



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI Miscellaneous Civil Application 38 of 2009
BENSON MWARINGAAPPLICANT
VERSUS
RHODA GALI KAZUNGURESPONDENT

RULING

By a Notice of Motion dated 11th August 2009, the applicant seeks that time to appeal against the decree and judgment of the Children's Magistrate Court in Malindi Children's case No. 100 of 2008 be enlarged.

He also seeks temporary stay of proceedings in the said case pending hearing of this application.

The application is made under Order XLIX Rule 5 of the Civil Procedure Rules and section 95 and 3A of the Civil Procedure Act and is premised on grounds that:-

- (1) The Children's court delivered its judgment on 12th March 2009.
- (2) The applicant acted in person up to the time when judgment was delivered
- (3) Applicant has not been enjoying good health since the time judgment was read, hence the delay in filing of appeal.
- (4) The delay is due to excusable reasons far beyond the applicant's control.
- (5) The trial court granted orders that were not prayed for
- (6) Applicant wishes to appeal against the said judgment, so it would only be fair if this application is allowed so as not to lock the applicant out of justice.

In the affidavit in support of the application, applicant annexed treatment notes to support his claim that he has not been in good health. He further stated that respondent is threatening to execute and enjoy the fruits that were not in issue and were not even prayed for.

At the hearing of the application, Mr. Otara submitted on behalf of the applicant that applicant had spent almost all his money and time towards his own treatment and only discovered too late that he was late in filing appeal.

The applicant undertakes to make periodical payments for maintenance as ordered until the appeal is heard.

The application is opposed by the respondent who argues that there has been undue delay – being five months – which makes the application frivolous and an abuse of court process and there is no arguable appeal with probability of success.

She complained that there has been delay in remitting the sums ordered to be paid for maintenance, which sometimes goes on up to eight months and told this court that she last received payment on 17th November 2009, being Kshs. 10,000/- and there is a balance of Kshs. 15,000/-.

That delay in payment is not denied, but Mr. Otara explains that it had been due to his ill health.

From what is presented to this court, it is apparent that applicant did not comply with the orders that required him to make periodical payments as directed by the court. These payments are intended to cater for his own children.

He explains that all these delays i.e in making payments, and in filing appeal has been due to his ill health having been diagnosed with hypertension and diabetes in February 2009 – which would not explain his inactivity in filing appeal. However it does not explain nor excuse his failure to make the relevant remittances for the care of his children and all that it demonstrates is a high degree of selfishness on his part and disregard for court orders.

Should this court then indulge an individual who is not keen on complying with court orders? I think not – he is not deserving of this court's discretion and comes to court with unclean hands. As a consequence then, the application is dismissed with costs to the respondent.

Delivered and dated this 24th day of **February 2010** at Malindi.

H. A. Omondi
JUDGE