



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO. 125 OF 2013

LWN.....APPELLANT/RESPONDENT

VERSUS

NMK.....RESPONDENT/APPLICANT

RULING

On 17th January, 2014 the applicant filed in this court two applications of the same date seeking several orders against the respondent; the first of these applications sought, in the main, for extension of parental responsibility in respect of a child of marriage between the applicant and the respondent. In the second application, the applicant sought interim orders compelling the respondent to make lump sum and periodic payments to cater for fees and maintenance of his children.

The first application was brought to court under **section 28** of the **Children Act 2001** while the second application was made under **sections 23, 24 and 26** of the same Act.

The basis of the applicant's applications is that at one point in time the applicant and the respondent were married and that their marriage was blessed with three issues; in 2005, that marriage broke down and the applicant was forced to leave the matrimonial home.

Subsequently, the applicant instituted a suit in the magistrates' court, apparently seeking for a maintenance order against the respondent. On 25th February, 2011, the court ordered the respondent to pay and to continue paying a sum of Kshs. 20,000/= on monthly basis for the maintenance of his children pending the hearing and determination of that suit. Such an order is provided for under **section 91** of the **Children Act**.

For some reason the respondent did not comply with the maintenance order and on 3rd May, 2011 he was committed to jail in Muranga Government of Kenya prison in order to enforce compliance. The subordinate court's record shows that on 6th May, 2011, the respondent committed himself to make some payments and based on this commitment, parties agreed that he be released from prison.

It would appear that the respondent defaulted on his commitments and that is why on 16th September, 2011, the court ordered for the his arrest; according to the applicant, this order could not be effected because the original file had been transferred to this court in view of the appeal that had been filed by the respondent.

According to the applicant, as of 17th January, 2014 when these applications were filed, the respondent was in arrears of Kshs 644,000/=; the applicant is aggrieved that the respondent has not taken any steps to prosecute his appeal and neither has he made any efforts to comply with the maintenance order.

As at the time this application was made two of the children were in college and high school respectively and were in urgent need of Kshs 182, 775/= to cater for their fees.

In the replying affidavit filed in response to these applications the respondent does not deny the existence of the maintenance order but says that his children are old enough to deal with him directly and they need not present their needs through their mother, the applicant herein.

When the application came up for hearing, the respondent did not appear and neither was he represented though there was evidence on record by way of an affidavit of service that he had been served with the hearing notice. The applicant therefore proceeded with his applications ex parte.

I have duly considered the applications by the applicant and noted that that as early as early as 25th February, 2011 the respondent was ordered to make a lump sum payment of Kshs. 50,000/= and monthly instalments of Kshs. 20,000/= pending the hearing and the determination of the suit against him.

There is no evidence that he has complied with this order and in the absence of any order staying execution of this order, it would appear that the respondent is in breach and continues to remain in breach of this order.

In the absence of a stay of execution, the respondent must comply with the order issued in the magistrate's court and make the payments as ordered.

Provisions relating to enforcement of maintenance orders are provided for in **section 101** of the **Children Act**. My understanding of that provision is that the application for enforcement should be made in the court in which the maintenance order was made; however, according to the applicant, her efforts to enforce the order as provided were frustrated by the transfer of the original court file to this court when the respondent filed an appeal against the subordinate court's decision.

It is noted that the suit in the magistrate's court is still pending and what the respondent appealed against is only an interim order; the subordinate court is therefore still properly seized of this matter and an application for enforcement of any order made by the court can properly be made in that court.

I also note that the applicant requested for an interlocutory judgement in default of appearance and defence. The record from the subordinate court shows that this judgment was entered on 25th May, 2011; however, being an interlocutory judgment, I suppose the matter still has to go for formal proof and for this reason the matter is still pending in the subordinate court.

Since the orders that were issued by the subordinate court are still in force, it will not be appropriate, in my view, for this court to issue the similar orders; all that the applicant needs to do is to invoke the appropriate provisions in the Act and enforce the orders that are already in place. If the transfer of the original file to this court is the stumbling block to the enforcement process, I direct that this file be transferred back to the magistrate's court for the applicant to enforce the existing orders or take any other step in the matter as may be appropriate.

For the reasons I have given, I am also of the view that the application for extension of parental responsibility should be made in the subordinate court, which as noted is properly seized of this matter. I find no inhibition to such an application being made or indeed taking any other step in proceedings in the subordinate court since this court has not issued any order staying proceedings in the subordinate court.

Allowing the applicant's applications and issuing orders which can properly be issued by the subordinate court would no doubt amount to conducting parallel proceedings, which in my view would be a blatant abuse of the process of the court. In the premises, I would reject the applicant's applications respectively dated 17th January, 2014 with no orders as to costs.

Dated, signed and delivered in open court this 23rd day of September, 2014

Ngaah Jairus

JUDGE