



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 39 OF 2014 (OS)

S K K.....APPELLANT

AND

D A L.....RESPONDENT

RULING

1. The appeal herein was filed on 4th June 2014, against orders made by Hon. Nyoike, Acting Senior Resident Magistrate, in Children's Case No. 139 of 2014.
2. On 20th June 2014, a Motion was lodged in the appeal seeking several orders. The orders sought included stay of execution of the impugned order, lifting of warrants of arrest, review or setting aside of orders of payment of school fees at a specified school, transfer of the subject children from one school to another and stay of proceedings pending appeal.
3. The grounds in support of the application are set out on the face of the Motion and on the facts deponed to in the affidavit in support of the application. The applicant's case is that the children should be schooling at the **[particulars withheld]** Academy where fees are affordable as opposed to the **[particulars withheld]** Kindergarten School where the fees are exorbitant. He argues that the children were transferred to **[particulars withheld]** Kindergarten School with the sole object of oppressing him financially.
4. The application was served. The respondent has replied to it through her affidavit sworn 9th July 2014. Her case is that the respondent abdicated his responsibilities to the children hence the filing of the case at Children's Court, where he was ordered to pay fees at the **[particulars withheld]** Kindergarten School where the children were. He is said to have had declined to pay despite court orders prompting the court to issue a warrant of arrest on 13th February 2014. He paid only after the said warrants were issued. He failed to pay school fees for the second term prompting the making of further orders on 12th May 2014. Upon the making of these orders he went and paid school fees at the **[particulars withheld]** Academy instead of the **[particulars withheld]** Kindergarten School where the children were schooling. After paying school fees at **[particulars withheld]** he moved the lower court for orders that the children be transferred to the said school. The court declined to allow the prayer, instead it ordered him to comply with the orders of 13th February 2014 and 12th May 2014, in default of which warrants were to issue. There was no compliance and on 17th June 2014 warrants of arrest were duly issued. It is the issuance of

the said orders that prompted the filing of the Motion dated 30th June 2014.

5. The application was argued before me on 18th July 2014 by Mrs. Arasa for the applicant and Mr. Kago for the respondent.

6. Mrs. Arasa submitted that the applicant paid school fees at *[particulars withheld]* Academy after he realized that he could not afford school fees at *[particulars withheld]* Kindergarten School. The rest of her submissions dealt on matters of fact that were not deponed to in any of the affidavits filed in the matter.

7. In reply Mr. Kago submitted that most of the orders sought in the Motion cannot be granted at the interlocutory stage of the appeal, and in any event they are the subject of the appeal itself. He argued that the applicant did not comply with my clear orders of the lower Court – he was ordered to pay school fees at the school where the children were but choose to pay the same in another school and then turned around to claim that he had complied with the court orders.

8. I called for the lower court file with a view to peruse it. I have noted from the record that the applicant was ordered on 31st January 2014 to pay school fees of Kshs. 189,000 for the first term of 2014, Kshs.36,000.00 to cover the term's extra-curriculum activities and Kshs. 60,000.00 per month for transport. The order was not complied with and on 12th February 2014, the court allowed the respondent to take out a notice to show cause. The notice was issued and served, when the matter came up on 13th February 2014 the applicant did not attend court and a warrant of arrest was issued. Execution of the warrant of arrest was stayed on 17th February 2014 when the applicant indicated to court that he had paid the school fees as ordered. On 21st May 2014, the court declined to order transfer of the children from their current school and ordered the applicant to clear school fees in the current school within twenty-one (21) days, in default of which warrant of arrest was to issue without further notice. The order of 21st May 2014 was not complied with and on 3rd July 2014 counsel for the respondent sought orders that the police do assist with the enforcement of the arrest warrant.

9. It is clear to me from the above that orders were made by the lower court that have not been complied with by the applicant. He has now come to this court to shield himself from arrest for failure to comply with the said orders. He has no doubt come to court without clean hands. It has been said before, that court orders must be obeyed. A party who is unhappy with or aggrieved by an order must comply with it first and thereafter move the relevant court appropriately for the review or setting of the order. Disobedience of a court order is not an option. There is no doubt at all that the orders made on 23rd May 2014 have not been complied with. Neither have they been reviewed nor set aside. They are valid and await compliance. A party who has disobeyed court orders should not expect audience before a court of law. The applicant in the instant Motion is clearly playing possum with court orders. That cannot be countenanced in a country which purports to be governed by the rule of law. The law must be complied with.

12. Needless to say that orders for maintenance of children and relating to their education cannot be stayed. Stay of such orders would not be in their best interests. Children have a fundamental right to education. They must be kept in school. Staying the orders of 23rd May 2014 would have the effect of forcing the children out of school.

13. I find no merit whatsoever in the Motion dated 30th June 2014. To dispose of it I will make the following orders:-

(a) That the Motion dated 30th June 2014 is hereby dismissed with costs;

(b) That the orders made on 18th July 2014, staying the warrants of arrest issued by the lower court on 17th June 2014, are hereby vacated; and

(c) That the lower court file in Nairobi Children's Court case number 139 of 2014 shall be returned to the said court for further handling.

14. It is so ordered.

Dated, signed and delivered in open court at Nairobi on 11th day of December 2014.

W. MUSYOKA

JUDGE

No appearance for the advocate for the applicant

In the presence of Mr. Kagwe advocate for the respondent.