



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 29 of 2012

ONESMUS MWASHIGADI APPELLANT

VERSUS

ESTHER NJOKI RESPONDENT

RULING

(1) By an application dated 22nd February, 2012, the Appellant seeks an order for stay of execution of the judgment and decree in Voi Children Court Case number 31 of 2008 pending the hearing and final determination of the appeal. The application is based on the supporting affidavit and supplementary affidavit of the Appellant of 22nd February, 2012 and 17th April, 2012, respectively, and on grounds set out in the application.

(2) The application is opposed by the Respondent who has filed a replying affidavit of 6th March, 2012. Counsel for the parties, Mr. Mwakireti for the Appellant and Ms. Achani for the Respondent, made submissions and ruling was reserved. However on account of heavy work load and official assignments within and outside jurisdiction, it has not been possible to deliver the ruling earlier and the delay is much regretted.

(3) The Children Court ordered the Appellant to pay Kshs.5,000/= monthly maintenance dues for the upkeep of the child the subject of the proceedings. The court held that the paternity of the children had been established by the testimony of the Respondent that the Appellant was the father. This was despite want of DNA testing and in view of a noted reluctance by the Appellant to undertake the DNA testing. The court said:-

“As stated elsewhere in this judgment, the court held the opinion that the accused person was frustrating the paternity test and preceded on the assumption that he was apprehensive that the reports were likely to be unfavourable to his case and he may be required to foot the bill in form of costs. Though paternity was (not) proved by way of DNA test, it was evident that it was the Defendant who was unwilling to have the test conducted and not the Plaintiff. His conduct led the court to conclude that he was aware that he actually (was) the father of the issue subject of the suit herein. I believe the evidence of the Plaintiff that the Defendant is the father of her child D.W and therefore liable to contribute towards her upkeep”.

(4) The Appellant's Memorandum of Appeal dated 22nd February, 2012 sets out grounds of the appeal, the principal of which is that **“the Hon. Magistrate erred in imputing or imposing parental responsibility upon the Appellant in contravention of the express provisions of the Children's Act.”**

(5) In adverting to the application for stay of execution, Counsel for the Applicant submitted on the basis of the principles for the grant of stay of execution under Order 42 rule 6 of the Civil Procedure Rules, namely, substantial loss on the Applicant and the provision of security. Counsel contended that the Applicant would suffer substantial loss if he were required to pay maintenance dues for the minor whose paternity he denies in that there is no paternal responsibility as envisaged by sections 24 and 25 of the Children Act. He also stated that such maintenance if paid would, if the appeal were successfully be unrecoverable from the child or its mother who had previously stated that she had no means to provide for the minor.

As regards security, counsel offered that the Appellant would diligently prosecute the Appeal and pointed to a certificate of delay from the Voi Court, which certified the period upto the issue on 22nd March, 2012 as having been necessary to prepare the certified proceedings.

(6) For the Respondent, Ms. Achani submitted that the Appellant had not been keen to have the matter concluded and had refused to attend the Government Chemist at Mombasa for the DNA testing; that the application for stay should have been made at the Voi Children's Court at the time of applying for certified copy of proceedings; that the Appellant had not provided security as required under Order 42 rule (6) (2) (b) of the Civil Procedure Rules; and that the appeal was filed on 2nd February, 2012 after expiry of period allowed under the law.

(7) Mr. Mwakireti for the Appellant replied that the orders for DNA testing were made twice and on each occasion one of the parties did not attend so that the testing could not proceed, and he confirmed that the Appellant was ready to attend the DNA test. Counsel relied on section 79 G of the Civil Procedure Act on the extension of time to lodge an appeal.

(8) I have considered the application and find as follows:-

(a) Section 79 G of the Civil Procedure Rules allows the late filing of the appeal in view of the Certificate of Delay of the Voi Children's Court that the period of the delay was required to prepare the certified copy of proceedings and judgment. The trial court and the Appellate court have concurrent jurisdiction to order stay of execution under Order 42 rule 6 (1) of the Civil Procedure Rules.

(b) The Appellant has an arguable case in the appeal on the question of imposition of parental responsibility duty of maintenance on a person who denies paternity of a child.

(c) As the Respondent's means do not indicate ability to repay the maintenance dues to be paid by the Appellant and in view of the contested paternity, the Applicant would suffer substantial loss if required to pay the maintenance arrears sought under the pain of arrest and detention.

(d) The Appellant has not offered realistic security for the grant of the orders of execution.

(9) Accordingly, for the reasons set out above, I grant conditional stay of execution of the judgment and decree of the Voi Children Court case number 31 of 2008 subject to the Appellant depositing in an interest earning account in the joint names of the counsel, within 30 days, as security the sum of Ksh.60,000/= being the amount of maintenance dues for the period since the filing of the application for stay. In default, the order for stay of execution shall lapse and be of no effect.

(10) As the Appellant could have but did not make the application for stay of execution before the Voi Children Court pursuant to Order 42 rule 6 (1) of the Civil Procedure Rules, at the time of the judgment, the Appellant will pay the Respondent's costs for the application.

Dated and delivered this 26th day of February, 2013

EDWARD MURIITHI

JUDGE

In the presence of:

Mr. Mwakireti for the Appellant

N/A for the Respondent

Miss Linda Osundwa - Court clerk