



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CIVIL APPEAL NO. 1 OF 2013**

**D K N..... APPELLANT/APPLICANT**

**VERSUS**

**E W M.....RESPONDENT**

**RULING**

The appellant has moved this honourable court by way of a Notice of Motion dated 19<sup>th</sup> September, 2013 seeking a stay of execution of the judgment delivered in Chief Magistrates Court Children's Case No. 13 of 2012 at Murang'a pending the hearing and determination of the his appeal. The Motion is supported by the appellant's affidavit sworn on 19<sup>th</sup> September, 2013.

Neither a copy of the judgment nor the decree extracted therefrom was attached to the motion and therefore it is not clear from the face of the application why the applicant was dissatisfied with the learned magistrate's judgment, at least from the perspective of the grounds set out in the motion or in the memorandum of appeal. Be that as it may, the respondent opposed the motion and filed a replying affidavit sworn on 27<sup>th</sup> September, 2013.

The motion was heard inter partes on 8<sup>th</sup> October, 2013. What I gathered from the applicant's counsel is that according to the judgment he is appealing against, he was ordered to make regular payments towards maintenance of his children. The appellant, according to his counsel, had no problem in paying the decreed sum but his problem was that the court was not specific as to whether this sum should be paid on weekly, monthly or yearly basis. In the face of this uncertainty, the appellant had opted not to pay anything since judgment was delivered in December, 2012.

By a letter dated 24<sup>th</sup> June, 2013, a copy of which is annexed to the affidavit of the appellant and marked as "DKN-2", counsel for the respondent reminded the appellant to pay maintenance to avoid execution. In that letter, counsel gave details of the respondent's bank account in which the applicant could deposit the money required for maintenance of his children.

Rather than pay as requested, the appellant filed this application using the respondent's letter as a basis for his argument that unless the order for stay of execution is granted, the respondent will proceed with execution process against him and thereby render his appeal nugatory. The applicant has also urged that he is unable to make any payment towards maintenance of his children because they are in custody of their mother, the respondent herein.

In opposing the motion, counsel for the respondent argued that the appellant has deliberately failed, ignored or neglected to maintain his children in flagrant disregard of the judgment of the court compelling him to do so. According to counsel, if the application is allowed the appellant will have succeeded in

having this court on his side in perpetuating disobedience of court orders. The application is, therefore, mala fides.

According to the respondent's counsel the grounds upon which the motion is based are not merited. Counsel has argued that custody of children cannot be a reason for the deliberate failure to maintain them. In any event, the issue of custody of children was determined in the magistrate's court and the appellant cannot seek to regurgitate it in this application to avoid satisfying the subordinate court's decree.

The learned counsel for the respondent stated that the pleadings in court were clear that the respondent was seeking monthly payments towards maintenance of the children which the court ultimately assessed at Kshs. 5,500 for each of the two parents. There is therefore no issue of ambiguity as to when these sums should be remitted.

I have duly considered counsel's submissions. The grant of stay under Order 42 Rule 6(1) of the Civil Procedure Rules is a discretionary remedy; Order 42 Rule 6(2) of the same Rules sets out the circumstances when the grant of stay of execution will be declined notwithstanding the latitude given to court to exercise its discretion under Rule 6(1). In other words the exercise of discretion under Rule (1) is subject to Rule 6(2) which provides as follows:

"No order for stay of execution shall be made under sub rule (1) unless-

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;
- b. such security as the court orders for the due performance of the decree or order as may ultimately be binding on him has been given by the applicant."

The Rule is more or less self-explanatory. In a nutshell, this Rule is to the effect that, over and above the discretion which the court enjoys to grant or refuse stay, it must be certain before it grants any stay that firstly, the Appellant has satisfied the court that he will suffer substantial loss if the order for stay is not made, secondly, he has demonstrated that his application has been made without unreasonable delay and thirdly, he has given security for satisfaction or performance of the decree in the event his appeal fails.

Based on the material before, I am not persuaded that the applicant deserves an order for stay of execution; such an order would not only deprive his own children of the parental care and support which is crucial at this stage of their life but it would also insulate the appellant from his parental responsibility; such an order would certainly be contrary to the appellant's constitutional and statutory obligations towards his own children.

The applicant has not demonstrated that he will suffer substantial loss if he maintains his own children; if anything, this loss is likely to occur if the children are not maintained. Again, while the judgment was delivered way back in December, 2012, it took the applicant almost ten months to file his application so that even if there was any grain of merit in his application it would have failed for laches in the absence of any explanation as to why the application was not filed without unreasonable delay. In a nutshell, the applicant has not demonstrated that he has satisfied the conditions under order 42 Rule 6(2) if the court was to exercise its discretion in his favour.

For the reasons given I reject the application dated 19<sup>th</sup> September, 2013 with costs.

**Signed, dated and delivered in open court at Murang'a this 22<sup>nd</sup> day of November 2013**

Ngaah Jairus

**JUDGE**