REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 36 OF 2010

DM .....APPELLANT

VERSUS

PKM.....RESPONDENT

R U L I N G

The application dated 15th September 2010 is by way of Notice of Motion under Order LXI Rule 4 and Order L Rule 1 of the Civil Procedure Rules, section 1A and 1B Civil Procedure Act. It seeks that there be stay of execution in Malindi SPMCC No. 43 of 2009 PKM V DM pending hearing and determination of the appeal.

The grounds in support of this application are that:

(1) The suit in the lower court revolves around the rights of the child to have and enjoy the society of his father (if at all the child is his) and the rights of a father who is probably being unfairly denied rights to his society, justly or unjustly, depending on whether he is the father of the child or not.

(2) The respondent has all along led the appellant to believe that he is the father of the minor herein, fact that would have been feasible since the respondent and the appellant were a couple who were cohabiting at the time respondent declared herself to be pregnant with the appellant's child.

(3) In the proceedings filed in the lower court, the respondent has now declared that appellant is not the father of the child but she has at the same time sought and obtained a direction that appellant makes a financial provision for the child in the sum of kshs. 30,000/- per month, pending hearing and determination of the suit.

(4) The appellant had in the past provided for the child in the belief that he was the father. The appellant is not married to the respondent and has not acquired parental responsibility over the minor.

(5) Since there is no adoption, custody or guardianship, or foster care placement order, or any other form of order vesting the appellant with parental responsibility, it would amount to an arbitrary deprivation of the appellant's right to property and would subject him to servitude. It is for this reason that he has preferred an appeal against the lower court's decision.
His apprehension is that the money paid will simply be used by the respondent, and that in the event of a successful appeal, then she would not be in a position to repay, as she is already indebted to appellant in the sum of Kshs. 250,000/=.

6. Appellant is willing to pay the monthly sum ordered into an interest earning account to secure the sum for the benefit of whoever is favoured by the appeal.

The matter proceeded exparte as the respondent and her counsel did not attend court, although service was effected and respondent had not filed any response.

Mr. ole Kina submitted that although under Article 53(1) (e) of the Constitution, every child has the right to parental care and provision, whether the mother and father are married or not – that duty to maintain is imposed upon the parents of the child. The respondent told the lower court that the appellant is NOT the father of the child and appellant is not prepared to maintain one who is not his offspring.

Basically this is an application for stay pending appeal, but under very peculiar circumstances because the person who will be affected by the orders is the child who unfortunately now has his paternal biological origins questioned.
Under Order XLI Rule 4(2) –

"No order for stay of execution shall be made under subrule 1 unless"

(a) The court is satisfied that substantial loss may result to the appellant unless the order is made and that the application has been made without undue delay and

(b) Such security as the court orders or due performance of such decree or order as ma y ultimately be binding on him has been given by the appellant.

With regard to filing of this application Mr. ole Kina submits that the orders were made on 25th May 2010 and by 25th June 2010 appellant had moved to the High Court and filed this appeal. By 15th September 2010 the application was field. My understanding of Order XLI rule 4(2) (a) is that it is the application for stay which has to be brought to court in a timely fashion and NOT the appeal.
From the date of delivery of the order of the date of filing this application on 15th September 2011, three months had lapsed – I wouldn't consider that an inordinately lengthy period.

The appellant also fears that if he pays the sum directly to the respondent he may not recover it because she owes him some money. The appellant states in his affidavit supporting this matter that the kshs. 30,000/= ordered by the court was to be used by the respondent to cater for the shelter, upkeep, education and healthcare of the child – which means the money will have been used and he may never recover. His fears stem from for the fact that respondent owes him kshs. 250,000/= as for exhibit D.Ex3 which is annexed.

That is a loan agreement dated 20th November 2007 between the appellant and respondent. Clause 4 of that agreement indicates that the respondent (who was the borrower) was to have repaid the sum within 9 calendar months from the date of receipt i.e by 20th August 2008 she ought to have completed repayment – appellant says she has never repaid the sum.

A demand note had been sent to her and is annexed as D.EX 4 – it is dated 17th May 2010 (probably sent after relations between them became strained). It would therefore seem that the appellants'' fears are justified and that this situation is easily distinguishable from the one that was obtaining in the case of **Kenya Shell Ltd v Benjamin Karugu Kibui and Another (1982 – 88)1 KAR at page 1018** – because in that case the respondent clearly demonstrated that they were persons of substance with a regular income and could satisfy and repay the judgment sum if the appeal was not in their favour. In the present case there is nothing to show that respondent is a person of means, she is already shown as being a loan defaulter and the respondents' fears are justified.

The substantial loss is no just a whimsical expression, the lower court ordered that the sum of Kshs. 30,000/- was to be paid on every succeeding month the suit is heard and determined.

The order from the lower court reads as follows;

"a) The defendant/respondent do make financial provision of the child AMM to the tune of kshs. 30,000/- per month pending hearing and determination of this suit."

That was an order issued on 25th May 2010. It did not seem to suggest that the suit would be heard on a given date – we are now in February 2011, which means that by say March when I expect these parties to take dates for hearing, then the appellant will have paid kshs. 30,000 x 9 = 270,000/= and if paying kshs. 250,000/- has taken respondent three years without paying then the appellant's fears are justified.

My only concern is this – mean while how does the child survive? What if the DNA tests turn out to show that the child belongs to the appellant. Will this court be protecting the rights of that child by completely withholding any support while his paternity awaits determination?

The child's right to education, basic nutrition, and healthcare is enshrined in Article 53 of the Constitution of Kenya and equal responsibility is placed on the father and mother whether married or not.

Article 53(2) provides that:

"A child's best interests are of paramount importance in any matter concerning the child"

This matter (although the child is not a litigating party) does concern the child. Section 90 addresses the issue of maintenance, it is not clear to me whether the respondent was ordered to contribute or whether the court took into account what the contribution towards maintenance of the child could be, while granting the orders. From the appellant's affidavit, it is apparent the child was born during the time he and the respondent were living together although they were not married BUT the catch here is that appellant says he had not acquired parental responsibility. This sort of removes appellant from what is contemplated by section 90(e) of the Children's Act No. 8 of 2001 and he seems to be removed from any responsibility. However section 94(1) seeks to apply, because appellant has confirmed he had all along accepted the child as his.

In the light of this and taking into account what has been observed in the earlier part of the ruling I will grant a conditional order of stay – for the sake of taking into account the child's interest pending hearing. The orders I issue are that temporary stay do issue to the effect that appellant shall not remit the entire kshs 30,000/= to the respondent as maintenance for the child, he shall instead pay kshs. 10,000/= per month as maintenance for the child. The balance of kshs. 20,000/= shall be deposited in an interest earning account in the names of the appellant's counsel and respondent's counsel at a financial institution to be agreed upon by both Counsel and parties within 14 (fourteen) days hereof. The costs of this application shall be borne at 2/3 by applicant and 1/3 by respondent.

Delivered and dated this **28th** day of **February 2011** at Malindi.

H. A. OMONDI
JUDGE

Mr. ole Kina for applicant
No appearance for respondent