

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO 123 OF 2019

SM.....APPELLANT

VERSUS

PEN.....RESPONDENT

RULING

1. The application filed on 13th August 2019 by the Appellant/Applicant had *inter alia* sought in the interim, an order to stay execution of the lower court order in **Kiambu Children Case No. 27 of 2016**, made on 2nd August 2019 to the effect that the Applicant pays half the decretal sum therein or be imprisoned for 30 days. The court granted this prayer on 13.8.2019 and ordered for the release of the Applicant upon executing a personal recognizance in the sum of KShs.30,000/=. The court fixed the application for hearing on 3.10.19 and gave leave to the Applicant “*to amend the application accordingly to clarify the orders sought*”. This is because once the stay prayer (iii) was granted the remaining live prayer was (iv) which sought:

“THAT, this Honourable Court be pleased to order stay of proceedings in Kiambu Children’s case No.27 of 2016 forthwith”
(sic).

2. The application is expressed to be brought under Order 42 rule 6(1) and (2) of the Civil Procedure Rules. On the date fixed for hearing of the motion, the Applicant and his counsel were absent, and the court dismissed the motion. This order prompted the Applicant’s motion to set aside the dismissal order and reinstatement of his application. The said application that was filed on 9.10.19 was canvassed on 24.10.2019. In an *extempore* ruling, the court allowed the motion, giving some but reserving other reasons for the ruling. The key reasons for allowing the motion are that counsel had mis-diarised the hearing date, and secondly, he had approached the court timeously subsequent to the dismissal order, and thirdly, it was in the interest of justice that the application filed on 13.8.19 be heard on merits.

3. The said motion was based on the affidavit of the Applicant and his key complaints were that the maintenance orders were made *ex parte* in the lower court; that paternity of the subject children which he disputes had not been proven; that though jobless and ailing, the Applicant had been ordered to pay half the decretal sum of KShs.430,000/= or be imprisoned. He claimed that by virtue of the above order, given *ex parte* on 2nd August 2019, he had been imprisoned as he was unable to raise half the decretal sum. During oral submissions, the Applicant’s counsel reiterated the material in the application.

4. For her part, the Respondent filed a Replying affidavit in opposition to the application, setting out the history of the matter since inception on 23rd December 2016 and the Applicant’s disobedience of maintenance orders made on 18th January 2017 and subsequent orders in execution. In submissions, her counsel relied on the said Replying affidavit, asserting that the maintenance orders not having been appealed on time were still subsisting. He pointed out that the appeal filed herein related to the execution orders of 2nd August 2019 rather than the substantive maintenance order and hence the application was ineffectual. He argued that an order staying proceedings in the lower court would be prejudicial to the interest of the children for the benefit of whom the maintenance orders were issued by the lower court.

5. The court has considered the matters canvassed by the parties regarding the motion filed on 13th August 2019. In particular, the court has studied the respective affidavits and annexures in order to glean the background to the application, because, it appeared that there was some confusion created by the various depositions of the parties concerning proceedings in the lower court. First of all, the appeal filed herein on 13th August 2019 by the Applicant is on the face of it in respect of orders made in Kiambu Children Case No 27 of 2019, by **Nyangena SPM** on 2nd August 2019. From the Applicant’s bundle of photocopies of proceedings in the lower court, marked **M1**, **M2** and **M3** respectively, it is evident that the order of 2nd August 2019 was only one of a series of execution orders made subsequent to the maintenance order, of 18th January 2017 pursuant to the Respondent’s application of 23rd December 2016. Seemingly an *ex parte* judgment had been entered against the Applicant on 29.11.16.

