



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 42 of 2008

CONRAD BILL MUTANYI MUDIBO. APPELLANT

VERSUS

LUCY WANGUI MUDIBO. RESPONDENT

R U L I N G

The application which was before the court is dated 2nd October, 2008. It sought the following orders:

-
- a) That this Honourable court do grant temporary stay of execution of the order of the Subordinate Court being RMCC Divorce Cause Number [.....] at Milimani Commercial Courts Nairobi dated 24th September, 2008 and/or any subsequent orders and/or any further proceedings therein concerning the children of the marriage R M, EKM and CM, pending the hearing and final determination of this application or further orders of this court.
 - b) That pending the hearing and final determination of this application, the custody of the said children be restored to the applicant as per the orders of the Children's Court at Nairobi being Civil Case Number[.....]dated 7th August 2006 and 25th September, 2008, previous court orders herein.

In the meantime the Respondent took objection to the competency and validity of the above cited application. He raised the following preliminary objections: -

1. That the application dated 2nd October, 2008 is incompetent as drawn and filed.
2. That it is otherwise an abuse of the process of the court.
3. That it is frivolous, vexatious and intended to delay the expeditious finalization of the suit in the lower court.
4. That the applicant approached this court with unclean hands having contemptuously disobeyed the order in issue.

I have carefully considered the arguments from both sides.

The first argument raised is that the application for stay is incompetent because it raises other prayers

seeking orders not appealed against by the appellant. This means as I understand it, that irrelevant prayers have been included in the application. If this is correct and true, does that alone render the whole application incompetent? In my opinion, it does not. The applicant could seek to expunge the irrelevant prayers and if successful, the application would still remain competent in respect to other aspects. There is therefore, no merit on that aspect of the preliminary objection. Indeed as the Respondent/Objector herself concludes, this court can choose to proceed with only those orders which deal with the appeal.

Secondly the Respondent argues that the applicant failed to annex the certified copy of the order or decree appealed against. This ground might have merit if it were correct. However the applicant's application has the photocopy of the handwritten lower court's orders annexed to it. While this is not the regular form generally used in these situations, nevertheless, the court cannot accurately say that the certified copy of the order was not annexed in the above circumstances. This ground accordingly also fails.

Thirdly, the Respondent argued that the application is incompetent for lack of leave to appeal against it by the court that made it. The applicant did not deny the fact that no such leave was asked for nor obtained. This simply raises the question as to whether interlocutory orders, which the relevant orders are, require leave to appeal against them.

The applicant simply argued that no such leave is required. The respondent, on the other hand, submitted that such leave is required. Neither cited any relevant legal authority except Section 75 of the Civil Procedure Act referred to by the Respondent. It states: -

“75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other orders with leave of the court making such order or of the court to which an appeal would lie if leave were granted-”

The section then enumerates the specific orders which do not require the leave of court to be appealed from. This to my understanding, means that all other orders not included in the listed instances, require the leave of court. The listed orders do not include interlocutory orders or orders made by the court as the proceedings in the matter before it, continues. This means, in my view and finding, that such interlocutory orders as are the subject of the Applicant's appeal and application, now the subject matter of this Preliminary Objection require leave of court to be appealed from as they fall in the second limb of section 75(1) which requires leave before appeal.

As earlier stated, the applicant's position was that no such leave is required. Having made a finding which is contrary to the one maintained by applicant as above mentioned, the court has no other way of dealing with the application except to find it incompetent for having been filed under and through an appeal that is itself incompetent ab initio.

The above conclusion raises a different dimension in this matter which is also one of the grounds of objection herein. By filing the appeal and obtaining interim orders of stay of proceedings which orders have delayed and diverted the lower court proceedings for a period of about a year, the applicant/appellant has interfered with important issues relating to and concerning the best interest of the children affected in this case. Such a practice is to be and requires frowning upon by this court. It amounts to the diversion of justice and is hereby condemned in serious possible terms.

The result is that this court declares the application dated 2nd October, 2008 seeking a temporary stay of the lower court orders dated 28th August, 2008, 24th September, 2008 and 7th October, 2008 incompetent. In the circumstances the application is hereby struck out and dismissed. All orders made under the application are hereby also discharged. Costs are to the Respondent. The Respondent is given liberty to summarily apply to strike out the Memorandum of Appeal dated 2nd October, 2009. Orders accordingly.

Dated and delivered at Nairobi this 30th day of October, 2009.

.....

D A ONYANCHA

JUDGE