



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

Civil Appeal 408 of 2004

HARRISON E. K. KINYUAAPPELLANT/APPLICANT

-versus-

WINNE KAHARIO KINYUA.....RESPONDENT

RULING

The Appellant/Applicant in the Notice of Motion dated 15th June 2004 also filed the Memorandum of Appeal against the Ruling and Order of Mrs. Ngugi, Resident Magistrate, Children's Court at Nairobi dated 24th May 2004, the Notice of Motion was filed simultaneously with this Appeal.

The Applicant has sought for an order of stay of execution of the orders dated 10th May 2004 in the Children's Court Cause No. 72 of 2002 pending the hearing and determination of the Civil Appeal No. 408 of 2004 or pending any other orders of this Honourable Court. This application is premised on grounds stipulated in the body of the application and the same grounds are further expounded in the supporting affidavits. The Appellant's principal complaint is that the order of his arrest and his committal to civil jail was unilateral and not founded in the application. That the Court had no basis for issuing the order that was not prayed for.

Secondly, Counsel for the Appellant argued that they have applied for the review of the order of maintenance and the matter is still pending before the Children's Court and hence the order of stay should be granted.

This application was opposed by counsel for the Respondent on the following grounds:-

Firstly, counsel argued that the Appellant does not merit any consideration by this Court as he has been in contempt of an order commanding him to pay the Respondent a monthly sum of Ksh. 30,000/- being maintenance and now there is an outstanding arrears of, about Kshs. 540,000/= which he owes to the Respondent as unpaid arrears.

Secondly, the Appellant has not been keen in prosecuting this application which was been an impediment towards the execution of the orders. Counsel drew the attention of this Court so this application which was filed on 1st June 2004 and it is the Respondent who even fixed the hearing dates. Thus the Appellant is merely abusing the Court process as he has not also been keen to prosecute the application for review which is still pending before the Children's Court.

Thirdly, the appeal has no chances of success, as there was a specific prayer for the arrest of the Appellant as prayed under prayer No. 5 and this is pursuant to the provisions of Section 101(7) of the Children's Act.

I have given due consideration to this application and all the material that was placed before me.

The Applicant's appeal is against the order of 18th May 2004 whereby the warrant of arrest was issued unless he pays the sum of maintenance of Kshs. 30,000/- as ordered from 18th September 2003.

The Appellant's complaint was that this order was issued unilateral but my reading of the application and especially of prayer No. 5 of the application for execution, the Respondent sought for an alternative prayer of arrest of the Appellant.

The Appellant did not pay the sum ordered and the provisions of Section 101 (7) fully empower the learned magistrate to issue a warrant committing a defaulting party to imprisonment for a period of not less than five days, nor more than four weeks if the party has persistently and willfully refused or neglected to make payment of the monies ordered to be paid under the maintenance order.

Furthermore the Appellant has not provided any evidence of payment of the outstanding maintenance as ordered.

In this regard, I am not satisfied that the Appellant's has an arguable appeal and I accordingly decline to allow the Notice of Motion dated 15th June 2004 which I hereby dismiss with costs to the Respondent.

It is so ordered.

Ruling read and signed on 25th November 2005.

MARTH KOOME

JUDGE