

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MIS. CAUSE NO. 149 OF 2014

M M.....APPLICANT

VERUS

R M. M.....1ST RESPONDENT

RULING

1. This matter was initiated in this court by way of a miscellaneous application dated 14th August 2014. The applicant was seeking release from civil jail pending determination of an application that he had filed at the Children's Court.

2. The grounds upon which the application is premised are set out on the face of the application and in the affidavit of the applicant. His case is that he had been ordered on 2nd July 2014 to pay a sum of Kshs.245,000.00 within thirty (30) days. The amount represented accumulated maintenance. He was not able to raise the amount and he was committed to civil jail. His family allegedly raised a sum of Kshs.50,000.00. He argues that his committal to civil jail was not in the best interests of the child.

3. Upon being served the respondent filed an affidavit in reply sworn on 28th August 2014. Her case is that the issues being raised in the application are infact the same issues that are before the lower court. She states that the applicant has another job with a company called [*particulars withheld*]. She asserts that the orders of the lower court which gave rise to the committal to civil jail are still valid and enforceable, for they have not been set aside. The applicant is still bound to comply with them. In any case he was committed to civil jail because he had never contributed to the maintenance of the children the subject of the lower court proceedings.

4. The application was canvassed orally on 2nd September 2014. Mr. Makumi argued the case for the applicant. His argument was that the applicant was committed to civil jail indefinitely. He asserted that his client was punished for not working. He prayed that the applicant be released so that he can look for the money.

5. Ms. Amboko submitted on behalf of the respondent. She stated that there was a formal judgment delivered on 22nd May 2014 which is still in force and has not been appealed against. She further stated that if the applicant is aggrieved by the order he should appeal it.

6. I called for the lower court and perused it. I noted from it that a DNA test was ordered, conducted and it turned out positive that the applicant was the biological father of the children in question. The matter proceeded for full hearing on 29th April 2013. The respondent testified and was cross-examined by counsel for the applicant. The applicant did not however attend court and did not testify. Judgment was delivered on 24th May 2013. The applicant was ordered to pay Kshs.38,000.00 per month with effect from date of the judgment as part of his contribution towards upkeep of the children. He was also ordered to cater for the child's medical needs.

On 21st March 2014 the respondent moved the court seeking to have the applicant to show cause why execution should not ensure for non-compliance with the terms of the judgment. The notice to show

cause was issued and was heard on 22nd May 2014. It was noted then that he was in arrears of Kshs.300,000.00. It was observed that his approach to the matter was casual. He was given up to 1st July 2014 to pay up.

On 30th June 2014 he moved the court arguing that the amount of Kshs.40,000.00 per month for upkeep was not affordable. The matter was mentioned on 2nd July 2014, when it turned out that he had not paid a single cent of the money decreed to the judgment. He was committed to civil jail for 30 days. Matter was placed for mention on 31st July 2014. The period was extended on 1st August 2014 for 60 days. It was to be mentioned on 30th September 2014. On 30th September 2014, he was allowed a week's reprieve.

7. Having scrutinized the record of the lower court, it is clear to me that there is no justification for the orders sought in the application dated 14th August 2014. The issues raised in the application should have been raised and addressed at the hearing of the suit at the lower court. The applicant however chose to absent himself from the proceedings and he did not give evidence and state his case. He chose not to avail himself of the opportunity given to him then, he should not be heard to complain now that the decree was oppressive. In any event he had the option of appealing.

8. I need not to say more. The application dated 14th August 2014 is completely without merit. It is hereby dismissed with costs to the respondent. The lower court file shall be released to the Children's Court forthwith.

DATED, SIGNED and DELIVERED at NAIROBI this 28th DAY OF November 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Kimathi for Ms. Amani advocate for the applicant