



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 160 of 2005

JOHN MUNDIA

MUHANDA.....APPLICANT/APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Senior Resident Magistrate R.A.A. Otieno's Ruling in C. M. P&D No. 147 of 2004 at Nyeri)

RULING

In his Chamber Summons dated 18th July, 2005, the Applicant John Mundia Muhanda wants a court order that this court

“grants a stay of execution and quash all consequential orders and proceedings in Nyeri C. M. P & D 147 of 2004 until the appeal shall be heard and determined

The application is based on the grounds shown on the face of the Chamber Summons and supported by the Applicant's affidavit dated 18th July, 2005.

Mary Wambui Ndirangu who complained to the Nyeri District Children's Officer has filed a replying affidavit to the Chamber Summons dated 18th July, 2005. The District Children's Officer has also filed his affidavit dated 7th June, 2006.

While Mary Wambui Ndirangu's affidavit is in opposition to the Applicant's Chamber Summons, the District Children Officer's affidavit is to the effect that he took this case to the court because the parties could not agree. In the Court therefore the District Children's Officer was recorded as the complainant although Mary Wambui Ndirangu was the Complainant in his office.

What I have heard is the Chamber Summons dated 18th July, 2005 and that is the only one I am deciding in this ruling. The Applicant's appeal, though filed on 21st March, 2005, is up to date not even admitted to hearing as the Appellant/Applicant appears to be sleeping in respect of that appeal. He would not to-day be wasting time and bothering people with his Chamber summons dated 18th July, 2005 had he been keen on moving forward with the prosecution of his appeal which incidentally, appears to have been filed in March, 2005 before the Memorandum of Appeal, also claimed filed on that date, was prepared and signed on 20th June, 2005, an interesting aspect of the appeal herein.

These proceedings concern a dispute between a husband and wife over three children. I get the impression the Applicant and his wife are not transparent enough concerning the children and therefore it is not clear why the child Peter Ndirangu did not feature in the deliberations of elders which preceded court litigation. But I remind myself that I have not heard the appeal and this ruling does not concern the appeal-where it is apparent the Appellant is trying to bring in this court evidence and issues he did not take to the Chief Magistrate's Court.

Strictly confining myself to the Chamber Summons dated 18th July, 2005, it is rather agonizing to deal with the prayer which does not mention the date of the order required to be stayed and goes on to ask the court to

“quash all consequential orders and proceedings in Nyeri C. M. P. & D 147 of 2004.”

without singling them out to avoid mistakes. It is difficult for me to know the consequential orders which the Applicant has in mind as some of them, if more than one, may not be amenable to the quashing order the Applicant is asking for.

Otherwise the record from Nyeri C. M. P & D 147 of 2004 shows that before the order the Applicant seems to be complained against was made on 16th June, 2005, the Applicant had consented to pay the fees of Kshs. 10,000/-. I say so because this is what the mother of the children said:

“The older child aged 17 years was due to join form 2 at Kihatha Secondary School but failed to do so as I did not have any money. The others are in primary school. The first child requires Kshs.10,000/- to return to school. His name is Peter Ndirangu Mundia. I also require maintenance For the other subjects.”

The Applicant's response was:

“I went to the school and found subject had left after 2 weeks. If he can go back to school I will pay the school fees.”

That having been said, the learned Senior Resident Magistrate stated:

“Respondent to pay school fees Kshs. 10,000/- to enable Peter Ndirangu Return to school and Kshs.2500/=Per month towards Maintenance of the Other subjects with effect from 30.6.05.”The record does not show that the Respondent, now the Applicant before me, commented on maintenance and in the circumstances I am assuming that he had no objection to the payment of maintenance.

The above being the position what the Applicant has told me during the hearing of this Chamber Summons that the order was made without investigation and without his consent is not tenable. He went outside his supporting affidavit and talked of matters he ought not have talked about during the hearing. Investigating how they stay and arranging meetings of elders, those are not in his supporting affidavit.

The mother of the children on the other hand seems to be asking for school fees when the Child Peter Ndirangu Mundia abandoned Kihatha Secondary School for reasons other than lack of school fees. He had not been sent away from school for any reason. He had been admitted to the school in February

and left in March, 2004. It is now more than two years since the child left school for reasons other than payment of school fees and those reasons have not been disclosed to the court. By the time the court made the order dated 16th June, 2005, the child had already abandoned the school.

To-day if the Applicant pays that Kshs.10,000/= to Mary Wambui Ndirangu, what will she do with that money bearing also in mind that half of the schooling year in Kenya is already spent and ordinarily it is not realistic to say that a child joining a class, during the second half of a school year, a class he is not repeating, can catch up with the rest of the children in that class especially where the child, like Peter Ndirangu here, has been out of school for so long – in this case two years three months. On the other hand, a school accepting such a child in a class will be a school interested only in its financial gain and definitely not interested in the welfare of the child – about which parents should be the most concerned parties.

What the learned Principal State Counsel, Mr. Orinda, said is most useful to the parties and to the court and I must thank him for that bit of contribution. It is on record.

From what I have been saying above therefore, I will partially allow the Applicants Chamber Summons dated 18th July, 2005 and partially dismiss it. But there will be conditions the Applicant must observe.

Accordingly the said Chamber Summons is hereby granted to stay execution of the order of the Senior Resident Magistrate dated 16th June, 2005 to the extent only of payment of school fees of Kshs.10,000/=. That stay is effective from 16th June, 2005 to 19th January 2007 if by that date the Applicant's appeal in this matter will still be pending. If the appeal will be determined earlier, the stay to expire on that earlier date.

Otherwise the part of the Senior Resident Magistrate's order of 16th June, 2005 dealing with the payment of kshs. 2,500/- per month towards maintenance of "the other subjects with effect from 30.6.05" is not stayed and the Applicant has to pay that money as ordered by the Senior Resident Magistrate, with effect from 30.6.05 until his appeal in this matter is heard and determined. If he has not been paying that money from 30.6.05 this ruling means that the Applicant has to pay all the arrears from 30.6.05 up to-date and thereafter continue paying Kshs.2500/- per month until determination of his appeal in this matter whereby further orders will be made. It may therefore be that the quicker the Applicant's appeal is determined the better for him. Parties are at liberty to obtain a copy of this ruling from the Registry.

I make no order as to costs in this Chamber Summons.

Delivered, signed and dated at Nyeri this 23rd day of June, 2006.

J. M. KHAMONI

JUDGE

Present:

The Applicant In Person

M/s Ngalyuka for the Republic

Mary Wambui Ndirangu In person