6. Subsequently, the Respondent had filed a motion to have the Applicant committed to civil jail for failure to comply with the maintenance orders of 18th January 2017. For his part, the Applicant had also filed a motion seeking to set aside the maintenance order, and pending the hearing of the said motions the parties recorded a consent *inter alia* to allow the Applicant to pay to the Respondent a sum of KShs.11,100/= per month in the pendency of the applications. The Applicant was in arrears by the date of the hearing of the two motions. It is not clear whether the trial court having heard the motions conditionally set aside the *ex parte* judgment orders of 18.1.17. However, the Applicant was allowed to file his defence and replying affidavit to pave the way for the hearing *inter partes* of the maintenance application of 23rd December 2016. Additionally, the initial order was varied so that the Applicant was required to continue paying the sum of KShs.30,000/= per month as maintenance, pending *inter partes* hearing of the maintenance application. He was also to clear accumulated arrears by

instalments of KShs.15,000/= per month. That ruling was delivered on 22nd November 2017.

7. It appears that the Applicant defaulted in making payments leading to further execution proceedings. In April 2018, the Applicant applied to set aside/review the orders of 22nd November 2017. The Respondent also filed a motion seeking to have the Applicant committed to civil jail for failure to pay maintenance as ordered by the court. On 29th August 2018 a second ruling was delivered. The Applicant was directed to provide a schedule of payments to clear outstanding arrears amounting to over KShs.350,000/= within a specified period and to continue paying the sum of KShs.15,000/= pm to the Respondent in accordance with the court's order of 22nd November 2017 or be committed to civil jail. Once more, he defaulted and further execution proceedings followed, resting with the order of 2nd August 2019 by which the Applicant was ordered to pay half the decretal sum owing at the time or be imprisoned for 30 days.

8. Apparently, the application dated 23rd December 2016 had not been heard *inter partes* as the ruling of 22nd November 2017 concerning the application filed on 24/2/2017 had envisaged. Reading through the handwritten copies of the rulings delivered on 22nd November 2017 and on 29th August 2018 it seems to me, if the record presented by the Applicant is accurate, that the Applicant's motion dated 24th February 2017 was in part, the subject of the two rulings above. Seemingly, the motion was allowed in the former but dismissed in the latter. Thus, it is not clear from material on record whether the application filed on 18th April 2018, and the subject of orders made on 23/5/18, 11/7/18 was determined. The ruling delivered on 29/8/18 subsequent to the proceedings on 25/7/18 related to earlier applications (filed on 28/3/17 and 24th February, 2017). Thus, on the material available the fate of the motion filed on 18th April 2018 cannot be determined from the material placed before the court.

9. Turning to the instant application, it seems that the Applicant did not deem it necessary to amend his motion pursuant to the direction given by this court on 13.8.19. The sole live prayer in the motion thus remains as it was. It is not crafted as seeking an interim order pending appeal, but as a prayer for a permanent order to stay proceedings in the lower court. Therefore, on the face of it has no relationship to the memorandum of appeal as filed. It is not clear to the court why a prayer to stay proceedings rather than execution was preferred by the Applicant. As for the memorandum of appeal itself, the grounds disclosed, save for ground 2 which relates to proceedings in respect of enforcement of the maintenance order under Section 101(4) of the Children Act, leave no doubt that what the Applicant is really after is to impugn the maintenance orders leading to subsequent orders in enforcement, including the one made on 2nd August 2019 and purported to be the subject of this appeal. These orders and related rulings were made between January 2017 and August 2018.

10. In order for the Applicant to properly challenge on appeal these substantive orders of maintenance orders of the lower court, he would require leave to appeal out of time. No such leave was sought prior to the filing of the Memorandum of Appeal herein. Even if available, a permanent order staying proceedings in the lower court would be of no moment if the maintenance orders continue to subsist. In view of the foregoing, and the backdrop to the Applicant's motion, it is my view that the motion filed on 13.8.19 is misconceived and does not lie. The same is struck out with costs to the Respondent. The court further directs that within 90 days of today's date, the Applicant amends or regularizes the Memorandum of Appeal filed herein, failing which it will stand as struck out for want of leave.

SIGNED DELIVERED ELECTRONICALLY AT KIAMBU THIS 12TH DAY OF MAY 2020

C. MEOLI

JUDGE