



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**

**FAMILY DIVISION**

**CIVIL APPEAL NO: 38 OF 2014**

**R J A .....APPELLANT**

**VERSUS**

**E N M.....RESPONDENT**

**RULING**

1. The Motion for determination is dated 5<sup>th</sup> June 2014. The appellant seeks stay of execution of the judgment delivered on 7<sup>th</sup> December 2012 by the Children’s Court in Children’s Case Number 1246 of 2011. His case is that he has appealed against the judgment delivered on 7<sup>th</sup> December 2012. His principal complaint is that the lower court has allowed execution of the judgment on record to proceed simultaneously with the hearing of the case. He further complains that the beneficiary of the judgment is a child and once the decretal amount is paid the appellant will have no chance of recovering the amount should the appeal be allowed. He also complains that there is no proper execution process taking place.

2. The application was served on the respondent, who swore an affidavit on 16<sup>th</sup> June 2014. She accuses the applicant of misleading the court by swearing false facts. She avers that maintenance orders were made on 7<sup>th</sup> December 2012 where the applicant was ordered to pay Kshs.10,000.00 per month as maintenance, and to pay school fees and school – related expenses. These orders were not complied with and accumulated to Kshs.154,000.00. She argues that there has not been demonstrated by the applicant that he would suffer substantial loss in caring for his child. She further states that a stay order would not be for the benefit of the child. She asserts that the applicant is in violation of the judgment of the Children’s Court.

3. The said application was argued on 18<sup>th</sup> June 2014. Mr. Maari urged the case for the applicant, while Mr. Waiganjo replied for the respondent.

4. Mr. Maari submitted that the applicant is aggrieved by the judgment made by the lower court because it was made without the participation of the applicant, and when the applicant sought to have the court set it aside, the court declined, but allowed the applicant to cross-examine the respondent. The order that the applicant would be allowed to cross-examine the respondent meant that the case was reopened and that there would be a further hearing leading up to a fresh judgment. It was his contention that such a circumstance would lead to two judgments, hence the earlier judgment ought to have been set aside. He further submitted that the applicant has satisfied all the requirements for a grant of stay of execution pending appeal.

5. Mr. Waiganjo on his part opposed the application. His submission was that the orders in question

were not strictly speaking made *ex-parte* as the advocate for the applicant was aware of the hearing dates but chose not to attend court. He also submitted that the judgment being challenged was delivered in 2012, and the fact that stay is sought in 2014 bespeaks delay and indolence. He emphasized that even in cases where a court is considering a stay application the guiding principle in Children's case should be employed to override the principles employed in civil cases to guide the court in determining applications for stay in purely civil court cases. He further stated that the orders sought to be stayed touch on the welfare of a child, and a stay would not be in the best interests of the child. He argued me to be guided by my decision in Ngata Muriuki .vs. Susan Ursula Wambui (2013) eKLR.

6. I called for the lower court file in Children's Case Number 1246 of 2011 by my order of 18<sup>th</sup> July 2014. The said file was availed the same day. I have had occasion to peruse it and acquaint myself with the proceedings that were conducted by the lower court from the 7<sup>th</sup> December 2011 and 21<sup>st</sup> May 2014.

