



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.19 OF 2014

FRANCIS MUKONO KIRUTHU.....APPELLANT

VERSUS

AGNES WAMUYU.....RESPONDENT

RULING

The application is brought by way of Notice of Motion under the provisions of **Order 42 rule 2(a)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** and all enabling provisions of the Law.

The applicant seeks the following orders:

- 1. That there be a stay of execution of the orders of maintenance made by the Naivasha Chief Magistrate's court Court on 4/2/2014 in C.M.C.C.NO.584 of 2011 in Francis Mukono Kiruthu V. Agnes Wamuyu pending the hearing of this application interpartes.**
- 2. That there be a stay of execution of the orders of maintenance made by the Naivasha Chief Magistrate's court Court on 4/2/2014 in C.M.C.C.NO.584 of 2011 in Francis Mukono Kiruthu V. Agnes Wamuyu pending the hearing and determination of the appeal.**
- 3. That costs of this application be in the cause.**

The applicant relies on the grounds on the face of the application and on the supporting affidavit made by the Applicant one Francis Mukono Kiruthu.

The applicant was aggrieved by the ruling made on the 4th day of February, 2014 by the trial magistrate in CMCC No.584 of 2011. The applicant had been ordered to pay the monthly maintenance of Kshs.70,000/= pending the final determination of the suit. It was deponed that the amount was grossly unfair and unjustified as the magistrate did not show the method that was used to arrive at such an award.

On the date fixed for the hearing of this application seeking the stay of execution of the said order of 4/2/2014. Counsel for the applicant instructed Mr. Kabitu Advocate to hold his brief and to inform the court to place the file aside till 10.30a.m. as he was on his way.

The court indulged counsel and the file was placed aside till 10.30a.m. It was assumed that counsel for the applicant would be in court at the time indicated and would be ready to proceed.

At 10.30a.m. counsel for the applicant, Mr. Gachiengo had still not arrived to prosecute the application and the court was urged by counsel for the Respondent to proceed with the matter. Despite a

spirited effort being put up by Mr. Kabita, the court declined to grant the application for adjournment as the date had been taken in court in the presence of both counsel for the parties. The Respondent proceeded to argue the matter. The application was unopposed. Counsel submitted that the applicant had failed to comply with the partial order for payment granted on the 7th February, 2014. He stated that the orders had lapsed due to non-compliance and prayed that the stay of execution be lifted and that the Respondent be allowed to proceed with the execution.

ISSUE FOR DETERMINATION:

Upon hearing the submissions of counsel for the respondent and upon perusing the court record, the only issue for determination is whether the applicant has complied with the partial order granted on the 7/2/2014 so as to warrant the order that is sought.

ANALYSIS:

The applicant moved the court by way of a Certificate of Urgency on the 7th February, 2014 and was granted a conditional stay of execution pending hearing of the matter *inter-parties* on condition that the applicant paid the monthly sum of Kshs.35,000/=.

On 12th February, 2014, the applicant made a payment of Kshs.35,000/= into court. Upon further perusal of the court record there is no indication of any sum being paid for the month of March, 2014. The application was not prosecuted and therefore no reasons adduced to explain the non-compliance of the said orders granted.

FINDINGS:

1. The court finds that the applicant has failed to comply with the order granted on 7th February, 2014
2. This court finds no good reason to grant the order sought for stay of execution pending the hearing and determination of the appeal.

CONCLUSION:

The application is hereby dismissed with costs to the respondent.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 30th day of April, 2014.

A. MSHILA

JUDGE