Munyi delivered on the 29<sup>th</sup> day of September 2014 in Children's Case No. 473 of 2012)*

**RULING**

1. The appeal herein is in respect of a judgment delivered in **Nairobi Children's Court Case No. 473 of 2012** on 29<sup>th</sup> September 2014.
2. The orders appealed against granted joint legal custody of the minors to the parties (with the respondent having actual custody and the appellant reasonable access), the appellant was to pay school fees and related expenses while the respondent was to cater for school uniforms, transport and school trips once she secured employment, the appellant was to initially shoulder the burden of medical care alone but share equally with the respondent once she got employment, he was to vacate the three bedroomed house at Kitengela and to continue paying mortgage on it to facilitate its occupation by the minors and the respondent, he was also to pay Kshs. 20,000.00 monthly for the children's food and house help's salary, while the respondent made contribution to the children's clothes and pay utility bills, and the parties were to provide entertainment for the children when in their respective custody.
3. The appellant moved the court under certificate of urgency on 14<sup>th</sup> October 2014 seeking stay of the orders in the judgment of 29<sup>th</sup> September 2014 pending appeal and in their place the orders made on 12<sup>th</sup> October 2012 to remain in force pending appeal.
4. In his affidavit in support of the application, sworn on 14<sup>th</sup> October 2014, he appears to be particularly aggrieved by two orders – the one to vacate the three bedroomed house at Kitengela and to pay Kshs. 20,000.00 monthly as maintenance. He says the order to vacate the house was not sought in the respondent's pleadings and no evidence was led on it to warrant it being made. On the monthly maintenance amount he pleads that the same is not affordable and the court did not consider his means. He points out that he takes care of the children's schooling and related expenses.
5. The respondent replied to the application through her affidavit sworn on 24<sup>th</sup> October 2014. She pleads that the orders were made after a full hearing of the matter and all the issues he has raised in his application were addressed by the court. She accuses the appellant of not paying the maintenance awarded by the lower court.

6. The appellant replied to the affidavit of the respondent by his supplementary affidavit sworn on 20<sup>th</sup> November 2014. He avers to have had sold the house in question in 2008 to persons named in the affidavit, but he has not provided evidence of the sale, nor has he indicated the date when he moved out of the house. He conceded that he has not faithfully complied with the orders to pay the monthly upkeep of Kshs. 20,000.00 for reasons that are clearly not plausible.

7. The parties opted to canvass the application by way of written submissions, and directions to that effect were given on 24<sup>th</sup> October 2014. Both parties did file their respective submissions, with the appellant filing his on 18<sup>th</sup> December 2014 and the respondent theirs on 5<sup>th</sup> February 2015.

8. Stay of orders pending appeal is provided for in Order 42 rule 6 of the Civil Procedure Rules. Under Order 42 rule 6(2) it is provided-

**“No order for staying execution shall be made under subrule (1) unless-**

- a. **The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- b. **Such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

9. The said provisions make grant of stay of execution orders pending appeal conditional on three grounds – application has been made without delay, demonstration that the applicant will suffer substantial loss and provision of security for due performance.

10. I note from the record that the decree appealed against was made on 29<sup>th</sup> September 2014. The memorandum of appeal dated 13<sup>th</sup> October 2014 was lodged herein on 14<sup>th</sup> October 2014 and the motion dated 14<sup>th</sup> October 2014 lodged in court on the same date. Clearly there was no delay in moving the court for stay of execution.

11. On substantial loss, the appellant has argued that the monthly maintenance amount of Kshs. 20,000.00 was exorbitant and beyond his means. He would like to continue paying Kshs. 10,000.00 monthly, which had been fixed in 2012. No doubt the children in question are growing and so are their needs. The value of the shilling has also weakened over the period, a matter that this court can take judicial notice of. The matter is about his children. He is bound in law to provide for them. Whether the figure of Kshs. 20,000.00 is beyond his means is a matter that is at the core of the appeal. I cannot determine, at the stage, whether the same is fair or not or one that is likely to expose him to substantial loss or not.

12. Then there is the issue of the house at Kitengela. I would have been persuaded to stay the order to have him vacate the house, but his averments regarding the same suggests that he is being less than candid with the court. In his affidavit in support of the motion, he does not plead that the house is no longer available as he had since sold it and therefore the limb of the judgment on the house was no longer tenable. He was silent on that, he merely avers that the issue of vacant possession had not been pleaded nor evidence led on it. It is only in response to the respondent’s reply that he now pleads the unavailability of the house. He says he sold it, but he is not able to provide evidence of the sale nor is he able to tell when he moved out of the house. It appears to me that the plea that the house was sold is an afterthought designed to avoid complying with the judgment of 29<sup>th</sup> September 2014.

13. Although orders for security for due performance are made by the court, the person seeking stay should demonstrate that they are able to satisfy such orders if the court were to make them. The appellant has not gone out of his way to demonstrate that he would be in a position to satisfy any conditions set by the court for grant of a stay of execution order.

14. I am not satisfied that the appellant has made out a case for grant of the orders sought in his

application by way of motion dated 14<sup>th</sup> October 2014. I hereby therefore decline to grant the orders sought, and I consequently dismiss the said application with costs to the respondent

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>ST</sup> DAY OF JULY, 2015.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Ms. Kemunto advocate for the appellant**

**In the presence of Mr. Juwanda for Mr. Ogwara advocate for the respondent**