



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

Children Appeal 27 of 2006

STANLEY MAINA MWANGI..... APPELLANT

VERSUS

**MAUREEN WAITHERA MAINA (Minor suing through mother and next friend
RAHAB NJERI WAITHERA)..... RESPONDENT**

RULING

By chamber summons dated 20.01.07 and filed on 25.01.07 stated to be under sections 3 and 3A of 'the Civil Procedure Rules Order XXI rule 22' and all enabling provisions of the law, the respondent applied for the following orders:-

1. That the court be pleased to vacate its orders made in this matter on 21.11.06.
2. That in the alternative the court sets aside the said orders and the applicant be granted leave of this court to file a replying affidavit.
3. Costs in the cause.

The application is based on the following grounds:-

- a) The appellant has made an application and obtained orders for stay of execution in this matter in his (chamber summons) application dated 17.11.06.
- b) That the court granted the application pending the hearing and determination of the said application.
- c) That all the prayers in the said application have been heard and determined by the court thus there is nothing pending of the said application.
- d) Affidavit of Rahab Njeri Waithera.

The affidavit of respondent Rahab Njeri at (d) above is to the effect that the respondent (sic – deponent must have meant appellant) and the process server colluded to mislead the court that the respondent had been served with the chamber summons application dated 17.11.06 while the respondent was not so served. Respondent Rahab Njeri Waithera's affidavit is also to the effect that the appellant Stanley Maina Mwangi misled this court to believe he was getting the stay sought pending the hearing of his chamber

summons dated 17.11.06 while the said application did not contain any prayers that would be pending after the appellant obtained the stay orders eventually made on 21.11.02 and issued on 22.1.06.

The appellant's chamber summons application came up for hearing before me on 21.11.06. The appellant who was applicant in the chamber summons appeared in person while there was no appearance for the opposing party, i.e. the respondent. The appellant/applicant informed the court that the respondent had been served with the chamber summons application of 17.11.06 on 18.11.06. The court's attention was drawn to an affidavit to that effect by one David Mwangi Kiombori sworn on 21.11.06 and on the basis of the appellant's statement and David Mwangi Kiombori's affidavit of service, the court granted the order of stay sought. The appellant's/applicant's prayer seeking the stay was prayer 2, which was in the following terms:

'That there be a stay of execution pending the hearing of this application for a notice to show cause coming up for hearing on 24th November 2006 in the lower court at Kigumo SRMCC No.20 of 2005.'

This court made a stay order *ex-parte* in terms of the said prayer 2 on 21.11.06 which was issued by the Deputy Registrar on 22.11.06.

The respondent, Rahab Njeri Waithera has now vide her affidavit sworn on 20.01.06 deposed that, contrary to David Mwangi Kiombori's affidavit of service that he served her with the chamber summons application dated 17.11.06 on 18.11.07 and that she declined to sign for the service, no such service was in fact effected on her, i.e. the respondent. The end result is that there now exist in this court file: one affidavit by David Mwangi Kiombori sworn on 21.11.06 deposing that he served the respondent Rahab Njeri Waithera on 18.11.06 but she refused to sign for such service; and one affidavit by the respondent Rahab Njeri Waithera herself deposing that she was not so served. One of the two depositions must be false.

When the present chamber summons application dated 20.01.07 came up for hearing before me on 16.03.07, the respondent who is the applicant in the said application was represented by learned counsel, Miss E.W. Kimuyu. There was no appearance for the appellant Stanley Maina Mwangi. Miss Kimuyu drew the court's attention to an affidavit of service sworn by Alex Mwangangi on 16.03.07 to the effect that he served the chamber summons application dated 20.01.07 on the 'Defendant' on 25.01.07 and that the latter declined to sign for the service. The 'Defendant' alluded to in Alex Mwangangi's affidavit of service is not named. As there is no 'Defendant' in the proceedings under consideration, I cannot be sure that the chamber summons application was served on the appellant Stanley Maina Mwangi.

Suspicion is now growing that each party may be coming before this court separately to allege he or she has served the other while no such service may in fact have been effected. In order to stem the tide of these accusations and counter-accusations and in view of the fact that prayer 2 in the chamber summons application dated 17.11.06 which sought 'stay of execution in the lower court at Kigumo SRMCC No. 20 of 2005 pending the hearing and determination of this application' is no longer pending before this court, I make the following orders:-

1. The order made by this court on 21.11.06 and issued on 22.11.06 in terms of prayer 2 in the chamber summons dated 17.11.06 is hereby vacated.
2. Any party desiring stay of orders of the Kigumo court in Kigumo SRMCC No. 20 of 2005 should in the first instance make the application of stay before that court and demonstrate before the court credible service of such application upon the opposing side.

I make no orders as to costs.

Orders accordingly.

Delivered at Nairobi this 20th day of March, 2007.

B.P. KUBO

JUDGE