



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 14 OF 2017

SLS.....APPLICANT

VERSUS

RA RESPONDENT

1. By a Notice of Motion dated 15.10.18 Sombwana Lali Sombwana, the Applicant seeks an order that the Court stops the attachment of his salary as ordered by the Children's Court on 2.10.18. He also prays that status quo be maintained and he pays school fees for the child pending the hearing and determination of the Appeal filed on 26.4.17.

2. The grounds of the Application are that the Applicant has no access to the child but is willing to pay school fees for the child. The learned Magistrate Hon. L. K. Sindani by her order of 24.9.18 directed that the sum of Kshs. 10,000/= be deducted from the Applicant's salary to settle the decretal sum arrears and school fees for the child. He claims he is not evading his responsibility to pay school fees but has other responsibilities. He has another wife and 2 children who depend on him and they will be affected by the attachment of his salary. He works with [particulars withheld] and earns peanuts and has a loan with Barclays Bank and receives less than 10,000/=. The Respondent RA is using the Court to frustrate him.

3. In response, the Respondent avers that she filed Children's Case No. 241 of 2015 because the Applicant has never taken on his parental responsibility for the child. The Respondent has no stable income and has had to provide for the child with assistance from her brother. The attachment of the Applicant's salary resulted from a second notice to show cause filed to attach 1/3 of his salary. The Applicant has made no effort to provide for the child. He should not use the loans as an excuse for not providing for his child's upkeep. If the orders are granted the child will suffer and the Respondent will continue to strain to provide for the child. The Applicant only supported the child once when he was in nursery school. It is high time the Applicant played his role in providing for the child. She prayed that the Application be dismissed

4. Oral submissions were made before me by the Applicant who was unrepresented and the Respondent's counsel and both parties reiterated their respective positions as set out in their affidavits. This Court is enjoined by Article 53(2) of the Constitution of Kenya 2010 and Section 4 of the Children Act to give priority to the best interests of the child.

5. The Applicant seeks stay of execution of the order of 24.9.18 pending the hearing and determination of the Appeal that he filed. It is trite law that grant of stay of execution of an order pending appeal is discretionary. For the orders sought to be granted, the Applicant must satisfy the Court that he is deserving of the same. The Court notes that on 26.4.17, the Applicant filed a memorandum of appeal challenging the learned Magistrate's order of 19.4.17. The Court further notes that since that time the Applicant has not filed the record of Appeal nor has he taken any visible steps to move the appeal forward. It would appear that the Applicant failed to comply with the orders of the Court thus prompting the Respondent to proceed to execution by filing a notice to show cause why his salary should not be attached. The exhibited order of 24.9.18 indicates that it was issued pursuant to an application dated 7.6.18. The Respondent stated that this was the second notice to show cause application which the Applicant did not dispute. It is this order attaching his salary that has awoken the Applicant from slumber since he filed the Appeal on 26.4.17. He appears to have evaded his parental responsibility over the child and has further failed to comply with Court orders thus inviting the execution by attachment of his salary.

6. Parental responsibility is a shared responsibility. Both parents have a statutory and moral duty to provide for the needs of their child. As I consider the Application herein, I must remind myself that the best interest of the child are paramount. In Z M O v E I M [2013] eKLR Musyoka J, observed and I concur:

“...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. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable.”

7. As the paternity of the child herein is not in dispute, my finding is that suspending the order of 24.9.18 will militate against the best interest of the child herein. My further finding is that conduct of the Applicant makes him underserving of the orders sought and I decline to exercise my discretion in his favour.

8. In view of the foregoing, I dismiss the Application date 15.10.18. This being a matter concerning a child, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 1st February 2019

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicant**

.....**for the Respondent**

.....**Court Assistant**