



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 68 OF 2013

E LAPPELLANT

VERSUS

C O.....RESPONDENT

RULING

1. There are three applications for determination, dated 14th October 2013, 12th November 2013 and 13th January 2014.
2. The application dated 14th October 2013 is by the appellant. It seeks stay of execution of the judgment dated 11th April 2014. In his affidavit sworn on 14th October 2013, the appellant says that the amounts stated in the judgment as payable by him are beyond his means as he is an old, infirm and sickly pensioner.
3. In reply to the application dated 14th October 2013, the respondent filed grounds of opposition dated 6th November 2013 and a replying affidavit sworn on even date. She accuses the appellant of being in contempt of court for failing to comply with the orders made in the judgment made on 14th October 2013.
4. The second application is dated 12th November 2013. It seeks the setting aside of a warrant of arrest issued on 8th November 2013 by the Children's Court in execution of the decree arising from the judgment delivered on 11th April 2014. The appellant raises the same arguments against the warrant of arrest as those raised in his application dated 14th October 2014 – that he is incapable of raising the amounts for maintenance given that he is an old and sickly pensioner.
5. I do not have record of a reply to the second application by the respondent.
6. The third application is dated 13th January 2014. It is by the respondent. It seeks committal of the appellant to civil jail for failure to settle the decretal amount in the judgment of Children's Court. It also prays that a sum of money held by the appellant's lawyer be released to the respondent. The reply to this application is by way of an affidavit sworn on 21st January 2014 by the appellant. It contains essentially of denials.
7. All three applications turn on the question of execution of the decree of the primary court. All these applications will be resolved by the determination of the first application. The issue therefore is whether the decree of the lower court ought to be stayed or not pending appeal.

8. In the judgment of 11th April 2013, Mr. A.K. Mwicigi, acting Principal Magistrate, split the maintenance of the subject child between the two parents. The respondent is to provide shelter for the child, while the appellant caters for his education, which includes related expenses such as transport. The remainder of the expenses, calculated at Kshs.26,500.00 per month, and which include food clothing and medical care for the child, was to be shared equally. The appellant was ordered to pay his share, calculated at Kshs.13,250.00 per month, on or before the 5th day of each month beginning April 2013.
9. The trial court underlined the fact that parental responsibility is absolute and cannot be abdicated, whether the parents are salaried or not. It is a mandatory duty that parents must provide care and protection within their means.
10. It is the said orders that I am asked to stay execution of. I reiterate that the child has to be provided for. He has to remain in school and has to have food in his stomach and clothes on his body. I find no basis upon which I can stay orders made by the primary court to enforce these very basic rights of the child unless a case has been properly made out for such interference.
11. It is my finding that no such case has been made out herein. The appellant says that he is unable to pay, but I note from the record that he has not provided evidence of his means – in terms of the assets he owns and the income accruing to him. He says he is old and infirm, but I do note that that has not stopped him from being appointed into the board of the leading reinsurance corporation in Kenya.
12. In cases of this nature, the paramount consideration is the best interests of the child. I ask myself whether staying the judgment of the primary court would be in the best interests of the child. The answer to that question is that a stay of execution of the said judgment would not be in the best interests of the child.
13. This matter is before me by way of appeal, and I am called upon to exercise appellate jurisdiction. It could be that the figures in the judgment are excessive or on the higher side. The trial court had occasion to take evidence that, from the parties evidence is yet to be tested before me. I will only have occasion to examine it when the appeal will eventually be argued before me.
14. Counsel for the parties addressed me at length on 11th April 2014 on various aspects of the matter and invited me to make certain orders. Most of the issues raised touch on execution of the decree and the orders of the primary court. It should be noted that this is not the execution court for the purpose of the judgment dated 11th April 2013.

The decree on record was by the lower court, and its execution falls within the jurisdiction of the said court.

15. In the end, I will make the following orders:-

- a. That the applications dated 14th October 2013, 12th November 2013 and 13th January 2014 are hereby dismissed.
- b. That the orders made on 14th November 2013 and extended several times thereafter are hereby vacated.
- c. That all matters touching on the execution of the judgment delivered on 11th April 2013 by the Children's Court shall be raised before and addressed to the Children's Court.
- d. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 10th DAY OF April, 2014.

W MUSYOKA

JUDGE

In the presence of Mr. Gisemba advocate for the Appellant

In the presence of Mr. Swaka advocate for the Respondent.