



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
FAMILY APPEAL NO. 10 OF 2021
MSR.....APPELLANT
VERUS
SMMRESPONDENT

(Being an Appeal against the ruling of Hon. V.J Yator, PM On the 22nd March, 2021 at Tononoka Children's case No 495 of 2015)

RULING

1. On 22nd March, 2021, Honourable VJ Yator the Principal Magistrate Tononka Children's court made various orders in Tononoka Children's court case No 495/2015 thus directing that;

- (1) **The defendant is hereby discharged from paying the sum of Kshs 129,131 owing as maintenance arrears;**
- (2) **That the defendant to continue buying shopping of kshs 4,000 per month**
- (3) **That the defendant to be sending a sum of not less than Kshs 250 per day for daily upkeep of the children;**
- (4) **That the deduction of kshs 3500 to continue;**
- (5) **That other orders as per the judgment of the court 17th February, 2016 to remain in force;**
- (6) **That mention to confirm compliance on 17th May, 2021.**

2. Aggrieved by the said review orders, the defendant now the applicant/appellant herein filed a memorandum of appeal dated 12th April, 2021 thus challenging the said orders. Contemporaneously filed with the memorandum of appeal is a notice of motion of even date seeking;

- (1) **That this application be certified as urgent and heard ex-parte in the first instance and as a matter of urgency.**
- (2) **That the Honourable court be pleased to order stay of proceedings in Tononoka children's case No 495 of 2015 between SMM V RSM pending the hearing and determination of the application herein.**
- (3) **That the Honourable court be pleased to grant a temporary order of stay of execution of order No 2 and 3 of the orders issued on the 22nd March, 2021 requiring the appellant to continue buying shopping of Kshs 4,000 per month and to be sending a sum of not less than kshs 250 per day for the daily up keep of the children.**
- (4) **That this Honourable court be pleased to set aside order No 2 and 3 of the orders issued on the 22nd March, 2021 requiring the appellant to continue buying shopping of Kshs 4,000 per month and to be sending a sum of not less than Kshs 250 per day of the daily upkeep of the children**
- (5) **That costs of this application be provided for.**

3. The application is premised upon grounds set out on the face of it and averments contained in an affidavit sworn on 12th April, 2021 stating that; he is a laborer working with the county government of Mombasa earning a salary of Kshs 9,756; that the Kshs 4,000 worth

monthly shopping and Kshs 250 per day was without legal basis; the respondent will not suffer any prejudice if the said amounts were lifted and; that his meagre salary cannot sustain any further payment as he was already burdened with several deductions as reflected in the attached pay slip.

4. In response, the respondent filed a replying affidavit sworn on 20th April, 2021 claiming that the application is filed in bad faith; it is full of malice and intended to derail the course of justice; the application amounts to a misrepresentation and concealment of material facts thus misleading the court and therefore worth dismissing.

5. That the applicant has consistently frustrated execution of the orders by regularly topping up Sacco loans. She further contended that the applicant is the one collecting rent from their rental premises hence a person of means.

6. In his rejoinder, the applicant stated that he is the one taking care of the children and that the children are staying in a family house.

7. During the hearing, Mr. Onkoba for the applicant reiterated the content contained in the applicant's affidavit in support. He contended that the applicant is providing for the children and that his sources of income cannot sustain the amount ordered for by the court.

8. On her part, the respondent who appeared in person equally reiterated the averments contained in her affidavit in reply.

Analysis and determination

9. I have considered the application herein, affidavit in support and response thereto. The applicant is seeking stay of execution in respect to the orders made on 22nd March, 2021 by the Tononoka Children's court directing him to pay Kshs 4,000 per month for shopping and kshs 250 daily for the upkeep of the children. Apparently, these were review orders pursuant to the judgment delivered on 17th February, 2016 in which the applicant was directed to pay Kshs 3,500 per month as maintenance expenses. The said amount of Kshs 3,500 is currently being deduced from the applicant's salary.

10. The applicant claimed that his net salary of Ksh9, 756 per month cannot sustain Kshs 4000 3,500 +250 per day thus totaling to kshs 14,000.

11. This court has been moved pursuant to order 42 Rule 6 of the Civil Procedure Rules. Under this provision, a party seeking stay of execution order is under obligation to prove the following key elements; firstly, that he is likely to suffer substantial loss should the court decline to grant the order sought. Secondly, that the application has been filed within reasonable time. Thirdly, whether security for due performance of the decree has been deposited. Fourthly, whether there is any sufficient cause to warrant issuance of such order.

12. The above position was amplified in the case of **Vishram Ravji Halai vs Thornton Turpin Civil application No Nai 15 of 1990 (1990)** where the court of appeal stated that; whereas the court of appeal's power to grant a stay pending appeal is unfettered, the high court's jurisdiction to do so under Order 41 (now order 42) rule 6 of the Civil Procedure Rules is fettered by three conditions namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, that the application must be made within reasonable time. Similar position was held in the case of **Carter and Sons Ltd Vs Deposit Protection Fund Board and 2 Others Civil Appeal No 291/1997.**

13. However, it is also trite law that to grant or not to grant a stay of execution order is a matter of discretion by the trial court which must be exercised judicially while bearing in mind that a party should not without sufficient cause be prevented from pursuing his appeal. See **Butt V Rent Restriction Tribunal (1982) e KLR.**

14. In this case, the impugned orders were made on 22nd March, 2021 and the instant application and memorandum of appeal filed on 12th April 2021. Clearly, the application was lodged within a period of 30 days as required by law.

15. As regards proof of substantial loss, the applicant claims that the amount ordered is excessive considering his meagre salary. He attached a pay slip reflecting a net pay of Kshs 9,756. The gross pay according to the pay slip is about Kshs52,000. The respondent claimed that the applicant has some rental houses from which he collects rent. She also claimed that the respondent has frustrated execution process by deliberately over loading his pay slip with loans.

16. Indeed, from the pay slip, Jitegemee Sacco is taking half of the gross salary. Clearly, the commitment may have been intended to frustrate execution process of the court. The question which then begs for an answer is, what will the children eat or survive on if the appellant decides to commit everything to loans? While his claim that the amount ordered is excessive is pending full determination on appeal, I do not see any prejudice or substantial loss to be suffered by the applicant which is greater than the children will suffer in the meantime.

17. Secondly, the applicant did not clearly and specifically deny that he has other sources of income. At the initial stage, I do not find it reasonable to interfere with the discretionary powers of the children court until the main appeal is heard and determined when parties would have argued the appeal fully based on their actual means of income.

18. Courts have time and again held that, extreme caution should be exercised before suspending orders touching on maintenance of a child. See **ZMO V EIM (2013) e KLR** where the court held that, where the duty to maintain a child is imposed on a parent by statute, it is not in the best interests of a child to suspend it but rather expedite the appeal process.

19. In view of the above holding, I do not find any substantial loss likely to be suffered by the applicant by paying the amount ordered in the

decree pending hearing and determination of the appeal on merit. Regarding security, this is a family dispute hence ordering for the same to be deposited will strain the couple's relationship further. This is not a suitable case to order for deposit of security. As to proof of any other sufficient cause, I do not see any. Accordingly, in the best interests of the children, the application herein is dismissed with no order as to costs. Parties to expedite the appeal process.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF JUNE, 2021

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J. N. ONYIEGO

JUDGE