



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. E048 OF 2021
IN THE MATTER OF APPLICATION IN THE CHILDREN'S ACT 2001
AND
IN THE MATTER OF EWG, JNG & AM (MINORS)
CNNsuing as next friend and mother to EWG, JNG & AM.....APPLICANT
VERSUS
PGN.....RESPONDENT
RULING

1. Before this Court for determination is the Notice of Motion dated **9th August 2021** by which the Applicant **CNN**(suing as next friend and mother to **EWG, JNG & AM**) seeks the following orders:-

“i. Spent

ii. Spent

iii. That this Honourable court be pleased to stay proceedings in Children's case No. xxx of 2019 filed at Chief's Magistrate's Court at Milimani pending the hearing and determination of this appeal.

iv. Spent

v. That the orders setting aside orders of attachment of a third of the respondent's salary issued on 15/6/2021 and all consequential orders to be stayed pending he hearing and determination of this appeal.

vi. That orders issued by the court on 15.6.2021 and all the consequential orders be stayed pending appeal.

vii. Costs be provided for”.

2. The application which was premised upon order **10 Rule 11 Order 45 Rule 1,2 and 3** of the **Civil Procedure Rules Section 4, 6 & 22 Children Act, Section 1A, 1B and 3A Civil Procedure Act, Cap 21, Laws of Kenya, Order 42 Rule 6 and Order 51 Civil Procedure Rules 2010, Articles 50, 159 Constitution of Kenya 2010** and all other enabling provisions of law and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **PGN** opposed the application through the Replying Affidavit dated **10th November 2021**. The application was canvassed by way of written submissions. The Applicant filed written submissions dated **27th October 2021** whilst the Respondent relied upon his written submission dated **10th November 2021**.

BACKGROUND

4. The genesis of this Appeal and application is the Ruling delivered by **Hon M KIBE Resident Magistrate** in **Nairobi Childrens Case No xxx of 2019** which ruling was delivered on **15th June 2021** in which the trial court set aside orders attaching **one-third** of the Respondents salary to made good arrears due on maintenance orders made earlier.
5. On **27th September 2019** the children Court made orders awarding actual custody of the minors to the Applicant and directing that the Respondent cater for the childrens school fees. Medical cover and food at **Kshs 15,000/-** per month. The Applicant was ordered to provide shelter for the minors and to cater for the salary of the house help.
6. The Applicant alleges that the Respondent failed to comply with the said maintenance orders and by **15th December 2019** had fallen into arrears in the amount of **Kshs 118,000**. A warrant of Arrest was issued against the Respondent.
7. The Respondent then paid **Kshs 16,000/-** and on **30th December 2019** made a proposal to settle the arrears of **Kshs 102,000/-** by way of monthly instalments of **Kshs20,000/-**.
8. Thereafter the Respondent paid a total of **Kshs 114,500/-** from **December 2019** to **August 2020** leaving arrears of **Kshs 123,500/-** outstanding.
9. A notice to show cause was issued on **28th September 2020** and subsequently the court ordered for the attachment of **one-third** of the Respondents salary in order to clear the arrears. The Respondent was also still required to pay the **Kshs 15,000/-** ordered as monthly maintenance.
10. The Applicant avers that the Respondent did not make the payments as ordered and that by **July 2021** the arrears stood at **Kshs 223,700/-**.
11. The Respondent filed in the **Children's Court** an application dated **23rd November 2020** seeking to set aside the orders of **12th November 2020** attaching **one-third** of his salary.
12. Vide a Ruling delivered on **15th June 2021** the learned trial magistrate set aside the orders of attachment to enable parties reconcile their accounts. Being aggrieved by that Ruling the Applicant filed this present appeal and application to stay the courts orders of **15th June 2021**.
13. The Applicant submits that the setting aside of the orders attaching **one-third** of the Respondents salary is making it difficult for her to meet the basic needs of the minors. That the minors will continue to suffer if the present orders are not granted.
14. On his part the Respondent submits that the attachment of his salary was unfair and prejudicial as he was not accorded an opportunity to defend himself in respect of the Notice to Show Cause dated **28th September 2020**. He urges court to dismiss the present application.

