



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

H.C.C.A NO. 17 OF 2014

M G N.....APPELLANT

VERSUS

M W N.....RESPONDENT

R U L I N G

1. The appellant through an application dated 6th May, 2014 brought pursuant to Order 42 Rule 6 of Civil Procedure Rules and Section 1A, 1B,3A and 63 of the Civil Procedure Act sought for an order of stay of execution of the orders and/or ruling delivered on 28th March, 2014 in the children's case No. 135 of 2013.
2. The application is based on the grounds on the face of the application interalia; that the appellant filed an appeal against the ruling delivered on 28th March, 2014; that the appeal herein has overwhelming chances of success; that the applicant stand to suffer substantial and irreparable loss unless the orders of stay of execution of the aforesaid ruling/orders are granted and that the application has been made without delay. The application is further supported by the applicant's supporting affidavit dated 6th May, 2014.
3. The applicant depones in his affidavit that the lower court ordered him to pay school fees for the minors and also pay Kshs.20,000/- monthly towards their maintenance. The school fees for the two minors is Kshs.85,500/- per term and that due to his being heavily indebted he cannot pay the school fees and maintenance as ordered; as he has a loan of Kshs.16,000,000/- which he is currently repaying by monthly instalment of Kshs.278,000/- and that he also has a loan with Barclays Bank of Kenya which he is also paying.
4. The applicant deponed that he and the respondent co-own a boutique business which is under the respondents care and the respondent is currently taking income from the said business and earns Kshs.150,0000/- per month from the said business and attached a copy of single business permit and photograph of the boutique and shop.
5. The applicant averred that he does not take any income derived from the boutique business and the income derived from the said business is enough to cater for the school fees for the children, food, clothes, shelter, other needs of the children and payment of part of the bank loan adding that the respondent is not assisting him service loan but is pocketing the entire income derived from the

boutique business.

6. The applicant further stated the income derived from other family business is only enough to pay the loans which he had taken from National Bank of Kenya and that he would be willing to participate in maintenance of the minors once he is through with repaying the loan. He added he is likely to be committed to civil jail unless orders of stay of execution of the orders of lower court are granted.
7. The applicant averred that the respondent has threatened to have him committed to civil jail and that he stands to suffer substantial and irreparable loss if he is committed into civil jail. The applicant also contend that unless orders are granted the land he provided as security Nyaki/Kithoka/2962 is likely to be sold and cause him to suffer substantial and irreparable loss.
8. The respondent opposed the application and filed replying affidavits dated 15th May, 2014 and 29th July, 2014 contending the appeal is frivolous and has no chance of success.
9. The respondent contended that the appellant/applicant is a very affluent importer, who is in absolute control of all jointly acquired family properties after he had ruthlessly chased the respondent and the children away.
10. The applicant is alleged to be running a very lucrative wholesale and electronic and motorbikes business in Meru town, styled [Particulars Withheld] before he chased the respondent in August, 2013. That the net profit from the said business was at least Kshs.250,000/- per day and that today he must be earning more. That applicant operates a guest house at Runogone styled [**Particulars Withheld**] with 15 lodgings let at Kshs.15,000/- per day, a bar, earning a net profit of about Kshs.40,000/- per day and a conference hall earning not less than Kshs.20,000/- per month.
11. The respondent deposed that the boutique business is exclusively hers which she started with her mother and she obtained loans to sustain her children and the said business and that as of 22/4/2014 she owed Family Bank Kshs.176,688/- which she is repaying as per annexed statement marked "MMNI".
12. The respondent tabled her profit from the boutique business pointing out it is not enough to meet all her tabled expenses and annexed receipts in support of her expenses. That after the court's ruling the applicant refused to comply with the order leading the respondent to obtain a loan of Kshs.500,00/- to pay school fees, house rent and buy some stock as per annexure "MON3" and further indicated how she spent the money on their children.
13. The respondent in his further affidavit dated 10th July, 2014 denied that he is a very affluent importer and denied being in control of boutique business which he averred is a family business. He admitted he operates a general merchandise business and a guest house, however he denied earning the amount claimed by the respondent per day.
14. The applicant deposes that the income he generates from guest house is not enough to pay the loans that he owes the National Bank of Kenya and Barclays Bank of Kenya and denied that he is extravagant as alleged by the respondent and termed other contents of paragraph 5 of the replying affidavit as scandalous, irrelevant and oppressive and prayed the same to be struck out.
15. The court has carefully considered the application, the affidavits in support and in opposition as well as submissions by Mr. J. G. Gitonga learned Advocate for the applicant and Mr. Carlpeters Mbaabu, learned Advocate for the respondent. The issue for consideration is whether the applicant has satisfied the conditions to warrant stay of execution of the lower court ruling pending hearing and determination of this appeal
16. The conditions for granting stay are set out under Order 42 Rule 6(2),(1),(a) and (b) of the Civil Procedure Rules which provides:-

(2) No order for stay of execution shall be made under subrule

(1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

17. The applicant is required before stay is granted to satisfy the court that unless stay is granted he would suffer substantial loss and that the application has been made without unreasonable delay and offer a security.

18. The applicant in this application did not disclose to the court his income from his various businesses. He did not give details of his income and his expenses. He did not disclose where he invested Kshs.16,000,000/- and kshs.391,736/- which he obtained as loan. He was in his affidavits evasive and mean with necessary and relevant information as regards his sources of his income. The applicant did not state that he has any problem with paying the loans but he has stated he has problem in paying school fees for his children and for their upkeep. He did not specifically deny his income as tabulated by the respondent but put a general denial which I find not to be sufficient in rebutting the matters specifically pleaded by the respondent.

19. The respondent denied the boutique in question being a family business and besides that she specifically analysed her income and expenses and demonstrated the income from the boutique business was not enough to meet the fees and upkeep of the two issues.

20. The applicant has failed to satisfy the court that substantial loss may result to him unless the order sought is granted though the application was filed without unreasonable delay.

21. This court notes that this matter concerns parental responsibility of father and mother to the two issues subject of this appeal and as such both the father and the mother have responsibility to meet the educational needs of their children. Section 24(1) of the Children Act provides:-

“24. (1) Where a child’s father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.”

22. In view of the foregoing the applicant cannot be heard to point out that the respondent has superior right or responsibility because she is financially well up, which is not the case here and a such fail to discharge his parental responsibility on the grounds he has loans to cater for while his children are suffering.

23. In view of the foregoing I find no merit in the applicant’s application dated 6th May, 2014. The application is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. J. G. Gitonga for the applicant

2. Mr. C. Mbaabu for the respondent

J. A. MAKAU

JUDGE