



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 178 of 2009

STEPHEN BLANCHETAPPELLANT

VERSUS

AKACH ADHIAMBO LANGIRESPONDENT

**(Arising from Tononoka Children’s Case No. 382 of 2008 made on the 6th October 2009 by Hon. R. Makungu –
Children’s Magistrate at Mombasa)**

RULING

This is an application by way of Notice of Motion dated 15.10.2009 under the provisions of Order 41, Rule 4 of the Civil Procedure Rules and also invokes Section 87 and 99 of the Children’s Act and Rule 7 of the General Rules and Regulations of the Children’s Act.

The Applicant seeks an Order of Stay of execution of the judgment of the Tononoka Children’s Court case No. 382 of 2008 delivered on 6.10.2009 pending the hearing and determination of the application herein.

The Applicant is the father of the 4 children who are the subject of the case in the Children’s Court while the Respondent is the mother.

The Court in its judgment ordered inter alia, that:-

1. *The Respondent would have the physical custody of the Children whilst the legal custody would vest equally with unlimited access to the Appellant.*
2. *The Appellant would pay monthly maintenance of Shs. 100,000/- payable to the Respondent. The said sum to be paid through the Respondent’s account on or before the 5th day of every month.*
3. *The appellant to pay school fees for the Children at their present school together with all other school requirements.*
4. *The Appellant to continue providing medical cover for all the Children through AXA Insurance.*
5. *The clothing expenses to be shared equally on 50”50 basis.*
6. *The Respondent to cater for rent and payment of water and generator expenses (utility) as part of her contribution. To this end the children are to continue staying in the present residence.*
7. *Each party to be at liberty to apply.*

The appellant being dissatisfied with the judgment filed

this appeal. The Appellant claims that he and the children stand to suffer substantial loss if the judgment and the decree is not stayed.

Under Order 41 Rule 2, no order for stay of execution shall be made 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 without unreasonable delay, and
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The judgment was delivered on 6.10.2009 and appeal filed within the prescribed period on 13th October 2009. This application was filed on 15.10.2009 within 9 days of the judgment. Certainly there was no delay and the Appellant had moved with commendable speed.

When considering an application of stay of execution of a judgment or decree that touches on the maintenance of Children by one or both parents, the court will not be confined to the provisions of Order 41 Rule 2 only but must significantly if not substantially be guided by considerations in the best interest of the child/children.

Section 4 (2) and 3 of the Children's Act provides that:-

“4 (1)

(2) In all actions concerning children, whether undertaken by the public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interest of the child shall be of primary concern.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers, conferred by this Act shall treat the interests of the child as the first paramount consideration to the extent that this is consistent with adopting a course of action calculated to:

- (a) safeguard and promote the rights and welfare of the child.**
- (b) conserve and promote the welfare of the child.**
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.**

I have considered the rival affidavits and the annexures and submissions by Counsel. It is the claim of the Applicant that despite financial difficulties he has endeavoured to satisfy the conditions in the Interim Order of stay which had been made by the court. That on two occasions due to delay in receiving money from the United Kingdom the Respondent took out notice to show cause why he should not be arrested and committed to civil jail.

The Applicant says that he and the children stand to suffer substantial loss as he is unable to pay the sum of Kshs.100,000/- per month as monthly maintenance.

I have considered that the Applicant is committed to paying the school fees for his children and he is doing this on his own without any assistance from the Respondent. The Applicant and Respondent chose to place their children at Braeburn School, Mombasa which is a high cost school. The fees payable are quite substantial for each of the 4 children. The Applicant does not even suggest removing the children from the said school and taking them to a less expensive school or even to public schools. This shows the Applicant's commitment and effort in respect of educating

his children.

The Applicant appears not to have any complaint with providing medical cover for his children. In fact unlike many parents even those who can afford, he has provided medical insurance for his children. It appears that he paid for school fees and medical care even before the court orders were given. I do not think that he is providing for the costly school fees and medical cover because the court ordered him to do so but he was doing it anyway even before the parent's disagreements.

The Applicant proposes to continue to cater for medical expenses and take out a policy with another local health provider which is much cheaper than the current one.

The Applicant has not raised any issue at this stage with the order that he pays for 50% of the Children's clothing.

It is my view that with regard to the application for stay the main grievance of the applicant is the order that he pays a sum of Kshs.100,000/- as monthly maintenance for the Defendant on or before the 5th day of every month.

The Applicant apprehends that he would be put in civil jail if he defaults in the monthly payments. He avers that he is duty bound to maintain his children and has always done so. That he is willing to pay the sum of Kshs.50,000/- as monthly maintenance pending the hearing and determination of the appeal. He says that if he is committed to civil jail the children will not be able to go to school, will not have medical facilities and his contributions towards their maintenance would be curtailed as he works very hard to sustain his children.

