



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL 40 OF 2008

JACOB ONDIEK OKINYO.....APPELLANT

VERSUS

PRISCILAH AKINYI ODUOR.....RESPONDENT

RULING

This is an application primarily for stay of execution of a maintenance order given on 28th January 2008 in Mombasa Children’s Case No. 328 of 2007. The applicant, who was the defendant in the Lower Court, was ordered to pay a total of Kshs. 10,500.00 monthly as contribution towards the maintenance of the respondent and the child of their union. The application is brought essentially under Order XLI Rule 4 of the Civil Procedure Rules.

The application is based upon the main grounds that the applicant has good grounds of appeal and has several financial commitments which will suffer if the stay sought is not granted. There is a supporting affidavit sworn by the applicant which elaborates the two main grounds.

The application is opposed and there is a replying affidavit sworn by the respondent. The main objection to the application is that the respondent and the child of the union are the applicant’s responsibility and if the stay sought is granted, it will cause the respondent untold suffering.

I have considered the application, the affidavits filed and the submissions made to me. Having done so, I take the following view of the matter. What is to be considered in an application such as this is found in Order XLI Rule 4 of the Civil Procedure Rules. Under the rule I am required to consider whether or not there is sufficient cause to warrant the stay of execution as mere filing of an appeal cannot operate as a stay of execution.

The applicant is convinced that his appeal raises serious matters and has high chances of success especially as the Lower Court determined the dispute between him and the respondent conclusively at an interlocutory stage without sufficient basis. In my view that contention is not frivolous. The applicant therefore has an arguable appeal.

For the applicant to succeed in this application however, he had to satisfy the other conditions set in the said order. He had therefore to show that he has moved the court with dispatch. The order appealed

from was given on 28th February 2008. This application was lodged on 14th March 2008 just about 2 weeks later. In my view the applicant is not guilty of delay at all.

The applicant has demonstrated that he has two wives and 6 children in addition to the respondent and the child of their union to look after. He has also shown that he looks after his mother and step mother and in that regard unless the stay is granted, those dependants will suffer. In the premises I am persuaded that the applicant has shown that substantial loss may result to him unless execution is stayed.

The last condition to satisfy before a stay can be granted is that of security. The applicant has proposed to pay Kshs. 5,000.00 per month for the maintenance of the child he has with the respondent pending the hearing and determination of his appeal. Considering all the circumstances surrounding this case, it is my view that the applicant's proposal is sufficient security for the due performance of any order that may ultimately be made against him.

I have considered whether in the event that the appellant succeeds in his appeal any money paid to the respondent in the interim will be beyond the reach of the applicant. I have come to the conclusion that that may very well be the case as the respondent herself has admitted that she is currently only doing relieving duty for an employee on maternity leave.

The upshot of this matter is that the applicant has satisfied all the conditions set in order XLI Rule 4 of the Civil Procedure Rules. The application dated 14th March 2008 is allowed. The execution of the maintenance order given on 28th January 2008 in Mombasa Children's Case No. 328 of 2007 is hereby stayed. The applicant shall pay Kshs. 5,000.00 per month to the respondent through the Children's Department Mombasa until the appeal is disposed of. Costs shall be in the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Sewe H/B for Songok for the Applicant and the Respondent in person.

F. AZANGALALA

JUDGE

7TH MAY 2008