

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 29 of 2009

JOSEPH NJOROGE GAITHIMA APPELLANT/APPLICANT

versus

SABINA W.J. NGURINGA RESPONDENT

RULING

This application arises from the decision of Senior Resident Magistrate Mrs. E Mbugua in a matter involving the maintenance of two minors, whose parents are **JOSEPH NJOROGE GAITHIMA** ('the applicant') and **SABINA W.J. NGURINGA** ('the respondent'), and who are currently under the custody of the respondent.

The parties had recorded a consent order on 26/3/2008 in the subordinate court, in which the applicant undertook to pay the monthly sum of KShs.50,000/- for the maintenance of the two children. An attempt by this applicant to have the said consent order set aside was dismissed by the said Magistrate on 21/4/2009, hence the appeal and this application, in which he now seeks orders for stay of execution pending the hearing and determination of his appeal against the decision of the learned trial Magistrate. He also prays for costs.

Mr. Gitonga, who appeared for the applicant was of the view that his client stands to suffer loss and his appeal would be rendered nugatory, should he be made to pay the sum of Shs. 50,000/- per month. He conceded that his client had not paid a cent since the consent order was adopted as an order of the court, and that in the circumstances, his client owed the sum of KShs.600,000/- as at 21/4/2009 when the contentious order was made. He therefore urged the court to find in his client's favour especially because his client was unable to pay.

Miss Mwau, who appeared for the respondent was however of the view that the applicant who had no grounds to base his application on, must nevertheless satisfy the conditions which are laid down in Order XLI rule 4 of the Civil Procedure Rules ('CPR'). She pointed out that the applicant had yet to pay whatever he had been ordered to pay, and it was her submission that that the respondent has the means to refund the money should the applicant succeed in his appeal, but that if this application were to be allowed, the well being of the children would be prejudiced. She therefore urged the court to dismiss the application.

I have considered the pleadings herein as well as the submissions of both counsel and I do bear in mind the fact that in an application of this nature, the applicant must demonstrate that he has complied with the requirements as laid down in Order XLIV rule 4 of the CPR, wherein it is required that he who applies for stay of execution, must demonstrate that he has already filed an appeal; that unless the order which he seeks is granted, he stands to suffer substantial loss, and that he has moved the court without unreasonable delay.

The record reveals that the applicant filed his Memorandum of Appeal 28/4/2009, which was within seven days of the contentious ruling, and in the circumstances, he has fulfilled the first condition.

The contentious decision was delivered on 21/4//2009. This application was filed on 7/5/2009, sixteen days is in my view within reasonable time.

The issue at stake between these two is whether the applicant should meet his obligations as contained in the aforementioned consent order.

Though Mr. Gitonga claims that not only is his client is unwell, but that he is financially constrained as his medical insurance cover is limited to only KShs. 1,000,000/- and even then for only four dependants. This fact is however controverted by the respondent who has availed proof that not only does the applicant enjoy a better cover but that it caters for his wife and all his children including his grandchildren, in my view that particular ground cannot therefore lie.

Be that as it may, though he also urges the court to allow his application because he otherwise stands to suffer loss and his appeal would be rendered nugatory, he has on the same token deposed that the respondent has a monthly rental income of KShs.80,000/-. That in my humble opinion is no mean income, and his assertions can not therefore hold any water.

Needless to say, in a matter pertaining to minors, their interest is paramount, and as is evident from the pleadings herein, the contentious sum is not to be paid as a one-off payment, but is payable on a monthly basis. I am unable to see what loss the applicant stands to suffer by providing for his children. Should his appeal be successful, he will have a right to set off whatever sums will be refundable to him, against whatever will be payable for the maintenance of the minors in the future.

This application therefore lacks in merit and I dismiss it with costs.

Dated and delivered at Nairobi this 16th day of June 2009.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the applicant – Mr. Gitonga.

For the respondent - Mr. Nyikuli.