



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPLICATION NO. 84 OF 2019(OS)**

**IN THE MATTER OF AN APPLICATION UNDER CHILDREN ACT, 2001 OF THE LAWS OF KENYA**

**IN THE MATTER OF A.R.A.**

**BETWEEN**

**MOA .....APPELLANT**

**VERSUS**

**HAO.....RESPONDENT**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CHILDREN CASE NO. 1012 OF 2014**

**IN THE MATTER OF THE CHILDREN'S ACT, 2001 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE APPLICATION FOR CUSTODY, CARE, CONTROL AND MAINTENANCE OF A.R.A.**

**HAO (*suing as the mother and next friend of the minor*).....PLAINTIFF**

**VERSUS**

**MOA.....RESPONDENT**

**RULING**

1. There is before the Children Court at Nairobi a dispute filed by the respondent HAO against the applicant MOA in 2014 relating to the custody, education and maintenance of their child ARA. On 30<sup>th</sup> June 2016 both parents were ordered to have legal custody; the applicant to have physical custody during school days; the respondent to have custody during weekends; custody to be shared during school holidays; and the applicant to pay Ksh.30,000/= to the respondent during school holiday and Kshs.10,000/= during weekends for the child's upkeep when the child is with the respondent.

2. On the basis that the applicant had not paid the ordered money, a notice to show cause dated 22<sup>nd</sup> October 2018 was filed to attach his salary to recover Kshs.681,700/=. A ruling was delivered on 20<sup>th</sup> December 2018, and thereafter an execution order was issued served on the applicant's employer on 3<sup>rd</sup> July 2019 to attach his salary to recover the amount. In the meantime, the applicant had on 12<sup>th</sup> September 2018 filed an application to review the orders issued on June 2016. The application has apparently not been heard.

3. In this notice of motion filed on 25<sup>th</sup> July 2019, the applicant seeks leave to file an appeal out of time against the rulings delivered on 20<sup>th</sup> December 2018 and 4<sup>th</sup> June 2019, respectively, by the lower court. There is an annexed Memorandum of Appeal which he seeks to be deemed to be properly filed. In the interim, the applicant asks that the execution of the orders of attachment be stayed.

4. In his intended appeal, the applicant will be saying that the lower court did not take into consideration that parental responsibility is shared between the two and that the respondent has income from the rental of the matrimonial home that she can apply towards the child's maintenance. There are other complaints.

5. It is my considered view that the applicant's complaint is in regard to the ruling delivered on 20<sup>th</sup> June 2016 that ordered him to pay maintenance which has since accumulated to the huge sum that was the subject of the notice to show cause and, later, the attachment of his salary. He is not saying that he made any payment towards what was ordered on 30<sup>th</sup> June 2016. If he did not pay, and there was no review ordered or there was no successful challenge to the orders on appeal, execution was bound to follow. This is what has happened.

6. I note that in the affidavit that the applicant filed in the trial court on 12<sup>th</sup> September 2018 he acknowledged that he was aware of the orders of 30<sup>th</sup> June 2016. He said he had been trying to comply with them, but that the respondent was the one in default.

7. If the dispute is over the total amount due, it is for the trial court to deal with it, taking into account whatever the appellant has so far paid.

8. I also consider that maintenance, education and upkeep of the child herein is a continuing obligation. If I order stay, the best interests of the child under **section 4(2) of the Children Act (Cap 141)** and **Article 53(2)** of the Constitution will be compromised. Secondly, stay of execution under **Order 42 rule 6(1)** of the **Civil Procedure Rules** is usually sought where there is a pending appeal. This is done to enable the appeal to be heard and determined when execution of the decree or order is in abeyance. In the instant case, no appeal has been filed.

9. This application was filed on 25<sup>th</sup> July 2019. It took nearly eight months for the applicant to seek to appeal the ruling on notice to show cause that was delivered on 20<sup>th</sup> December 2018. The service of the attachment order upon his employer on 3<sup>rd</sup> July 2019 was a furtherance of the orders made on 20<sup>th</sup> December 2018. The applicant states that he was not aware of the ruling of 20<sup>th</sup> December 2018 until it was served on his employer on 3<sup>rd</sup> July 2019. He stated that the application had been heard on 30<sup>th</sup> October 2018 and he was informed a ruling would be on 7<sup>th</sup> December 2018. Come that day, the ruling was not delivered. It was subsequently delivered on 20<sup>th</sup> December 2018 without notice to him.

10. Given those undisputed facts, I find there has been reasonable explanation why the applicant could not appeal the decision of 20<sup>th</sup> December 2018 within 30 days. I find that he has demonstrated a good and sufficient cause for not filing the appeal on time (**section 75G of the Civil Procedure Act; Samwel Mwaura Muthumbi –v- Josephine Wanjiru Mungi & Another [2018]eKLR**). I bear in mind that the power to grant leave to appeal out of time is discretionary (**Mwangi –v- Kenya Airways Ltd [2003]KLR 486**). The court will mind the importance of compliance with timelines under the law, but also consider the circumstances that led to the delay in filing the appeal and the degree of prejudice that either side will suffer if the application is allowed or not allowed.

11. Consequently, I allow the applicant leave of 7 days to file and serve his appeal. He has been indulged. He will pay the costs of the application.

**DATED and DELIVERED at NAIROBI this 18<sup>TH</sup> NOVEMBER 2019.**

**A.O. MUCHELULE**

**JUDGE**