



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL 213 OF 2006

MORRIS DZORO APPELLANT

-VE RSUS-

DIANA NYANCHAMA MOKUA RESPONDENT

RULING

This is an application brought *inter alia* under the provisions of Order 41 Rule 4 of the Civil Procedure Rules for stay of execution.

In Mombasa Children's Court Case No. 46 of 2005 Diana Nyachama Mokuia (the respondent in this appeal) claimed the legal custody of and maintenance for the child, Yvonne Kerubo, whom she said was sired by the Appellant. The Appellant filed a defence and denied that he is the father of the child and therefore denied being liable to maintain her.

On the day the case was fixed for hearing neither the Appellant nor his advocate appeared and the Children's Court heard the matter *ex parte* and held that the Appellant has parental responsibility for the child and ordered him to pay to the mother a sum of Kshs. 20,800/- per month. The Appellant's application to set aside that *ex parte* judgment was dismissed thus provoking this appeal.

Pending the hearing and determination of the appeal the Appellant has applied for stay of execution of the decree in that case arguing that his appeal has overwhelming chances of success. It is also contended on his behalf that if stay is not granted and the payments are made he will suffer substantial loss, as he will have no chance of recovering the amount from the mother of the child who is not employed.

For the respondent it was submitted that this appeal has no chance of seeing the light of day as the Appellant's advocates were properly served but ignored to attend court for the hearing of the matter. It is further contended for the Respondent that this application has no merit and is only intended to delay the execution of the decree.

I have considered these rival submissions and the whole matter. The Appellant has through his advocate offered to keep depositing in court the sum of shs. 20,800/- he was ordered to pay to the Respondent monthly. So if the appeal is dismissed the amount due to the Respondent upto that time will be in court.

Though the Respondent will not suffer any loss as such while the appeal is pending and monthly payments, are being deposited I am however alive to the fact that this is a case involving a child who

requires money for daily subsistence. In the circumstances and so that the Appellant is not denied his right of appeal or his appeal is not rendered nugatory , I grant a stay for a period of 90 days only during which period the Appellant shall ensure that his appeal is heard and disposed of. In the interim and until this appeal is heard and disposed of the Appellant shall on the or before the last day of each month with effect from this month deposit in court the sum of shs. 20,800/-. In default of payment of any single monthly sum this application shall automatically stand dismissed and the respondent shall be at liberty to execute the decree. Each party shall bear its own costs of this application.

DATED and delivered this 27th day of February 2007.

D.K. MARAGA

JUDGE

27.2.2007

Before Maraga Judge

Lewa for Applicant

Njoroge for Respondent

Court Clerk –Mitoto

Court – Ruling delivered in chambers.

D.K. MARAGA

JUDGE