



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 23 OF 2019

APK.....APPELLANT

VERSUS

HVS.....RESPONDENT

RULING

Introduction

1. Pursuant to Article 53 of the Constitution of Kenya 2010, Sections 1A and 2A, Order 42 rule 6, Order 50 rule 6 of the Civil Procedure Act, Sections 23, 24, 76, 113 and 119 of the Children's Act 2001, the applicant moved the court through a notice of motion dated 8th March 2019 and filed on 11th March 2019 seeking orders that:-

(a) The honourable court be pleased to certify this application as one of the extreme urgency, dispense with service in the first instance and hear it on a priority basis.

(b) That temporary stay of execution of the orders issued by the children's court at Nairobi in Children's Case No. 100/2018 on 7th March 2019 specifically Order 2(i) (ii) (iii) and (iv) and all consequential orders be hereby granted pending the hearing and determination of this application.

(c) That stay of execution of the orders issued by the children's court at Nairobi in Children's Case No. 100/2018 on 7th March 2019 specifically order 2 (1) (ii) (iii) and (iv) and all consequential orders be hereby granted pending the hearing and determination of the appeal.

(d) That costs of this application be in the cause.

2. The application herein is premised upon grounds stated on the body of it and an affidavit in support sworn by the applicant on 8th March 2019. Contemporaneously filed with the said application is a memorandum of appeal of even date citing 14 grounds of appeal.

3. Upon being served, the respondent filed a replying affidavit deposed by the respondent on 14th March 2019 thus challenging the application. When the file was placed before the duty Judge, the same was certified urgent and directions to serve the same upon the respondent made. During interpartes hearing, counsel agreed to orally canvass the same. Upon close of the hearing, a ruling was reserved for 4th April 2019 and prayer (b) of the application allowed pending delivery of the ruling subject to the applicant paying 30,000/= by close of business that day.

4. Before I endeavour to determine the application, a brief background of this matter would suffice. Sometime on 5th April 2018, the respondent (mother to the subject) filed a suit being Children's Case No. 100/18 at Nairobi Children's Court against the appellant/applicant the biological father to the minor seeking custody of the baby and maintenance expenses against the father. Equally, the applicant/appellant moved to the same court and filed children case No. 111/18 seeking similar orders against the respondent (mother to the minor).

5. The two suits were however consolidated and proceeded under case No. 100/18. After hearing the application for interim custody and maintenance orders prayed for by the respondent (mother), the court made a number of orders to the effect that:

(1) The plaintiff/mother shall exercise actual custody, care and control of the child.

(2) The defendant/father shall have unlimited but reasonable access on terms the parties should agree.

(3) The defendant is directed to hand over the child to the mother together with the child's personal effects.

(4) The plaintiff/mother shall provide rent expenses.

(5) That the defendant/father shall provide for medical expenses.

(6) That the remaining expenses totaling to Kshs.28,000/= shall be shared with each parent/party contributing Kshs.14,000/= per month by the 5th of each month starting immediately.

(7) That the parties are directed to source for a counselor of their own and upon completion of counseling sessions they do file a report before court.

(8) That each party will bear its own costs of application and shall be at liberty to apply.

6. On 13th December 2018, the respondent commenced proceedings for notice to show cause why the appellant/applicant could not be committed to civil jail for failing to honour his obligations and the orders of the court as directed on 5th April 2018. Apparently, on 31st December 2018 the applicant/appellant also took out notice to show cause proceedings against the respondent. In the said application, the appellant/applicant sought review or variation orders against the court orders of 5th April 2018. Further, the applicant sought to have actual custody of the minor shared on 50%:50% basis or increased access to the baby to the applicant and grandparents at a neutral place.

7. After hearing both applications, the honourable magistrate delivered a ruling dated 7th March 2019 thereby ordering that:

(1) The defendant's application dated 31st December 2018 is dismissed with costs.

(2) (i) The defendant is granted leave to clear the arrears contained therein in two installments.

(ii) The 1st installment of Kshs.59,553/= will be due and owing on or before 15th March 2019.

(iii) The second installment will be due and owing on or before 31st March 2019.

(iv) Should the defendant fail to remit the installments as directed in (ii) and (iii) above, a warrant of arrest will issue without further reference to the court.

(3) That the Children Officer's report be filed within 14 days.

(4) That parties to fix the main suit for hearing in order for the court to conclusively determine the issues in controversy once and for all.

(5) That parties to file their affidavits of means before the main suit is heard.

(6) That mention to confirm filing of a Children Officer's report and fixing a hearing date for the main suit on 27th March 2019

(7) That mention notice to issue.

8. Aggrieved by this ruling, the appellant/applicant swiftly moved to this court seeking to stay execution of the orders by way of arrest or committal to civil jail.

Applicant's Case

9. According to the applicant, the amount of money (arrears) included in the respondent's notice to show cause to the tune of Kshs.119,107/= payable in two installments of Kshs.59,553/= each was irregular; that the notice to show cause was not served upon him in person; that the trial court failed to take into account Kshs.5,000/= which he had paid vide M-pesa on 12th February 2019; that the sum of Kshs.61,407/= factored in the notice to show cause as medical expenses was not proved or authenticated by way of receipts.

