



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Appeal 30 of 2006

MUSYIMI MUNYITHYA APPELLANT

VERSUS

REBECCA MUTIA

 RESPONDENT

(Being an application for stay of execution under Order 41 Rule 4 of the Civil Procedure Rules)

RULING OF THE COURT

1. By his application dated 11/07/2007, brought by way of Notice of Motion under Order 41 Rule 4 (1), Order 50 Rule 1 of the Civil Procedure Rules (CPR) Section 3A of the Civil Procedure Act, Cap 21 and all the enabling provisions, the applicant prays:-
 - a. **THAT** the application herein be certified urgent, service be dispensed with and the same be heard exparte in the first instance;
 - b. **THAT** the execution of the lower court's judgment in the Senior Resident Magistrate's Court at Mwingi, Children's Court decree dated 24/01/2007 be temporary (sic) stayed pending the hearing and determination of this application;
 - c. **THAT** there be a stay of execution of the aforementioned judgment and decree of the lower court pending the hearing and determination of this appeal;
 - d. **THAT** the costs of this application be provided for.
2. There are six grounds on the face of the application in support and in the main the applicant states that though an appeal has been filed, the respondent has already obtained warrants of execution calling for the arrest of the applicant and committal to civil jail. The applicant also says he is ready for furnish such security as the court deems fit for the due performance of the lower court's decree and that unless the order sought is granted, the appeal herein shall be rendered nugatory.
3. The appellant/applicant swore an affidavit in support dated 11/10/2007. He says therein that though he has filed the appeal, he is apprehensive that his liberty may not be guaranteed since warrants for his arrest and committal to civil jail have been issued and the respondent is working for his arrest. He also says that as a teacher, he will be greatly prejudiced if he is arrested and committed to civil jail and prays that the court allows him to offer such security as the court may deem fit, for the due performance of the lower court's decree.
4. The applicant also says at paragraph 7 of his affidavit that the respondent being a person of unknown financial capability would not be able to repay the decretal sum if the same is paid out to her. He also says that from advice received from his advocates on record, his appeal has high chances of

success, and that it is only fair, just and in the interests of justice to grant the order of stay pending the hearing and determination of the appeal.

5. The applicant was granted temporary orders of stay in terms of prayer (b) of the application and ordered to pay the sum of Kshs.10,000/= as security for costs of the application. The applicant duly complied, with the order for payment of the 10,000/= as security for costs of this application.

6. The application is opposed by the respondent who filed her Replying Affidavit on 7/11/2007. She says that the alleged Warrant of Arrest was lifted by the lower court on 10/07/2007, though the applicant has been unwilling to settle the decretal amount. She also says that the application has not been brought without inordinate delay and that since the respondent is unemployed, the child of the marriage will be greatly prejudiced unless the decretal amount is paid. She also says that the applicant's appeal is completely without merit. The respondent urges the court to order the applicant to deposit all the accumulated payments as a condition precedent for the stay.

7. The case in the lower court was for maintenance and education of the minor plaintiff and for such other relief as the court may deem appropriate. The plaintiff's claim was based on the allegation that the defendant (appellant/applicant) was the father of the minor plaintiff and that the defendant had willfully neglected the said plaintiff since birth. Apparently, and from the pleadings as reflected in the judgment of the lower court, the minor was born on 26/01/1997 as a result of a fleeting affair between the plaintiff's mother and the defendant. The defendant seems to have reneged on his promise to marry the plaintiff's mother. The learned trial magistrate found that the relationship between the appellant and the defendant was not a secret affair and accordingly, he entered judgment for the plaintiff and ordered that the defendant should immediately assume parental responsibility over the minor plaintiff and also pay the sum of Kshs.3,000/= (three thousand) per month to the plaintiff's mother towards the education and maintenance of the minor plaintiff until the age of 18 years. He also awarded costs against the defendant/appellant.

8. At the hearing of the application, Mr Nzili for the respondent contended that apart from the present application, there are two other applications filed by the applicant on 6/11/2006 and 26/06/2007, both of which were yet to be heard and determined. Mr Nzili contended further that the present application was filed without disclosure of the existence of the other two applications and that for reason of non-disclosure all these applications should be struck out for lack of good faith on the part of the appellant/applicant.

9. Further, Mr Nzili submitted that this present application was not brought by the applicant without undue delay. It was also contended on behalf of the respondent that since the case between the parties is under the Children's Act, 2001, the interests of the minor plaintiff override any other interests, including the liberty of the applicant.

10. The applicant's application is premised on by the provisions of Order 41 Rule 4 (2) of the Civil Procedure Rules which provides that:-

“(2) No order for stay of execution shall be made under sub rule (1) unless:-

a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

11. The issue that arises for determination is whether the appellant/applicant has satisfied the above three conditions for the granting of an order of stay. In my assessment of the pleadings and submissions, I do not think that the applicant has satisfied this court that substantial loss may result to him if the order for stay is not granted. It is not disputed that the applicant is a primary school teacher who was earning about Kshs.13,000/= as at time of the hearing of the case. It is also not in dispute that the plaintiff herein

is a minor whose interests override the interests of other parties in this case. All that the applicant is being asked to do is to give only Kshs.3,000/= out of his salary for the maintenance of the minor plaintiff. Infact if there any loss to be suffered, the sufferer is and has been the minor plaintiff on whose behalf the respondent brought the suit. For this reason, the applicant's application must fail.

12. What about the second condition of bringing the application without undue delay? The judgment which is being appealed against was delivered on 21/02/2006 and it was not until 11/07/2007 that this application was brought. Whatever standards and through whatever lenses one looks at the whole matter, it cannot be said that the applicant's application was brought without undue delay. Granted, the applicant may have filed other applications which are still on record and yet to be determined, but the bottom line is that the applicant has been anything but diligent. I think that the applicant is a vexatious litigant and that his aim as far as this application is concerned is to frustrate the respondent's efforts to enjoy the fruits of the judgment. In the meantime, the minor plaintiff continues to suffer because the applicant has not even been courteous enough to make any remittances towards the minor plaintiff's upkeep. On the ground of reasonableness, the applicant's application fails.

13. Thirdly, though the applicant says he is ready and willing to offer security for the due performance of the decree of the lower court, I find that this offer alone is not sufficient to earn him the order he seeks.

14. In the result, I find and hold that the applicant's application lacks merit. The same is accordingly dismissed in its entirety with costs to the respondent. For the avoidance of doubt, the interim order of stay granted to the applicant on 13/07/2007 be and is discharged.

15. It is so ordered.

Dated and delivered at Machakos this 8th day of February, 2008.

R.N. SITATI

JUDGE