



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 68 OF 2010

T.K.N.....APPELLANT
VERSUS
T.W (Minor suing through the
mother and next friend R.W.C).....RESPONDENT

RULING

T.K.N. filed the Notice of Motion dated 8/7/2010 seeking stay of execution of the order and/or decree in Nakuru Children's Case No. 87 of 2009 **R.W.C v T.K.N.** In the lower court, the applicant was ordered to maintain and provide upkeep of T.W (minor), provide for the minor's basic needs and that such maintenance or financial contribution be paid to the minor's mother R.W. The applicant is dissatisfied with that judgment and he preferred an appeal. The grounds in support of this application are found on the face of the application and the affidavit in support and dated 8/7/2010. The child in issue is about 3 years old, a tender age. It is the applicant's contention that the respondent do continue to maintain the child because if he were to pay the Kshs.4,000/- per month as has been ordered to pay he is likely to suffer substantially since he has a family and children who depend on him. He contends that he was never married to the respondent and the question of paternity was an issue even in the lower court and he still questions it. That the respondent has the parental responsibility towards the child in accordance with **Section 23 and 24** of the **Children's Act** and he has never maintained the child before. So, the respondent should continue doing so till the issue is resolved. It would have been different if he had maintained the child before. He urged that there are several issues to be resolved on appeal and the applicant should be given a chance to address them and he is even willing to abide by any conditions that the court may direct.

R.W.C, the respondent, herein appeared in person, and filed an affidavit dated 2/9/2010 in opposition to the application. Her contention is that the application is fatally defective as it does not demonstrate that it has high chances of success or whether it arises from the order of 29/6/2010 or the decree of 16/3/2010. It is also argued that the applicant has come to court with unclean hands in that he has never denied the issue of paternity but only denies ever having maintained the child before. The respondent urged that the court should consider the welfare of the child first as the child is likely to suffer if the orders of stay are granted.

The application is premised on the provisions of Order 41 Rule 4(1) of the CPR. The applicant is required to satisfy the court that:-

- (i) That the application has been made without unnecessary delay.
- (ii) That substantial loss may result to the applicant if an order of stay is not made.
- (iii) That such security for due performance of such decree has been made by the court or offered by the applicant.

The appeal arises from the judgment of the subordinate court which was delivered on 16/3/2010. The respondent cannot therefore be heard to claim that the application is defective for not stating against which order the stay is sought. The memorandum of appeal is clear that it is the judgment of the lower

court that is appealed against.

The judgment against which an appeal is preferred was delivered on 16/3/2010. The memorandum of appeal was filed on 1/4/2010 and this notice of motion was then filed on 8/4/2010. I find that the applicant moved the court without undue delay.

The minor is still 3 years old. The respondent has been in custody of the child. The respondent has deponed that she is jobless save for casual jobs which she sometimes does at the market. She does not have an income so that if the applicant's appeal were successful, she could be able to refund. Section 23, 24 and 25 of the Children's Act gives the guiding principles on whether or not the applicant should pay maintenance. Section 23 defines what parental responsibility entails. The act says **"it means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation of the child and the child's property in otherwise consistent with the evolving capacities of the child."** The duties to the child include provision of adequate diet, shelter, clothing, medical care, education, guidance and protect against abuse or discrimination. Section 2 then sets out who has parental responsibility over a child. In the instant case it seems to be common ground that the applicant and respondent have never been married and Section 24(3) therefore applies. It reads as follows:

"(3) where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other –

- (a) **the mother shall have parental responsibility at the first instance;**
- (b) **the father shall subsequently acquire parental responsibility for the child in accordance with the powers of Section 25."**

Section 25 provides as follows:-

"(1) where a child's father and mother were not married at the time of birth –

- (a) **the court may on application of the father, order that he shall have parental responsibility for the child; or**
 - (b) **the father and mother may by agreement (a parental responsibility agreement) provide for the father to have parental responsibility for the child.**
- (2)

There is no agreement between the parties as to parental responsibility envisaged under Section 25(1) (b). There is no agreement between the parties as to parental responsibility envisaged under Section 25(1) (b). Paternity of the child is disputed and the applicant also denies ever having maintained the minor before. These are the issues that are being raised on appeal. It is my view that in the event the appeal succeeds, the applicant would stand to suffer substantially. The court will therefore grant an order of stay in terms of prayer 3 of the Notice of Motion dated 8/7/2010.

The paramount consideration by this court is the welfare of the child. The applicant is therefore ordered to deposit a sum of Kshs.50,000/- within 7 days hereof as security for due performance of the decree. This court further order that this appeal be determined in order to safeguard the welfare of the minor child.

The applicant is therefore directed to prepare the record of appeal and serve it within 30 days. Mention on 6/12/2010 for further directions as to the hearing.

DATED and DELIVERED this 3rd day of November 2010.

R. P. V. WENDOH
JUDGE

PRESENT:

Mr. Waiganjo for the applicant
Ms Rahab in person

