

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Appli 53 of 2006

PETER MWARO VIDZO.....APPLICANT

VERSUS

BRENDA NDUKU MUTISYARESPONDENT

R U L I N G

On the 23rd day of December 2005, the children Court sitting at Mombasa ordered Peter Mwaro Vidzo, the applicant to, in addition to payment of school fees and medical expenses provide Kshs.6,000/- to Brenda Nduku Mutisya, the Respondent through the Children's Department, Mombasa. Being aggrieved by that decision he preferred this appeal. Pursuant to the provisions of order XLI rule 4 of the Civil Procedure Rules, the applicant obtained temporary orders of stay of execution of the said decision pending the hearing of the main motion on the 23rd day of January 2006. The order for stay was only in respect of the extra payment of Kshs.6,000/- to the Respondent.

When the motion came up for inter-partes hearing on 8th March 2006, the same was adjourned generally at the prompting of Mr. Nyabena advocate who held brief for Mrs. Kipsang advocate for the applicant. There was no application for extension of the interim orders of stay granted on 23.1.06. It would appear there was a lull until the Respondent served the applicant with a notice to show cause why the applicant's salary should not be attached to recover the amount. This is the Notice, the applicant's advocate now says made her realize that the say orders were not extended on 8.3.06 by the Counsel who held her brief. This situation gave rise to the current summons dated 6th June 2006 in which the applicant seeks for an order reinstating the temporary orders of stay given on 23.1.06 and for a further order extending the orders to subsist until 19.7.06 when the main application for stay will be argued before the honourable Mr. Justice Maraga.

It is the argument of Mrs. Kipsang advocate for the applicant that the failure to extend the interim orders of 23.1.2006 was a mistake on the part of the advocate who held her brief on 8/3/06. The learned advocate urged this court not to visit the sins of the advocate on the applicant.

On his part, Mr. Dennis Mabeya urged this court to reject the application on the ground that the child will suffer in that he will be out of school for non-payment of school fees. He also pointed out that since the D.N.A. results are out, the applicant has no choice but to meet the school fees. Mrs. Kipsang on her part was of the view that the Respondent took the child to a high cost school which was beyond his financial capability. Mr. D. Mabeya countered this submission by stating that the child joined class 1 in SOS primary school as opposed to nursery school.

I have considered the able arguments made by the learned counsels on both sides. I have also taken into account the pleadings placed before me. What is clear is that this matter came up for interpartes hearing on 8/3/06 and the applicant's advocate did not apply for the extension of the existing interim order. The record shows that Mr. Nyabena advocate held brief for Mrs. Kipsang advocate for the applicant. It is said that the mistake was not intentional. This averment is not challenged by the Respondent. It is not denied that the Respondent has commenced execution proceedings to realize the sum the applicant was directed to pay in a notice to show cause dated 22/5/06. It is not also denied by the applicant that he has not paid school fees for the child. After a careful consideration of the above matters

I am satisfied that the stay orders issued on 23.1.06 should be reinstated and extended to subsist until 19.7.06. I arrived at this decision on the basis that there was a genuine mistake on the part of the applicant's advocate. It should be made clear to the parties that the order of 23.1.06 did not exempt the applicant from paying school fees. The order of 23.1.06 only stayed recovery of the monthly sum of Kshs.6,000 payable to the Respondent and nothing more. I agree with Mr. D. Mabeya that the child was in nursery school at the time of delivery of the order of the children's court. The child is now admitted to SOS primary school. I am convinced that the Respondent did not shop for a high cost school. Let the applicant play his parental responsibility of paying school fees for the child as he battles out with the Respondent over the stayed amount. I am not convinced that he is incapable of paying the fee due to SOS primary school. The applicant has not convinced me in any way that he is incapable of paying Kshs.8,000/- school fees. He has conveniently failed to attach a copy of his pay slip to indicate what his monthly pay is.

In the end this court appreciates that children matters should be expeditiously heard and determined. It also appreciated the fact that the welfare of the child is paramount.

In the final analysis the orders of stay issued on 23.1.06 are reinstated and extended to subsist until 19.7.06. The applicant should immediately pay the child's outstanding school fees due to SOS primary school and in default execution to issue.

Dated and delivered at Mombasa this 26th day of June 2006.

J.K. SERGON

J U D G E

In the presence of Mr. D. Mabeya for the Respondent and Mrs. Kipsang for the applicant.