



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 51 of 2009

A M.....**APPLICANT/APPELLANT**

VERSU

M M.....**RESPONDENT**

RULING

From the pleadings it would appear that the court below, in a ruling dated 6th February, 2009, granted custody of children in this dispute to the respondent. The applicant, on the other hand was ordered to pay school fees and cater for the children's educational needs as well as to provide their upkeep including medical expenses.

It looks like this ruling which was given *ex parte* aggrieved the applicant who sought to have it reviewed. That application was rejected and the applicant filed this appeal simultaneously with the instant application for stay of execution of the orders of 6th February, 2009.

That application is based on the ground that the application was heard *ex parte* and orders with effect of finality issued. That the orders are oppressive and not specific or quantified. That the applicant stands to suffer substantially if the order of stay is not granted.

The respondent has opposed this application arguing that the appeal is incompetent as it does not arise from any of the orders enumerated in **Section 75** of the **Civil Procedure Act**. That that being so, the applicant ought to have sought leave before bringing the appeal as no appeal as of right can be brought from the decision arising from an application under the **Children Act**.

Secondly, it is averred that the application has been brought after undue delay; that the applicant has not paid school fees since the temporary order of stay was granted in September, 2009 with the result that the children have not consistently attended school; that the applicant has instead been busy making frivolous applications; that High Court lacks jurisdiction to order stay of an order of maintenance under the **Children Act**.

I have considered these arguments. It is common ground that the applicant is the father of the three children, the subject of this matter. It is also a fact that the orders of maintenance were issued *ex parte* against the applicant but it is not true that they were final. The extracted order in question is clear that the maintenance orders were to remain in force pending the hearing and termination of the suit. Is the application incompetent for the reason that no leave was obtained before the appeal was filed and also for lack of jurisdiction

Section 80 of the **Children Act** provides that:

“80. Unless otherwise provided under this Act, in any civil and criminal proceedings in a Children’s Court, an appeal shall lie to the High Court and a further appeal to the Court of Appeal.”

That disposes of that question of leave and jurisdiction. The next question is whether this court can entertain an application for stay of execution of maintenance orders. The applicant does not appear to be challenging the order of custody. His concern is that he has been ordered to pay school fees and provide the children's general upkeep which are not specified in the order.

The instant application is expressed to be brought under **Section 3A** of the **Civil Procedure Act** and **Order 41 rule 4** of the **Civil Procedure Rules**.

The **Children Act** (the Act) under which the dispute was brought has enough provisions to cover situations like the one before me. Maintenance orders of the kind issued by the court below are provided for under **Section 98** of the Act.

Section 99 stipulates as follows:

“99. The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.”
(Emphasis supplied)

It is clear from the foregoing that this court can stay orders of maintenance and in so doing does not proceed under the **Civil Procedure Act** or the rules made under it but under the **Children Act**, guided only by what is just and in the interest of the child.

Although the lower court did not specify the amount of maintenance, that alone is not sufficient to deny the children their right and shield the applicant from his parental responsibility. The orders are interim, as I have already noted. They are specific that the applicant will pay school fees to the three children and without knowing what the school fees is, he cannot complain that he stands to suffer substantial loss.

It is similarly his parental responsibility to provide the basic necessities of life for a child, namely, food, shelter and clothing. I reiterate that these being temporary orders, the applicant, instead of engaging the court with application after application, would be advised to list the suit before the court below for hearing to determine some of the issues he is raising in the instant application. A stay of execution will adversely affect the education of the children and there can never be a loss for a parent to maintain his children.

I decline to grant the orders sought with the result that this application fails and is dismissed with costs. Interim orders are discharge.

Dated, Signed and Delivered at Nakuru this 16th day of April, 2010.

W. OUKO

JUDGE