

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 17 OF 2019

DLK.....APPELLANT

VERSUS

CM.....RESPONDENT

RULING

1. The appellant has moved the court by a Motion dated 12th June 2019, seeking:-

(a) stay of execution of orders in Butali SPMC Children Case No. 3 of 2019 made on 8th February 2019; and

(b) leave to pay Kshs. 7, 000.00 as monthly maintenance pending appeal.

2. His case is that he is aggrieved by the said order OF 8TH February, 2019 and he has since appealed against the same. He avers that the said appeal has high chances of success. He submits that he would be unable to raise the amount of money ordered by the court since he is not in employment where he is paid monthly, and he offers to pay Kshs, 7, 000.00 per month instead. He argues that his appeal would be rendered nugatory should the court not grant the orders sought in the application.

3. The application principally seeks stay of execution of orders of the trial court. A copy of either the ruling or the order has not been attached to the application. There is no proof that the court did deliver the ruling impugned or make the orders alleged. A court does not act blindly. It is obligatory for the applicant, in such a case, to demonstrate to the court that such a ruling does or orders do in fact exist, lest the court is made to act in vain. He should literally be pointing at an extract of the order, duly certified, and telling me, look here is the order that I am talking about. The fact that the appellant has filed an appeal does not qualify him, automatically, to a grant of stay orders. The order sought herein is discretionary, and a case must be made out for the exercise of that discretion. Without evidence that those orders were made, there cannot be any basis for me to consider making the orders that are sought in the application.

4. The appellant offers to pay Kshs. 7, 000.00 as maintenance for the children the subject of the suit. In the first place, the appellant has not attached any document from the trial court, demonstrating what the trial court has ordered him to pay, which he now says would be burdensome to him, I would have no basis to vary that order without the order itself not having been shown to me as evidence of its existence. Secondly, the appellant has not attached any documents to support a case for being only able to pay Kshs. 7, 000.00 per month, and nothing more than that. A court cannot be expected to make orders out of the blue, there must be some basis, some evidence.

5. A court of law has already made an order on maintenance, and the appellant appears not to have complied with the said order, but has been paying an amount of his own choice. I agree with Mr. Khayumbi, the advocate for the respondent, that a party should not choose or pick which orders to obey and which ones to disregard. Put differently, a party does not choose how to obey a court order, he should comply with it as framed. A party should first comply with a court order even as it asks the same court, or even a higher one, to review the orders. A court order is not a proposition or suggestion, it is a command. It must be obeyed first, and complaints raised later. Purporting to comply with a court order in a manner that a party pleases rather than on the terms of the order itself, amounts to contempt of the order and of the court making it. As it is the appellant is guilty of disregarding a court order. Surely, he should not expect this court to exercise discretion in his favour if he cannot even obey the orders that he is now challenging. For this court to exercise discretion in his favour, the appellant must first demonstrate that he has fully complied with order that he is inviting me to review.

6. On his appeal being rendered nugatory, should I not grant the orders that he seeks, I would say that the appellant would only have himself to blame should that happen, for the reasons that I have given above. Secondly, the orders made by the trial court are in respect of maintenance. The appellant has a duty to maintain his children. A stay order is not available to stop a parent from paying maintenance or, generally, to suspend parental obligations.

7. I am, therefore, for the reasons given above, not persuaded that the Motion dated 12th June 2019 is merited. I hereby dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF FEBRUARY, 2020

W. MUSYOKA

JUDGE