REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 64 OF 2015

P A K……..…… APPELLANT

VERSUS

S A K……RESPONDENT

R U L I N G

1. The application before court is the one dated 7th July 2015. In it, the Appellant seeks orders from the court of temporary stay of execution of the judgment and decree of the Subordinate Court delivered on 18th June 2015 pending the hearing and determination of the appeal. The grounds in support of the application are stated in the face of the application. The Application is supported by the annexed affidavit of P A K, the Applicant.

2. Parties filed written submissions made by Mr. Arusei for the Appellant and by Mrs. Wambugu for the Respondent. Mr. Arusei submitted that the Appellant had an arguable appeal with high chances of success. He referred to the memorandum of appeal which in his view raised various grounds of appeal which are arguable. He submitted that if stay is not granted, the Appellant would be committed to civil jail in execution of the order of the court, and because he is sickly be would suffer substantial loss and damage, a fact which the trial court failed to consider. He explained that if he was committed to civil jail, the appeal would be rendered nugatory and his right to freedom would be interfered with. The Applicant averred that he was willing to pay between Kshs.5,000 – Kshs.10,000/- per month for the maintenance of the children pending the hearing and determination of the appeal. He relied on the following cases:

    a. Ujagar Singh vs Runda Coffee Estates Ltd (1966) EA 263
    b. Butt vs Rent Restriction Tribunal (1982) KLR 417
    c. Civil Case No. 285 of 2004 (unreported) Vijay Morjaria vs Harris Horn Junior & Ano.
    d. R. P. M. vs P.K.M (2012) eKLR

3. Mrs. Wambugu for the Respondent opposed the application. She submitted at length first, that the application is Res Judicata in that a similar application dated 15th March 2012 in Civil Appeal No. 2 of 2012 sought similar orders and was dismissed by the court on 2nd July 2014. She urged the court not to allow the application because it was an abuse of due process and should be struck off with costs.

4. Secondly, Mrs. Wambugu contended that the Applicant has not satisfied the conditions set out under **Order 42 Rule 6(2) Civil Procedure Rules**, in that he seeks to stay an order for execution

for maintenance which was given on 27th February 2012, hence the Application is not brought expeditiously. That the Applicant's argument that he is seeking to stay an Order commanding his arrest is frivolous, for reasons that the arrest is a consequential Order for noncompliance with the Order for maintenance.

5. The issues for determination are whether the application is Res Judicata and secondly, whether the orders sought are deserved.

6. On the issue of Resjudicata **section 7** of the **Civil Procedure Act 2010** stipulates that:

> **…….”No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

This is the test to which the court has subjected the matter now under consideration.

7. This court has carefully evaluated the facts of this application, and observed that the Subordinate Court did on 27th February 2012 order the Appellant to pay the sum of Kshs.40,000/= per month for the maintenance of the Respondent and their children. The Appellant was aggrieved with this decision. He filed an appeal to this court challenging the decision. Pending the hearing and determination of that appeal, he filed an application seeking stay of execution of the orders of the court. The application was opposed. Upon consideration Kimaru J dismissed the application. I have considered the application now before court and it is clear as pike staff that the matter in issue was the matter directly and substantially in issue in the application for stay dated 15th March 2012, in civil Application No. 2 of 2012 before Kimaru J. A court of competent jurisdiction has therefore heard and finally decided the matter.

8. As to whether or not to grant a stay of the lower court's orders pending Appeal, the Court shall not issue any stay orders unless the two grounds set out in **sub-rules (a)** and **(b)** of **Order 42 Rule 6(2)** are satisfied. The pertinent **sub rule** in this case is **6(2)(a)** which provides that:

“No order for stay of execution shall be made under sub rule (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:”

From the above quotation the applicable provisions of the law are couched in mandatory terms, on when the court may grant stay orders.

9. The court finds that the Applicant has not satisfied the second limb set out in **sub-rule (a) of Order 42 Rule 6(2)**, as the application was not made without undue delay from the time the lower court orders were issued. The Applicant's argument that he is seeking to stay an Order commanding his arrest does not hold water because the order commanding hs arrest is not something new but is a consequential Order for noncompliance with the Order for maintenance.

10. More importantly, the orders sought by the Applicant relate to children. In law, in any matter concerning children, the best interest of the children is paramount. **Article 53(2)** of the **Constitution** provides the guiding principle on this question as follows:

> **“A child's best interests are of paramount importance in every matter concerning the child.”**

The other pertinent law is the **Children Act No. 8 of 2001** and in particular **Section 4(3)** thereof.

11. It is also important to note that the Applicant has not obeyed the said orders. This Court has said

times without number that Court orders have to be obeyed as soon as they are issued and it matters not whether the recipient agrees with them or not. In ***Hadkinson vs. Hadkinson*** **(1952) All ER 567,** the court maintained that court:

> ***"Orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up".***

This point was emphasized in **Kanchanben Ramniklal Shah vs. Shamit Shantilal Shah & 6 Others (2010) EKLR** by Njagi, J (as he then was) as follows:

> **"A Court Order is valid and effective from the moment it is made. It is born mature and has no period of infancy, and therefore commands obedience forthwith."**

10. In view of the foregoing, this court holds that the circumstances of this case are such that it cannot exercise its discretion to grant the orders sought, for to do so would not serve the best interest of the children herein. Secondly, these orders having been made by a court of competent jurisdiction, the Applicant who is aggrieved thereby must first indicate that he has endeavored to comply with them even as he moves the higher court on appeal. The conduct of the Applicant demonstrates that he does not deserve the discretion of this Court.

Accordingly, the Applicant's application must fail, with costs.

SIGNED DATED and **DELIVERED** in open court this **11th day** of **December 2015**.

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L. A. ACHODE

JUDGE