7. The chronology of events in that matter were as follows:-

- a. 7<sup>th</sup> December 2011 –the lower court granted orders against the applicant before me ordering him to cater for school fees and for school related expenses for Term 1 year 2012 at **[particulars withheld]** Junior Academy;
- b. 27<sup>th</sup> December 2011 – the orders made on 7<sup>th</sup> December 2011 were suspended after the applicant before me denied the paternity of the child;
- c. 4<sup>th</sup> July 2012 – DNA sampling ordered to be done on 1<sup>st</sup> July 2012 at the government laboratories at Kenyatta National Hospital;
- d. 30<sup>th</sup> July 2012 – the order made on 7<sup>th</sup> December 2011 reinstated effective from 9<sup>th</sup> December 2011 after the applicant before me failed to appear for the DNA test,
- e. 30<sup>th</sup> August 2012 – the applicant is ordered to pay for the child's school fees and school related expenses pending the hearing and determination of the suit. Court satisfied that the applicant before me had been properly served;
- f. 13<sup>th</sup> November 2012 – main suit proceeds to full hearing after court is satisfied that the applicant before me had been properly served. The plaintiff testifies and the matter is fixed for judgment on 7<sup>th</sup> December 2012;
- g. 7<sup>th</sup> December 2012 – judgment is delivered to the effect that the:-
  - (i) the plaintiff retains actual and legal custody of the child;
  - (ii) the defendant caters for the child's school fees and related expenses will effect from January 2013;
  - (iii) the defendant pays Kshs. 10,000.000 upkeep as his contribution towards food, clothing and medical needs of the child;
  - (iv) the plaintiff caters for all other needs of the child; and
  - (v) each party bears their costs of the suit and have liberty to apply.
- (h) 3<sup>rd</sup> February 2014 – notice to show cause ordered to issue on allegations of failure by the applicant before me to satisfy the judgment;
- (i) 20<sup>th</sup> March 2014 – application to set aside judgment certified urgent and to be heard together with the notice to show cause;
- (j) 9<sup>th</sup> April 2014 – the application and notice to show cause are heard, and ruling is reserved for 21<sup>st</sup> May 2014;
- (k) 21<sup>st</sup> May 2014 – ruling is delivered to the effect that:-

- (i) the applicant before me had been properly served with the process which led up to the delivery of the judgment of 7<sup>th</sup> December 2012;
- (ii) most of the applications by the respondent before me proceeded *ex-parte* for neither the applicant before me nor his counsel attended court despite service;
- (iii) the court declined to stay the judgment nor to set it aside;
- (iv) there were valid orders of the court in force and the same had to be obeyed given that the judgment on record was made procedurally;
- (v) the applicant before me was given 30 days to settle the amount stated in the notice to show cause, and
- (vi) the matter was to be fixed for the hearing of the main suit to enable the applicant before me cross-examine the respondent before me and to testify and call evidence to support his case.

8. From the proceedings at the lower court, it is plain that the applicant is the author of his own difficulties. It is quite clear that he was properly served with court process but chose to ignore it and let the respondent herein carry on with her case hence the judgment of 7<sup>th</sup> December 2012. The execution proceedings that naturally flowed from the said judgment cannot therefore be faulted.

9. I note that the applicant thereafter moved the court seeking to have the said judgment set aside. In exercise of its discretion the lower court declined to set aside the judgment, but allowed the applicant a chance to cross-examine the respondent and to adduce evidence in his defence. It is the manner in which the lower court exercised its discretion that provoked the current appeal. The point of law being raised, as I understand it, is whether it is open to a trial court faced with an application to set aside a final judgment to allow the defence to adduce evidence on its case but decline to set aside the judgment. There is a moot point for determination on appeal. In my view the applicant before me has an arguable appeal. A case has therefore been made out for stay of the proceedings before the lower court to await the outcome of the appeal.

10. On stay of execution of the decree, I am persuaded that the justice of the situation would require that the challenge to the ruling of 21<sup>st</sup> May 2014 should affect the execution of the judgment of 7<sup>th</sup> December 2012. That stay however should not be understood to mean that the child will be exposed to adversity, for I do have jurisdiction to make orders for the welfare of the child in the meantime.

11. The orders that I am disposed to make are as follows:-

- (a) That there shall be stay of execution of the judgment delivered in Nairobi Children's Court Children case No. 1246 of 2011;
- (b) That there shall also be stay of proceedings in the said children's case pending the hearing and determination of the appeal herein;
- (c) That pending hearing and determination of the appeal herein and/or further orders of this court:-
  - (i) The respondent shall retain the actual and legal custody of the minor the subject of these proceedings;
  - (ii) The appellant shall cater for the child's school fees and school related expenses; and
  - (iii) The appellant shall pay Kshs. 5,000.00 to the respondent as his monthly contribution to the child's upkeep while the respondent shall cater for the child's other needs;

(d) That there shall be liberty to apply.

(e) That the lower court file shall be returned to the lower court's registry forthwith.

**DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF August 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of ..... advocate for the applicant.**

**In the presence of .....advocate for the respondents.**