RPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA T NAIROBI

CIVIL APPEAL NO. 13 OF 2013

Z M O.....APPELLANT/APPLICANT

VERSUS

E I M.....RESPONDENT

RULING

The appellant's application date 14th March 2013 seeks in the main stay of execution of the order of the Children's Court made in the Milimani Children's Court in Case No. 614 of 2012 on 6th February 2013 pending the hearing and determination of the appeal herein.

It is founded on the grounds set out on the face of the application and on the facts set out in the affidavit of the applicant, Z M O, sworn on 14th March 2013. He says that the Children's Court had ordered on 27th July 2012 that he should pay a monthly sum of Ksh. 30,000.00 for the up keep of the child the subject of the proceedings. He complains that before this order was made he was already meeting the child's expenses relating to his education, food, medical care, among others. He further complains that on 6th February 2013 the court order that the appellant to pay a sum of Ksh. 70,000.00 to the respondent within thirty days. The appellant's general argument appears to be that the order of 27th July, 2012 ought not have been made as he had been providing for the minor before then. His supplementary affidavit of 30th April 2013 is in the same spirit.

The application was served on the respondent. She swore an affidavit on 8th April 2013, filed in court on 12th April 2013, in reply to the application. She explains that the application which culminated in the order of 27th July 2012 was filed on 16th May 2012 seeking in the main maintenance of the subject minor. On 16th May 2012 interim orders were made for payment of fees and the application was then set down for hearing *inter partes* on 20th June 2012 of the maintenance prayer. The appellant was served on 21st May 2012. He did not reply to the application neither did he attend court on 27th July 2012. As there is no reply on record to challenge the respondent's claim for the child's maintenance and as the appellant did not attend court, the court proceeded to order monthly maintenance at Kshs 30,000.00 per month. The appellant did not obey the said orders of the court, prompting the respondent to take out a notice to show cause as a way of enforcing of the order of 27th July,2012. The Notice to Show Cause was issued on 19th September 2012 pressing for settlement of the monthly maintenance of August 2012 and September 2012 totaling Ksh. 60,000.00. When the notice came up for hearing on 8th October 2012, the parties entered into a consent where the respondent was to pay Ksh. 30,000.00 within seven (7) days, being the maintenance for October 2012, and Ksh. 60,000.00 for the months of August and September 2012 by the end of October 2012. In default warrants of arrest were to issue. The appellant did not fully comply with the said consent Orders as the payments the subject of the consent were not fully made. He made a sum of Ksh. 20,000.00 in October 2012 and another Ksh 20,000.00 in November 2012. This

meant that he paid a sum of Ksh 40,000.00 only instead of Ksh 90,000.00. Apart from the Ksh. 40,000.000 paid by November 2012, no other amount has been received from the appellant to date. This means that he in arrears on the maintenance account from the month of September 2012 to date.

The application is premised on Order 42 Rule 6(1)(2) and Order 40 of Civil Procedure Rules. Order 42 Rule 6 provides for stay of execution pending appeal. Order 40 provides for grant of temporary injunctions. The application is for stay pending appeal, it does not relate to injunctions. Therefore Order 40 rules 1 and 2 is wholly irrelevant.

Grant of stay of execution of an order or decree under Order 42 rule 6 is discretionary. It is not automatically granted upon application. Neither is it an automatic entitlement upon the filing of an appeal. It is granted at the discretion of the court. Order 42 rule 6 92) provides:-

> "(2) No order for stay of execution shall be made Under subsection (1) unless.
>
> (a) the court is satisfied that substantial loss way 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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant"

The effect of this provision is that the court must not make a stay order unless these three conditions are met. It is my duty, faced with an application under Order 42 rule 6, as I am in this matter, to consider whether the conditions set out in Order 42 rule 6 (2) have been met.

The first condition that I am bound to consider is whether the application has been made without unreasonable delay. The appeal is predicated on the orders made on 6th February 2013. Those orders were obtained on a notice to show cause to have the arrears of the monthly maintenance payments ordered on 27th July 2012 settled In reality the appeal is against the order on 27th July 2012 as that of 6th February 2013 is merely ancillary to that of 27th July 2012. The appeal was lodged in this court on 7th March 2013, while the application was filed on 18th March 2013. A close reading of the affidavit is support of the application reveals that the applicant's main grouse is with the order of 27th July 2012. I am of the view that application seeking stay of the orders of 27th July 2012 has been made after inordinate delay. Indeed, it was made only after it became plain to the appellant that he was exposed to arrest for failure to comply with court orders.

The second condition is on whether the application would suffer substantial loss should the order not be made. I note the the order herein was not made based on contractual or tortious liability, where quetions often arise as to whether there is such liability or not. The matter revolves around parental responsibility. The appellant admits that the subject child is infact his son, he is the child's father. He concedes that he had assumed parental responsibility over the subject child. Parental responsibility is a statutory duty. It cannot be avoided. I note that the payment ordered by the court related to parental duty. The payments are meant for the monthly upkeep of the child. The appellant, as a parent, cannot run way from them. He cannot argue that parental responsibility is unconscionable. To my mind the issue of substantial loss so far as parental duty is concerned does not arise. Needless to say that the issue here appears to turn on the quetation of the maintenance ordered by the court. Is the amount fair or reasonable? These are issues that I cannot address at this stage as they form the substratum of the appeal. In any event, the appellant has not even stated what he considers reasonable nor even made an effort to pay monthly maintenance at a rate that he considers reasonable and sustainable.

On the third condition, I note that the appellant has not offered security for due performance of the order as may ultimately be binding on him. The appellant has admitted to being the parent of the child and to having assumed parental responsibility. Ultimately, the appellate court will no doubt uphold the maintenance order, perhaps only altering the quantum payable monthly by appellant. As I have indicated above, parental responsibility is statutory and mandatory, there is no escaping from it. The lower court is saying, in its order, to the appellant there the subject child is his and that he has a duty to maintain him.

The appellate court is unlikely to order otherwise. The appellant should be be maintaining the child on a monthly basis- by paying sufficient money to cover his daily expenses. It would be unrealistic for the respondent to expect that he will not be required to make such monthly payments. He ought therefore to have offered security as there will no doubt be an order made against him with respect to maintenance.

The order, as indicated elsewhere, is discretionary. It can be denied where the conduct of the appellant demonstrates that he does not deserve it. In this matter it would appear that the appellant was served with the court papers in May 2012, but he ignored them. He only roused himself from slumber when a notice to show cause was served on him in September 2012. In October 2012 he entered into a consent regarding the monthly maintenance payments but he did not comply with the consent order, which forced the appellant to cause another notice to show cause to issue upon him. It is this latter notice to how cause which culminated in the orders of 8th February 2013. It would appear that there is lack of will on the part of the appellant to care and provide for the subject child.

As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.

The upshot of this is that the appellant has not convinced the court that he is entitled to the prayers sought in the application dated 14th March 2013. I hereby dismiss the said application and award costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 12th DAY OF July, 2013.

W. MUSYOKA

JUDGE