



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 80 OF 2019

HAK.....APPELLANT/APPLICANT

VERSUS

MK.....RESPONDENT

Coram: Justice R. Nyakundi

Odhiambo S. E. & Co. Advocates for the Appellant

M. Ananda Advocates for the Respondent

RULING

The intended appellant **HAK** has indicated his intention to file an appeal against the ruling of the trial Magistrate in respect of the post Judgment decree in **Kilifi – Children Case No. 3 of 2016**.

In the interim he has followed it with an interlocutory application dated 4.10.2019 brought pursuant to Section 1A, 1B, 1A, 3A of the Civil Procedure Act, Order 22 Rule 22 Order 42 Rule 6 of the Civil Procedure Rules, and Section 3 and 13 of the Environment & Land Court, seeking the following reliefs:

(a). That there be an order staying arrest and committal to civil jail of the appellant.

(b). Pursuant to the order of the Honourable Court dated 2.10.2019 pending the hearing and determination of the appeal.

The applicant swore an affidavit in support of the application in addition to the grounds stated in the body of the motion. The gist of the averments is a complaint he has with the Judgment of the trial court on payments ordered towards the maintenance of their child with the respondent.

Further he is dissatisfied that despite meeting obligations of the decree, the respondent has taken out a notice to show cause why he should not be committed to Civil Jail, for noncompliance with the order.

Arising from that the respondent opposed any relief being granted to the applicant as premised in the replying affidavit. The respondent expressing herself on the history of the matter, she urged the court to take into account the impact of the applicant's default of payment of maintenance has over the welfare and best interest of the minor.

Determination

It has been stated time and again by the superior court that the requirement of the three limbs of Order 42 Rule 6 of the Civil Procedures Rules must be met by an applicant who wishes to invoke the jurisdiction of the court namely:

(a). The application in question be filed without undue delay.

(b). The applicant ought to show that substantial loss not remediable with damages would otherwise result if stay is not granted.

(c). That there be security for due performance of the decree.

The requirements of the three limbs for the applicant to succeeds are as stated in the case of **Kiambu Transporters v Kenya Breweries**

{2000} eKLR.

It is also to be remembered that at this stage the applicant must demonstrate that if the applicant is not allowed, the intended appeal or appeal, if successful would be rendered nugatory. This test is subjective to the circumstances of each case as observed by the court in **Reliance Bank Ltd v Nor Lake Investments Ltd {2002} IEA 227**. According on the question that the application for stay of execution should not be seen to defeat the ends of justice the court in **Global Tours & Travels Limited Nairobi winding up cause No. 43 of 2000** held:

“As I understand the Law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice, the sole question is whether it is in the interest of justice to order a stay of proceedings and if it I, on what terms it should be granted in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.”

In light of the above provisions of Order 42 Rule 6 of the Civil Procedure Rules and the guiding principles together with the affidavits by the parties to the notice of motion the following salient points from the touch stone of my decision. The record indicates that the notice to show cause arises out of non-compliance of the decree of the court extracted pursuant to a valid and uncontested Judgment of the trial court.

It is quite clear that having regard to the issues which arose and got to be adjudicated by the trial Magistrate the claim for maintenance was assessed and it became obligatory for the applicant to settle the substance of the decree. Instead, particularly as here, the arguments by the applicant seems to dwell on accounts and to a large extent computation presumably rendering it punitive. While I agree that the applicant may have some kind of grievance, he needs to identify serious legal question going to the merits on the test of substantial loss.

In other words, evidential material that stipulates that the enforcement of the Judgment before his appeal is heard would among other things leave him financially ruined and in the event the appeal succeeding, the respondent would not be in a position to repay back the decretal sum.

Further, in the present case these regulatory provisions also emphasize as deduced from the cited case Law that the court would only interfere with the exercise of discretion only in extreme cases, where an applicant demonstrates with evidence allegations on misdirection, the order was against the weight of evidence or there was no evidence to guide the decision making of the order or Judgment.

Upon reading the affidavits and all questions of the applicability of the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, more specifically on substantial loss, the applicant has not made it to the finishing line to be granted stay. His motion fell on the wayside both on the legal and evidential burden of a prima facie case with serious issues to be tried on appeal and if stay not permitted, the appeal would be rendered nugatory.

Unfortunately, from the affidavit in support and reasons put forth by the applicant are such that the execution cannot destroy the subject matter or deprive him the right to prosecute the appeal.

The other situation which disentitles the applicant of the orders are the principles illustrated in **Hulbury’s Laws of England 4th Edition Vol 37 Paragraph 699**:

“Two principles have to be balanced against each other as to whether a stay of execution pending the appeal should be granted, first, that a successful litigant should not be deprived of the fruits of his litigation, and secondly, that an appelland should not be deprived of the fruits of a successful appeal.”

In the instant application, this court has anxiously assessed the nature and purpose of the appeal primarily arising from a child maintenance order made by the trial court. The serious question before that court was to balance the competing interest of both parents but ultimately ensure the principle on welfare and best interest of the child under Section 4(2) of the Childrens Act carries day. However, one can ask what prejudice has the applicant suffered in being ordered to pay for maintenance of his own child.

My view is that, the trial court is seized of the matter. This court and its appropriate, jurisdiction cannot issue any stay order to stifle the on-going execution proceedings to defeat or limit the extent of the reliefs. That does not mean the applicant has been denied his right of appeal. Being an interlocutory kind of application he is entitled to pursue the appeal and I dare say that the appeal would not be rendered nugatory as suggested by the applicant. I believe this matter is largely is where the policy of the court and exercise of its discretion ought to be tilted towards the conceptual framework of the interest of justice infused with welfare and best interest of the child under Section 4 (1) of the Childrens Act.

This is one case I am forced to apply the principle in **Winchester Cigarette Machinery Ltd v Payne & Another {1993} TLR 648** – where the court held:

“As a matter of common sense and a balance of advantage. But in holding any such balance, full and proper weight to be given by the court to the starting principle, that there had to be a good reason for depriving a plaintiff from obtaining the fruits of a Judgment.”

Having come to the above conclusion stay is denied and the notice of motion dated 4.10.2019 dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Kariuki for Mr. Odhiambo for the appellant
2. Mr. Atiang for Ananda for the respondent