It is my view that while the parental responsibility was ordered to be shared yet it is the Applicant who caters for most of the necessities and maintenance. He solely pays for the school fees and medical care. He pays for the school lunch and transport for the children. The only contribution the plaintiff was ordered to make is for payment of rent and payment of water and generator expenses i.e. fuel and maintenance.

From the material presented to the court and the submissions by counsel, I do find that the Respondent in fact does not pay for rent as ordered by the court. The truth is that she still lives in the home in which the Applicant and Respondent lived together with their children.

The property in which the Respondent and the children live is registered in the name of the company which is known as Creek Marketing and Development Limited owned jointly by the Applicant and Respondent. It is the subject matter of another suit between the parties. But for now, I do find that the Respondent is not paying any rent to the said company as it is a property in which both parties have an interest. It cannot be said that because she remained in the house that she is paying rent. At this stage I see no actual monetary contributions by the Respondent.

I think that the Applicant is entitled to feel overburdened and discriminated against. The Respondent in her Replying Affidavit has admitted that she took out Notice to Show Cause on two occasions when the Respondent failed to remit Shs.50,000/- without any explanation and it was only then that he paid promptly. This proves that the apprehension of the Applicant is quite real and genuine considering that he knows he is expected to pay Shs.100,000/- per month.

There is no doubt that substantial loss will result to the Applicant and in turn to the Children, if he is put in Civil jail for non-compliance with the court orders with regard to maintenance. The apparent inequity he perceives is that the Respondent is only paying for fuel for the generator and nothing else. Where do the money for rent go to? How much is it? If the company which owns the house is owned jointly then can that be deemed to discharge her from her obligation under the court order? Should she then not contribute to the maintenance of the children?

As stated earlier, this matter also involves the welfare of the 4 children herein and therefore the application of the provisions under order 41 cannot be the only consideration. The court has already stated that it is obligated to apply the provisions of the Children's Act also.

The Applicant has complained in his application that he is suffering financial constraints yet the Respondent

resides in the house with her boyfriend. This court has seen the pleadings in Divorce Cause No.[...]n which one George Ndirangu Kamau has been enjoined as co-respondent.

The Divorce Cause is still pending but the court will not sit back if it opines that issues from the said case could adversely affect the Children's best interest and welfare.

The Respondent did not respond to the allegations. In view of the dispute herein it does not augur well for the Children if the situation is made worse due to interference by third parties. It is clear that the Applicant appears aggrieved by the fact that the Respondent has allowed her boyfriend to reside at the premises.

The court is concerned about this issue and would recommend to the Respondent not to allow her relationships to affect the Children and the support they are getting from their father, the Applicant. There is no need to provoke the emotions and feelings of the Applicant and traumatize him with a sense that another man has taken away his family and property. It should not be lost that without the Applicant and his well-being that the children's education and welfare could suffer negatively and their entire livelihood jeopardized.

The court will consider invoking its powers and jurisdiction under the Children's Act to investigate any impact of the relationship between the Respondent and the said George Ndirangu Kamau on the Children, directly or indirectly.

In view of the foregoing, and doing the best for the children I do hereby stay the execution of the judgment in Tononoka Children's Court Case No. 382 of 2008 delivered on 6.10.2009 and the decree ensuring therefrom pending the hearing of the Appeal.

I do hereby order that the Applicant in the meantime, do pay a maintenance of Shs.50,000/- towards the children payable on or before the 5th of each month through the Respondent pending the hearing and determination of the appeal. I do order that the Respondent to actually pay or cater for the rent for herself and the children. This must be by actual real and direct contributions. As the property and residence on the face of it is owned jointly through the company, I do find that the Applicant is in fact already a contributor to the accommodation of the children and the Applicant. What is fair and in the best interest of the children? I think that the Children's Court judgment should be actualized that the Respondent's Contribution of paying rent be real.

I do therefore order that the Respondent shall pay a sum of Kshs.25,000/- per month being a reasonable sum to cover for rent as ordered by the court. This shall be on or before the 5th of each month. The Respondent shall remit/pay the said money upon proof which shall and is hereby ordered to be applied towards the Children's maintenance. The net effect is that there shall be a total of Shs.75,000/- per month coming from the two parents towards the maintenance of the children. This shall ensure that each parent's actual contribution towards the maintenance is real, fair and enforceable.

Each party shall bear their own costs of this application. Orders accordingly.

Dated, delivered and Signed at Mombasa this 29th day of January 2010.

M. K. IBRAHIM
J U D G E

29/01/10

Before Hon. Justice M. Ibrahim

Court clerk – Robow

Ms. Osino for applicant

Mr. Njoroge for Respondent

Ruling delivered in their presence.

IBRAHIM, J