ANALYSIS AND DETERMINATION

15. I have carefully considered the application before this court, the Replying Affidavit as well as the written submissions filed by both parties.
16. **Order 42 Rule 6** of the **Civil Procedure Rules 2010** provides for the circumstances in which a stay pending appeal may be granted as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

17. Therefore in determining the merits of this application the court must consider –

(1) Whether the application was filed in a timeous manner.

(2) Whether the Applicant has an arguable appeal.

(3) What security if any ought to be ordered.

18. The Ruling in question was delivered on **15th June 2021**. The current application was filed on **9th August 2021** approximately **two (2) months** after said Ruling. I am satisfied that the application was filed within a reasonable time span.

19. It is not in dispute that the **Childrens Court** on **27th September 2019** ordered the Respondent to cater for the minors school fees, medical cover and well as providing **Kshs 15,000/-** monthly towards the minors food expenses. It is further not disputed that the Respondent failed to comply with the said orders leading him to fall into arrears in respect of the monthly maintenance.

20. When warrants of Arrest were issued against him the Respondent made a proposal to clear the arrears by paying **Kshs 20,000/-** monthly. Again, the Respondent defaulted against his own proposal falling into arrears once more. This led to the issuance of the Notice to Show Cause after which the court made orders attaching one-third of the Respondents salary.

21. From the above it is clear that this is a Respondent is a person who is out to play games with the court. He is a serial defaulter who seems to believe that he only need obey court orders as and when he feels like. The Respondent must be warned that courts do not make orders in vain and a party to whom a court order is directed has an obligation to obey said order until the same is set aside or reviewed.

22. In determining this application the court cannot lose sight of the fact that the suit relates to the welfare of minors. **Article 52(2)** of the **Constitution of Kenya 2010** provides that:-

“A child best interests are of paramount importance in every matter concerning the child”.

23. Additionally the **Children Act 2011** provides at **section 4(3)** as follows: -

“In all actions concerning the children, whether undertaken by public or private or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”. (Own emphasis)

24. The orders which were made by the trial court were made for the welfare of the minors. It is trite law that the maintenance and upkeep of minor is the joint responsibility of **both parents**. The Respondent has not denied paternity. The trial court assigned to the mother the duty to provide shelter for the minors and to pay the house help. The Respondent as the children’s father was directed to provide **Kshs 15,000/-** monthly towards the maintenance of the minors. This was an obligation the Respondent was required to fulfil in the best interests of the child.

25. As stated earlier from his actions it is clear that the Respondent has no regard for court orders and seems to believe that his duty to maintain his children is optional. The maintenance of a child is the responsibility of both parents and is a responsibility that cannot be trifled with.

26. To date the Respondent is in arrears to the tune of roughly **Kshs 200,000/-**. Given his past behavior there is no guarantee that the Respondent will continue to honour the order requiring him to pay **Kshs 15,000/-** monthly. The only way to compel the Respondent to obey the court orders and to make good the arrears due is to have the amount deducted at source.

27. I note that the learned trial magistrate set aside the orders of attachment of salary to enable the parties reconcile accounts. It was not necessary to set aside the orders to enable a reconciliation to be done. In any event as stated earlier failure by the Respondent to pay his share of the maintenance is prejudicial to the welfare of the child and places undue burden on the Applicant who will be forced to cater for all the needs of the children single handedly.

28. I find that the decision to set aside the orders of attachment mitigates against the best interests of the child. Accordingly, this application succeeds and I make the following orders-

(1) The orders made on 15th June 2021 setting aside orders of attachment of one-third of the Respondents salary and all consequential orders are hereby stayed pending the hearing and determination of the appeal herein.

(2) For avoidance of doubt the orders made by the trial court attaching one-third of the Respondents salary in order to settle arrears due for maintenance payments are hereby reinstated.

(3) The Respondent is to continue paying Kshs 15,000/- monthly towards the upkeep of the minor children as per the orders made by the trial court on 27th September 2019.

(4) This being a family matter each side shall meet its own costs.

Dated in **Nairobi** this **11TH** day of **February 2022**.

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MAUREEN A. ODERO

JUDGE