



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CIVIL APPEAL NO. 116 OF 2015

EKC.....APPELLANT

VERSUS

I K (Minor) Suing thro' T S.....RESPONDENT

(An Appeal from the Ruling and Order of the Hon. T. Olando (Resident Magistrate) delivered on 8.10.2015 in Eldoret)

RULING

The applicant filed a Notice of Motion dated 6th November, 2015 seeking an order for stay of execution of the Ruling and Orders made in Eldoret Children's Case No.327 of 2012 pending the hearing and determination of the Appeal.

The Orders that were given in the Magistrate's Court on 8th October, 2015 were that the Defendant pay Kshs.33,500/= monthly, being interim maintenance for the minor Plaintiff to the Guardian ad litem/mother, payable on or before the 5th day of every month pending the hearing and determination of the main suit.

APPLICANT'S CASE

The Applicant submitted that the grounds for the application were set out in the supporting affidavit. The supporting affidavit by the Applicant's Advocates avers that the application dated 14th May, 2015 was mischievous as it sought Orders that had already been sought in the Plaint and that it sought to give the applicant visitation rights which they had never sought.

The Applicant's Advocate in his supporting affidavit contended that the Ruling was erroneous as it made findings that had not been pleaded or canvassed. He also faulted the dating of the Ruling as 7/10/2015 yet it was delivered on 8/10/2015. Further, he averred that the Trial Magistrate erred by granting Final Orders in an interlocutory application yet there were triable issues.

He maintained that if the stay of execution is not granted the appeal if it succeeds, would be rendered nugatory and that the applicant would suffer irreparable loss and damage. The Advocate deponed that the applicant risked being committed to civil jail for contempt in the absence of stay and the application had been brought without unreasonable delay. He, s committed to providing security and further deponed that the Respondent would not suffer any prejudice or damage that could not be compensated by costs. The security proposed was by way of a Bank Guarantee to the equivalent of 2 years of the sums ordered by the Trial Magistrate.

RESPONDENT'S CASE

The Respondent submitted on the issue of paternity. These are issues in the main suit and the current application is based on stay of execution of the orders of the Court, however, there are crucial issues brought out such as the refusal of the applicant to undergo a DNA test that may be of importance to the pending application.

The Respondent set out the benchmark for stay orders by citing Order 42 Rule 6(2) of the Civil Procedure Rules. She further highlighted that the affidavit in support of the application was deponed to by the Advocate and therefore the Applicant has not had an opportunity to demonstrate the benchmarks for issuance of stay orders.

ISSUES FOR DETERMINATION

- a) Whether the Applicant has met the pre-requisites of Order 42 Rules 6(2)
- b) Whether the Court erred in issuing 'Final Orders' in an interlocutory application.

Before we delve into the requirements for an order of stay, it is important to note that this being a children's matter the Courts have pronounced themselves on stay as follows; Musyoka Judge in **ZMO -vs- EIM (2013) eKLR** stated:-

“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.”

The difference between the cited case and the current case is that the paternity is disputed in the latter. It is peculiar that the applicant though claiming that the child is not his has refused to undergo a DNA test, which would have absolved him of all parental responsibility if his claim is proven. In my opinion, the applicant would have avoided orders for maintenance if he had undergone the DNA test and established he was not the father. That notwithstanding, we shall go into the threshold for issuance of stay orders.

Whether the applicant shall suffer substantial loss

In Stanley Karanja Wainaina -vs- Rido Anyangu Mutubwa (2016) eKLR the Court held the following:-

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an application expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge. In my view, the respondent was unable to discharge his burden.”

The burden of proof therefore falls on the respondent to prove that the decretal sum can be refunded in the event that the appeal succeeds. The respondent has not provided proof of the same.

Whether the Application has been made without unreasonable delay

The ruling was made on 8th October, 2015 and the application filed on 6th November, 2015. In my opinion the application was made without unreasonable delay.

Whether the Applicant has given security.

The applicant's Advocate, in his supporting affidavit has stated that the applicant is ready to provide any reasonable security. He submitted that the security could be the equivalent of two years of the sums ordered by the Trial Magistrate.

In my opinion the applicant has met what would be the threshold for stay in a civil matter. I however disagree with the applicant that these are final orders as the order says they are pending the determination of the main suit

The appeal is against the ruling, once the same is determined the suit in the Lower Court will continue. The orders issued were not final and the applicant should expedite the hearing of the appeal against the maintenance orders issued. This will allow the suit to be determined and the court to make a final order on the main suit. The Appeal does present triable issues especially considering that the issue of paternity had not been determined. I find no issue with the applicant's Advocate deponing the supporting affidavit.

In matters including a child or children, Section 4 (2) of the Children Act No. 8 of 2001 indicates that:-

“in all actions concerning children, whether undertaken by Republic or Private Social Welfare Institutions, Courts of Law, Administrative Authorities or Legislative Bodies, the best interest of the child shall be a primary consideration.”

This application involves a child and the order in issue is at the best interest of the said child. It cannot be reversed as it will adversely affect the survival and best interest of the said child.

On the ground the application is unmerited. It is dismissed. Costs be in the cause.

Dated and Delivered at Eldoret this 12th day of March, 2019.

S. M. GITHINJI

JUDGE