



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 242 of 2010

T. O..... APPELLANT/APPLICANT

AND

B. N)

S. B)

J. H.M)

E. K)

(Sung through their mother

and next friend – V. M. M..... **RESPONDENT**

(Being an appeal from the Ruling of the Hon. Njeri Thuku, Resident Magistrate in

Kisii Children's Court Civil Case No.47 of 2010 dated 29th October 2010)

RULING

1. This matter arises from Childrens case Number 47 of 2010 filed at the Chief Magistrate's Court Kisii by the Respondent herein, V.M.M against the applicant herein, T.O. The Respondent sued the appellant for maintenance in respect of the 4 children of the marriage. On the 29th October 2010, the trial court made orders directing the appellant to provide maintenance for the children.

2. The appellant was aggrieved by the said orders and filed this appeal seeking to have the orders by the trial court set aside and/or reviewed.

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He prayed for fresh orders to be issued in his favour. He also prayed that the respondent herein be condemned to pay the costs of the appeal.

3. In the meantime, the appellant filed the Notice of Motion dated 20th June 2012 seeking the following orders:-

1. THAT this matter be certified urgent and be heard in this first instance.

2. THAT this Honourable Court be pleased to stay the proceedings in this matter and its ruling delivered and given on the 22nd day of March, 2012 pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to stay the proceedings in this matter and its ruling delivered and given on the 22nd day of March, 2012 pending the hearing and determination of this suit.

4. THAT this Honourable court be pleased to review, lift the various warrants, vary and/or set aside the ruling dated 22nd day of March, 2012 and all its consequences pending the hearing and determination of this application.

5. THAT this Honourable court be pleased to review, lift the various warrants vary and set aside the ruling dated 22nd day of March 2012 and warrants issued and all its consequences pending the hearing and determination of this appeal.

4. The application is supported by the grounds set out on the face and in the applicant's affidavit sworn on 20th June 2012. The gist of the applicant's case is that the appeal herein was compromised without his instructions'; that the Respondent has never availed the children for DNA test as ordered by the trial court; that the paternity test is crucial

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in determining the issue of maintenance and that in the circumstances, the applicant ought not to be condemned to provide maintenance in the absence of evidence that he is the father of the children, the subject of the maintenance order for which he has been cited for contempt.

5. The application is opposed. There are grounds of opposition dated 9th July 2012 and filed in court on the same day to the effect that the application as filed is misconceived, misleading and otherwise an abuse of the process of the court; the application is filed by a stranger to these proceedings and the application does not lie.

6. Briefly, the facts of this case are that the respondent herein filed Childrens Case No.47 of 2010 before the Chief Magistrate's Court Kisii, seeking maintenance for the 4 issues of the marriage, namely B.N.O, S.B.O, J.H.O and E.K.O. These children were the outcome of a husband and wife relationship that subsisted between 1998 and 2008. In 2008, the parties herein separated and the applicant apparently abdicated his parental responsibility by neglecting both the children and the Respondent.

7. On 29th October 2010, the Childrens Court ordered the applicant to

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maintain the children. Thereafter, the applicant filed an application dated 5th April 2011 through the firm of Wambeyi Makomere & Company Advocates seeking stay of proceedings of the childrens' case pending the hearing and determination of the appeal. The application came up on 16th May 2011 when Mr. Migiro appeared on behalf of Wambeyi Makomere & Co. Advocates for the appellant while Mrs. Asati of Asati & Co. Advocates appeared for the Respondent. The counsel appearing asked for time to consult, so the file was placed aside.

8. When the matter came up at 11.25 a.m. that same morning, Miss Kahinga appeared on behalf of M/s Wambeyi Makomere Advocates for the applicant. Mrs. Asati then informed the court that they had a consent to record which consent was duly recorded and signed for by the parties' advocates. The consent order was to remain in force pending the hearing and determination of the appeal. Parties were at liberty to apply.

9. By an order of this court made on 28th October 2011, the respondent got leave of the court to commence contempt proceedings against the applicant for failure to comply with the orders of 16th May 2011 and on

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16th December 2011, the respondent filed the application for contempt. That application was canvassed before me and same was allowed by the ruling dated and delivered on 22nd March 2012.