10. The applicant went further to claim that the court did not consider the fact that he lost his employment and that currently he is not earning any salary. He stated that the period given to clear the arrears was too short. He accused the trial court of bias terming the orders made as punitive.

11. During the hearing, Mr. Kivuva counsel for the appellant basically reiterated the averments contained in the affidavit in support of the application. He submitted that unless stay is allowed, the appeal will be rendered nugatory. He further stated that, the appellant had filed an affidavit of means to show that he had no job hence financially incapacitated.

Respondent's Case

12. In response to the application, the respondent basically relied on the averments contained in the replying affidavit. She argued that the appellant/applicant was applying a delaying tactic while refusing to honour the order of the court. She averred that the applicant is running away from responsibility by refusing to honour his obligations and that the application is an abuse of the court process. She however acknowledged payment of 5000/= which she claimed was not made in good faith.

13. Regarding medical expenses totaling Kshs.61,000/=, the respondent attached several receipts (annexures HV1 – 6) to prove the amount spent as medical consultancy expenses and pharmacy related expenditure.

14. During the hearing M/s Fazah counsel appearing for the respondent equally adopted averments contained in the replying affidavit thus urging the court to take into account the best interests of the child by dismissing the application.

Analysis and Determination

15. I have considered the application herein, affidavit in support, replying affidavit and oral submissions by both counsels. Issues that render for determination are:

(a) Whether the appellant will suffer substantial loss if stay is not granted.

(b) Whether the appeal will be rendered nugatory if the stay orders are not granted.

(c) Whether stay orders will be in the best interests of the baby.

16. The application herein is basically anchored upon Order 42 rule (6) (2) of the Civil Procedure Rules which provides that; no order for stay of execution shall be made unless the court is satisfied that substantial loss may result to the appellant unless the order is made and that the application has been made without undue delay; that security for due performance of the decree has been provided and lastly, the court can on its own motion for good reason if it deems it fit grant such an order.

17. From the wording of the above provision, the court has unfettered powers or discretion to grant such orders. Besides, the principles governing granting of stay orders have been settled through various case law pronouncements. In the case of **Reliance Bank Ltd (in liquidation) vs Norlake Investments Ltd Civil Appeal No. Nai 93/02 (UR)** it was held thus:

“Hitherto, this court has consistently maintained that for an application under rule 5 (2) (b) to succeed, the appellant, must satisfy the court on two matters namely:

(1) That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal.

(2) That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction”.

18. Is the plaintiff likely to suffer substantial loss if the application is not granted? According to the applicant, the period of two months given to settle the amount awarded which had accrued arrears to the tune of Kshs.119,000/= is too short and unreasonable given that he is not in employment as he lost his job. From 5th April 2018 when the orders were made, the applicant did not file any appeal or application challenging the same. He simply went to slumber land and waited to be woken up to pay the amount required.

19. Basically, he was not opposed to the amount awarded. He only complained against the short time given to pay the amount due and owing.

20. Whereas the appellant is entitled to file an appeal and have the same heard and determined, he is under obligation to satisfy the court that he has an arguable appeal. He must convince the court that he has at least even one issue upon which the court can or should pronounce its decision (**See Kenya Tea Growers Association and Another vs Kenya Planters and Agricultural Workers Union Civil Application Nai No. 72/2001**).

21. Equally, the right of appeal must be balanced against an equally weighty right, that of the plaintiff (respondent) to enjoy the fruits of the judgment delivered in her favour. There must be a just cause for depriving the plaintiff of that right (**See M/s Partreitz Maternity vs James Kahanya Kobia Civil Appeal No. 63 of 1997**).

22. In the instant case, the court must balance the best interests of child as underpinned under Article 53 (2) of the Constitution and Section 4(2) and (3) of the children’s Act. Although the application and appeal were filed without undue delay, the applicant has not prima facie proved that he has an arguable appeal and that he will suffer substantial loss if the stay orders are not granted.

23. The interest of the baby is paramount vis a vis individual interest. The fact that the appellant was given two installments within which to pay the arrears does not amount to bias or punitive action. He is the one to blame for delaying in paying this accumulating arrears. That was his own mistake to which nobody is responsible. It is important to bear in mind that the Kshs.14,000/= per month to maintain the baby is not punitive given the rate of inflation in Kenya today and generally the cost of living.

24. The claim that the appellant has since lost his job is a matter for review before the trial court or submission of evidence during the hearing of the main suit and not refusal to pay. Without delving into the merits of the appeal, I have not been sufficiently persuaded to grant the orders sought.

25. The best this court can do is to adjust the payment period to four months installments to clear the arrears. However, the monthly payment shall continue as usual payment of the arrears notwithstanding.

26. Accordingly, it is my finding that the application herein is not merited and the same is dismissed with orders that:

(a) The appellant clears the outstanding arrears less the amount paid in four installments commencing the 5th day of April 2019 and thereafter the 5th of each succeeding month till full payment.

(b) That the monthly payment shall continue as per the order of the trial court dated 7th March 2019.

(c) That the trial court shall fast track the hearing of the main suit to determine the suitable orders to make upon receiving evidence from both parties.

(d) That the appellant/applicant shall be at liberty to fast track the appeal herein by filing and serving proper record of appeal.

(e) Each party to bear own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL, 2019.

J.N. ONYIEGO

(JUDGE)