



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MACHAKOS
APPELLATE SIDE
Criminal Appeal 175 of 2004
(From Original P & D Case No 31 of 2005 of the Resident Magistrate's Court at
Machakos P.M. Muriuki RM on 26/10/04)

KELVIN MUTUA KIOKO

ESTHER KAVENGE APPELLANTS

VERSUS

REPUBLIC RESPONDENT

R U L I N G

The appellants Kelvin Mutua Kioko, and Esther Kavenge, brought the application dated 26/7/04 under Certificate of Urgency. They were seeking orders of Stay of Execution of the Ruling delivered on 26/10/04 pending hearing and determination of this appeal and that the court do grant any other interim orders it deems fit to grant. As is the practice the State Counsel was served and both parties appeared before the court on 29/7/05, when the State Counsel raised an objection to the application.

The application is brought under Rules 5 (x) and 7 of the General Rules and Regulations, the Children's Act. The State Counsel's objection is that the application is wrongly before this court as the orders sought are not available under Rules 5 (x) and 7 and can only be granted under Section 357 of the Criminal Procedure Code.

The 2nd limb of the objection is that what was granted was an interim order that cannot be appealed against and that the applicant should have moved the court under Section 117 of the Act for review of these orders and hence the application is premature.

Thirdly, the State Counsel contends that the order intended to be appealed against is not annexed nor is the appeal introduced in the applicant's affidavit.

In response the applicant's counsel, Ms Kilonzo, contends that they are properly before the court as an appeal has been filed, as the orders granted by the lower court are of final nature and that a stay was sought before Mr Okello, Senior Resident Magistrate, but the same was refused. She submitted that under Rule 5 (x) the court has powers to grant stay and the court has inherent jurisdiction to grant the orders under Section 357 Civil Procedure Code and 117 of the Children's Act.

Rule 5 (x) of the General Rules and Regulations- Children's Act, invokes the application of Order 21 Civil Procedure Rules which relates to execution of decrees and orders. Order 21 does not deal with stay of orders. It is Order 41 Civil Procedure Rules that deals with stay pending appeal and it is not listed as one of the orders of the Civil Procedure Rules that apply under these Rules.

Rule 7 General Rules and Regulations, Children's Act on the other hand, gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. But even before these Rules are invoked we have Section 117 of the Children's Act which provides for review; variation of or suspension of its orders as the need may arise. Why would the applicant invoke subsidiary legislation when there are statutory provisions?

The appeal arises out of a criminal charge. Rule 1 of the General Rules and Regulations, Legal No. 77 (Children's Act) provides that:

“All civil matters under parts III, VIII, and XIII of the Act shall be conducted in accordance with these rules and regulations but the court shall have power and discretion to decide all matters with due speed and dispatch without undue regard to technicalities of procedure.”

It is apparent that Rule 5(x) and 7 which the applicant was invoked applies to civil matters but not criminal matters and cannot therefore be applicable to the present appeal which is criminal in nature. I will therefore agree with the learned State Counsel that the wrong provisions of law were invoked and it seems the applicant should have fallen back to the provisions of Section 357 Criminal Procedure Code which provide for suspension of sentence on application pending appeal.

The learned State Counsel had also argued that the appeal is premature because it is an appeal against an interim order. It was the applicant's argument that the order granted was final in nature. That argument has no basis because what matters is whether the court acted properly and within its powers in granting of the order. If the court granted the wrong order, there is no reason why it should not be reviewed.

In sum, I do find that the application as filed is incompetent and improperly before this court and it is also premature and it is a non starter in any event and it is hereby struck out.

R.V. WENDOH

JUDGE

Dated at Machakos this 17th day of August 2005