



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL APPEAL NO. 61 OF 2013

BETWEEN

C M K.....PETITIONER

AND

L W K.....RESPONDENT

RULING

1. This matter originated from Nairobi Children's **Court Case No. 714 of 2012**. The same was initiated by L W K (herein after called Leah) against C M K (hereinafter called Charles). I have not had the benefits of seeking the pleadings filed in the primary court, but from the record before me it would appear that the same concerned the meantime of the child the subject of these proceedings.
2. It would appear that Charles did not, upon service, reply to the court papers culminating in the order of 9th September 2011 of Hon. Mwigigi, R.M, where custody of the minor was granted to Leah with a further order that Charles pays monthly maintenance at the rate of Kshs. 23,000.00. he was also required to pay arrears for 5 months calculated at Kshs.40,000.00.
3. Leah thereafter took out notice to show cause proceedings on the grounds that Charles had failed to pay the sums awarded by the court on 9th September 2011. An order was made on 31st July 2013 that his salary be attached.
4. The orders for the attachment of salary were stayed on 24th October 2012 by Hon. D.K. Kutto, R.M. following an application by Charles, which was certified urgent and fixed for hearing on 22nd November 2012. Charles was directed to give the same on Leah.
5. On 22nd November 2012, Leah attended court but Charles was absent. As he was not available to prosecute his application the stay orders made on 24th October 2012 on the basis of his application were vacated.
6. On 28th November 2012, Charles moved the court on an application dated 27th November 2012 for stay of the attachment of salary. It was ordered that the application be served for hearing on 10th January 2013.
7. Come 10th January 2013, Leah was in court but Charles was not present to prosecute his application dated 27th November 2012. The said application was dismissed for want of prosecution.

8. On 7th February 2013, Leah asked the court to change the mode of execution from attachment of salary to committal to civil jail. The court issued a warrant for the arrest of Charles and fixed the matter for mention on 22nd March 2013.
9. The warrant of arrest was effected and Charles was produced in court under escort of the police on 21st March 2013. He was remanded in custody for further directions on 22nd March 2013. He indicated that he only had a sum of Kshs.30,000.00 on him.
10. On 22nd March 2013, it was ordered that the sum of Kshs.30,000.00 be released to Leah. Charles was given 30 days to come up with a proposal on payment of the accrued arrears. The matter was stood over to 17th April 2013 for mention when Charles was to give his proposals. Charles was also directed to file the relevant application.
11. On 17th April 2013, the appointed date for mention for Charles to give his proposals, Charles did not attend court. He had also not filed any application nor put forward his proposals on payment of the accrued arrears. The court calculated the accrued arrears and the total came to Kshs.460,000.00 for the period up to April 2013, plus the 5 months rent arrears of Kshs.40,000.00 bringing the total to Kshs.500,000.00. The Kshs.30,000.00 paid on 21st March 2013 was deducted reducing the figure to Kshs. 470,000.00. The court directed that the motor vehicles belonging to Charles – that is to say KBG 227V and KPA 118J – be attached and sold to recover the sum of Kshs. 470,000.00.
12. It is the orders of 17th April 2013 that set the stage for the filing of the undated Notice of Motion by Charles on 9th September 2013. The said Motion sought stay of execution of “*the judgement*” determined on 17th April 2013 and of the proceedings in the primary suit pending hearing and disposal of the instant application. On 16th September 2013 Charles followed up his Motion with a Memorandum of Appeal dated 16th September 2013.
13. The Motion was placed before Kimaru J on 16th September 2013. Being a children’s matter His lordship certified it urgent and fixed for hearing in ten (10) days on 26th September 2013. Charles was directed to serve his application on Leah within 3 days. A temporary stay was ordered pending hearing *inter parties* of the Motion.
14. When the matter came up on 26th September 2013 for hearing it transpired that Charles had not yet served Leah with the Motion. The Motion was stood over generally. Charles was directed to obtain a hearing date at the registry.
15. Charles had not moved on his Motion by 1st November 2013 when Leah approached the court with her own application dated 31st October 2013 filed under certificate of urgency. She sought the vacating of the rules of stay made on 16th September 2013. She also sought leave to proceed to recover the Kshs.470,000.00 from Charles or in the alternative that Charles be ordered to deposit the sum of Kshs.470,000.00 in court.
16. Leah’s Motion dated 31st October 2013 was placed before Kimaru J, who certified it urgent and ordered it served on Charles within three (3) for hearing *inter parties* on 8th November 2013.
17. The matter was not listed in the cause roaster for 8th November 2013, whereupon Leah took out another certificate of urgency on 15th November 2013. The matter was placed before me on 19th November 2013 when I directed that the same be heard on 28th November 2013 before Kimaru J.
18. The matter was listed on 28th November 2013 and Leah obtained a date at the court’s registry for the hearing of the Motion dated 31st October 2013 on 19th December 2013. The matter was not listed on 19th December 2013 prompting Leah to file another certificate of urgency on 23rd December 2013. When the

matter was placed before me on 23rd December 2013, I directed that the same be heard on 30th December 2013 and that Charles be served. I did not hear the matter on 30th December 2013 as scheduled for the affidavit of service that Lear was relying on had not been commissioned. I directed that the Motion be heard on 7th January 2014 and that the Charles be served. Come on 7th January 2014 Leah attended court. Charles did not. There was on record an affidavit of service indicating that he had been served on 2nd January 2014. I heard Leah on her Motion dated 31st October 2013 *ex parte*.

19. Is Leah entitled to the orders sought in her application 31st October 2013 for the discharge of the stay order made on 16th September 2013 by Kimaru J? I think she is. I have deliberately set out the history of the matter to bring out Charles' track record. He has no doubt taken no steps whatsoever to obey the orders made by the primary court. He only quickly wishes to court to obtain temporary relief and thereafter go to sleep.

20. More unfortunately, the orders of the primary court that are impugned were made on 17th April 2013. Charles moved to the High Court on 9th September 2013 to challenge the said orders. This is way out of the 30 days allowed by law for appeal. There is no appeal on record. Charles is in court seeking leave of court to appeal out of it. No plausible excuse has been given for the delay. Given that inordinate delay in moving to the High Court I doubt whether Charles is entitled to discretion being exercised in his favour.

21. This is a children's matter. I am bound to act in the best interests of the child. I am of the impression that Charles has been prevaricating, buying time, with no intention of obeying the orders of the court. He could prove me or my colleagues wrong in the fullness of time, but that is the view I hold given the record before me.

22. In view of what I have said above, I do hereby set aside the only order made by my brother Kimaru J on 16th September 2013. There is no valid appeal before me. I need not make any orders on the sum of Kshs.470,000.00. The setting aside of the orders of 16th September 2013 gives liberty to Leah to move primary court in Children Cause No.714 of 2012 to give effect to the orders of Hon. Mwicigi, RM, of 17th April 2013.

23. The costs of the Motion dated 31st October 2013 are awarded to L W K.

DATED, SIGNED and DELIVERED at NAIROBI

This 16th DAY OF January 2014.

W. M. MUSYOKA

JUDGE