

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL APPEAL NO. 73 OF 2012

J M A.....APPLICANT

VERSUS

R G O.....RESPONDENT

RULING

1. The matter herein is a dispute on maintenance of the children of the parties to this suit. The matter originated at the Children’s Court in Nairobi being Children’s Case No. 781 of 2011.
2. The appeal herein arises from a ruling made in an interlocutory application on 3rd October 2012 by Ms. Ocharo Principal Magistrate in the primary suit. The said ruling is impugned on a number of grounds – case lacked merit, was not proved on a balance of probability and is prejudicial to the appellant.
3. The memorandum of Appeal was lodged on 12th October 2012. On 23rd October, 2012, the appellant filed a Motion seeking stay of execution of the orders of the primary court and review of the said orders, among others. In his affidavit in support of the application, the appellant avers that the court erred in law and in fact in making the said orders. He further argues that, the court failed to properly evaluate the evidence before it made its final conclusions.
4. Attached to the affidavit in support of the application is a copy of an order made by the primary court on 6th February 2012, commanding him to pay school fees, school related expenses and house rent. A copy of the order appealed against, the one made on 3rd October 2012, has not been annexed.
5. The respondent has replied to the affidavit in support. Her affidavit was sworn on 7th March 2013. Her response dwells on the right amount of rent payable and to whom, whether the appellant has been paying school fees and meeting school related expenses.
6. The issue of paternity which is raised in the application was disposed of following the order made on 8th March 2013 by Kimaru J. It would appear from the submissions filed by the parties that the paternity tests were carried out and it was confirmed that the appellant was the father of the subject children.
7. The application that I am called upon to determine is prescribed on *Section 99* of the Children Act and “*Order 42 Rule 6 Section 3 & 3A of the court of Appeal rules.*” I am not aware of the existence of “*Order 43 Rule 6 Section 3 & 3A of the Court of Appeal rules.*” If any such provision does exist, I doubt whether it would apply to proceedings before me.
8. *Section 99* of the Children Act gives power to the court to impose conditions and to vary orders. These ideally are powers given to the primary court. The question is whether I can exercise the powers given in *Section 99* on appeal. The parties have not addressed me on these provisions.
9. I am cognizant of the fact that this court is seized of this matter in its appellate jurisdiction. There is an appeal pending. The orders sought in the Motion filed on 23rd October 2012 seek stay of the orders of the primary court pending the hearing and disposal of the appeal herein. The orders sought to be stayed were made in favour of the children the subject of the suit. *Section 4(3)* of the Children Act enjoins all the institutions vested with jurisdiction to implement the Act to act in the best interests of the child. I

suppose that the orders appealed against were made in accord with *Section 4(3)* of the Act. No reason has been given to me why I should disturb the said orders. Staying the said orders would no doubt be against the interest and welfare of the subject children and therefore contrary to *Section 4(3)* of the Act.

10. The Motion also prays for a review of the said orders in the manner prescribed in the affidavit in support. I have noted that the appellant is seeking review of the orders that he has appealed against. This is abuse of court process. Should I review the said orders the appeal herein would effectively be disposed of. I doubt whether that is the correct procedure. It would amount to disposing of the appeal substantially without hearing it on its merits.

11. I have also noted that the order the subject of the appeal was made on 3rd October, 2012. The said order has not been exhibited in the Motion dated 23rd October 2012. The primary court's file has not been availed and therefore I have no basis of knowing whether the said order exists or not. It is trite law that a court should never act in vain. I should not act on an order whose existence has not been demonstrated.

12. For the reasons advanced above have I come to the conclusion that the application dated 23rd March 2012 is without merit. I see no basis for granting the orders sought. The application is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE