



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. E048 OF 2020

AKK.....APPELLANT

VERSUS

SMM.....RESPONDENT

RULING

1. The appellant AKK is a citizen of Sierra Leone currently working in Kenya at the [Particulars Withheld] Embassy as the Minister. He has been accredited by the Government of Kenya as a diplomatic agent, and therefore covered by the [Particulars Withheld] on Diplomatic Relations, 1961.
2. On 25th August 2017 the respondent SMM filed **Children Cause No. 1073 of 2017** at Nairobi against the appellant stating that, following cohabitation, a child JSM was born between them on 30th April 2016 and that the appellant had neglected to maintain the child. She indicated the income of the appellant and her income, and asked that he be asked to pay Kshs.98,000/= per month towards the child's maintenance. She pleaded that she was willing that DNA be conducted to prove that the appellant was the father of the child.
3. With the plaint was filed a chamber application for interim maintenance of Kshs.98,000/= every month for the child.
4. The appellant filed a defence denying that he was in any relationship with the respondent or that he had fathered the child. He denied that he was entitled to maintain the child. He then raised a preliminary objection to the suit and application on the basis that he had immunity under the Vienna Convention.
5. The trial court heard the application and objection. It dismissed the objection, and ordered the appellant to provide interim monthly maintenance of Kshs.20,000/= for the minor's upkeep effective July 2018 pending DNA. He did not pay the money and did not go for DNA. He did not appeal the decision, but, instead, challenged it in High Court **Judicial Review Miscellaneous Application No. 497 of 2018** at Nairobi. On 9th October 2019 the High Court found that he could not invoke the court's judicial review jurisdiction in relation to the orders and proceedings of the Children Court in the matter. The appellant unsuccessfully sought the Children Court to review its orders on maintenance.
6. The non-payment of maintenance led to the sum to grow to Kshs.640,000/=. The trial court was moved by the respondent to have the appellant appear before it on 1st October 2020 to show cause why execution should not issue. The application sought the attachment of the appellant's movable property. The appellant opposed the application by raising **Article 31(3)** of the Vienna Convention. His case was that he was immuned from the proposed measure of execution. On 15th October 2020 the trial court dismissed the objection to jurisdiction.
7. The appellant filed an appeal against that ruling. His basic case was that the trial court was wrong in finding that he was not immuned against execution in the matter. According to him, **Article 31(3)** of the Convention gave him absolute immunity against execution.
8. With the appeal was filed the present application dated 27th October 2020 seeking the stay of the proceedings before the trial court and the stay of the execution orders that the court had issued on 11th September 2020. The sought stay was asked to be in place until the appeal is heard and determined. No directions have been given on the appeal.
9. Mr. Manyara for the appellant and M/s Muhanda argued the application for stay. The appellant's position is that he has absolute immunity against the intended execution, and that the exclusions under **Article 31(1)(a), (b) and (c)** do not include matters relating to children. M/s Muhanda referred to the history of the cause and argued that attachment of personal goods was not protected under the Vienna Convention. I have considered what each counsel submitted on the application.

10. The application was brought under **sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Order 42 rule 6** and **Order 51 rule 1** of the **Civil Procedure Rules**. The appellant is basically seeking the exercise of the court's discretion to stop all the proceedings relating to him and the respondent over the child in the trial court. This is until the appeal is heard and determined. The application was brought without delay. The appellant is left to show that if the proceedings and execution are let to proceed, and the appeal eventually succeeds, he will suffer substantial loss. Hence the need for stay. **(J.I.K. –v- J.W. [2017]eKLR)**.

11. I note that the appellant has not offered any security for the due performance of the decree that may ultimately be binding upon him.

12. The dispute between the appellant and the respondent relates to a minor child. Under **Article 53(2)** of the Constitution and **section 4(2)** of the **Children Act** this court is commanded that in all actions and cases concerning children the best interests of the children shall be the paramount consideration.

13. The child in this case is in need of maintenance from the father and the mother. The mother is the respondent who has custody and is doing her part to maintain the child. She said that the appellant is the father, which he denied. He was asked to undergo DNA to confirm paternity which he has not done, since 2018. He was asked to pay Kshs.20,000/= per month towards child's maintenance. He did not appeal the decision. The application for review and the application for judicial review were declined. He has since not paid a cent. The amount is over Kshs.640,000/=. It is evident that the child's right to maintenance is being compromised by the appellant's refusal to pay the ordered amount. A litigant who refuses to obey a valid court order is not deserving of the exercise of the court's discretion in his favour. It would have been different had the appellant offered to deposit the amount sought, or even a reasonable part of it, into the court pending the hearing and determination of the appeal. Better still, he should have paid the amount, or part of it, towards the upkeep of the child, now that he is not seriously contesting paternity.

14. In **Z.M.O. –v- E.I.M [2013]eKLR**, Justice W. Musyoka indicated as follows:-

“As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute.”

15. Given all the facts that his application has presented, I am not persuaded that it is in the best interests of the child herein to allow the application to stay either the proceedings or the application for execution before the trial court. I dismiss the application with costs.

DATED and DELIVERED at NAIROBI this 3RD DECEMBER 2020.

A.O. MUCHELULE

JUDGE