10. On the dated 20th June 2012, the applicant filed the instant application seeking stay of the orders made on 22nd March 2012. A temporary stay order was granted on 26th June 2012. The application proceeded by way of written submissions which are on the record and which I have carefully read. I have also considered the authorities cited by counsel.

11. The issues that arise for determination are (a) whether the applicant has satisfied the conditions for stay and/or review of the proceedings and ruling delivered and given by this court on 22nd March 2012.

12. The principle to be applied when determining applications for stay of execution is now settled. In **Dan Cranford Serwadda v-s- Alphonse Odido – Civil Application Number Nairobi 41 of 1987** the Honourable Judges of Appeal held, *inter alia*,:

“In an application for stay of proceedings pending appeal the court has

to review proceedings and yet not prejudice the appeal so as to make sure that it is not lightly interfering with the order of the High Court but on the other hand preserving the status quo so that the appeal will not be rendered nugatory.”

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13. It is also trite law that “whilst it is true that the court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which *prima facie* he is entitled

pending an appeal, it is equally true that when a party is appealing, exercising his undoubted right of appeal, if successful, is not rendered nugatory, but it is however in the discretion of the court to grant or refuse a stay.” See **Swanya Ltd –vs- Daima Bank Ltd – Civil Application No. Nairobi 45 of 2001 – Court of Appeal at Nairobi.**

14. After carefully considering the pleadings and the submissions made by both counsel in this matter, this court has come to the conclusion that the applicant has not made out a case to warrant the grant of the orders sought. The applicant’s case is premised on his contention that the consent orders of 16th May 2011 were made without his instructions. The law is that consent orders once made can only be set aside/stayed/reviewed with the consent of the other party or upon application by the aggrieved party on grounds similar to grounds that would lead to the setting aside of a contract. See **Flora Wasike –vs- Wamboko [1988] [1982] 1 KAR 625.** This court also finds that the evidence adduced by the applicant to the effect that he was not served

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with the consent orders is hard to believe because his counsel was present in court when the consent order was made. It is also in evidence that the applicant, though fully aware of the consent order, did nothing about it until the Respondent took out execution proceedings. At no time was the applicant not represented by counsel. Because the applicant has not come to court with clean hands, he is not entitled to the order sought.

15. I now come to the next issue for determination namely whether or not the applicant has met the threshold for granting of the prayer for review and/or setting aside the orders of 22nd March 2012. For the applicant to succeed on the application for review, he must satisfy this court that he has complied with the provisions of **Order 45 Rule 1** of the **Civil Procedure Rules, 2010**. The conditions to be met require the applicant to demonstrate that:-

a) There is discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made; or

b) There is some mistake or error apparent on the face of the record; or

c) There is some other sufficient reasons to warrant a review.

16. In the instant case, I agree with submissions made on behalf of

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the Respondent that the applicant has not shown that there is new and important matter which was out of reach despite diligent efforts on his part at the time when the order of 22nd March 2012 was made, nor has he shown that there is an error apparent on the face of the record. The applicant has also tried to convince this court that there is other sufficient reason to warrant granting of the prayer sought because the consent order of 16th May 2011 was made without his consent/

instructions. I reject the said argument.

17. Further I find from the record that the applicant did not obey and continues in disobedience of the consent order of 16th May 2011. He has not shown that he has purged or is ready to purge the contempt and this means that the applicant has not come to court with clean hands.

18. The applicant has also contended that the Respondent has refused to avail the children for DNA test to determine the paternity of the children whose maintenance he is required to make. As rightly submitted on behalf of the Respondent, the issue of the DNA test does not constitute a ground of appeal, which means that bringing up the issue in this application is an afterthought and only intended to divert the court's attention from the real issue at hand, which is that the

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applicant has refused to carry his responsibility in this case.

19. In a nutshell, the applicant's application is not made in good faith, it is not supported by evidence and is an afterthought without basis.

20. Accordingly, the Notice of Motion dated 20th June 2012 is found to be without merit and is accordingly dismissed with costs to the Respondent.

Dated and delivered at Kisii this 18th day of April, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Minda for Miencha for Appellant/Applicant

Mr. Momanyi Aunga for Asati for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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