REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 15 OF 2015

C C D.....APPELLANT/RESPONDENT

VERSUS

E N B.....RESPONDENT/APPLICANT

AND

P K N (suing as next friend of P N, L L, E N)

V D

B U.....INTERESTED PARTIES

RULING

1. By an application dated 12.4.16, the Respondent/Applicant seeks the following:

a) Spent

b) THAT the Honourable court be pleased to issue an order to set aside, review, vary and or discharge the orders given on 1st April, 2016 by Honourable Chepkwony Judge in the best interest of the minor children and to reinstate the orders given on 23rd February, 2016 by Honourable Thande Judge and the orders given on 28th May, 2015 by Honourable Kamau, J. Kamau (Resident Magistrate) pending the hearing and determination of this application and suit herein.

c) THAT the Honourable court be pleased to issue an order granting leave to the Applicant to institute to institute contempt proceedings against CCD and NMJ pending the hearing and determination of this application and suit herein.

d) THAT the Honourable court be pleased to issue an order directing the branch manager Co-operative Jomo Kenyatta Avenue branch (Mombasa)to release the financial A/C number [Partculars withheld] in the names of C C D and E NY B.

e) That cost of the application be borne by the Appellant/Respondent.

2. It is the Respondent/Applicant's case that Hon. Thande, J. by her order of 28.2.16 declined to stay the execution of the maintenance orders issued on 28.5.15 by Hon. Kamau, in Children's Case No. 65 of 2014. The learned Magistrate had made a finding that both the Respondent/Applicant and the Appellant/Respondent had parental responsibility over the 2 children of the Respondent/Applicant and directed the Appellant/Respondent to pay school fees for the 2 children. However on 1.4.16, Hon. Chepkwony, J. made orders staying execution of the said orders pursuant to an application dated 24.3.16 by the Interested Parties. According to the Respondent/Applicant, the Hon. Chepkwony, J, misdirected herself on the law on the wrong presumption that the attachment of the Appellant/Respondent's salary was made under Section 25 of the Children's Act. Further the Court had already considered the issue of stay and made a determination which fact was not disclosed to the Court by the Appellant/Respondent in the application of 24.3.16 or by the intended Interested Party. The Respondent/Applicant contends that the Appellant/Respondent with his employer, NMJ though served have through collusion failed to comply with the order to attach his salary. The education and welfare of the 2 children continues to be unjustly compromised with imminent danger of irreparable damage to their wellbeing.

3. According to the Respondent/Applicant the Appellant/Respondent had failed to comply with an order of 28.5.15 directing him to pay school fees for the 2 children whereupon the Respondent/Applicant filed a notice to show cause dated 15.1.16. The Appellant/Respondent was given time to make good the default and when he failed to do so, the Court by its order of 14.3.16 attached ? of his salary. The order was served on the Appellant/Respondent's employer. The Appellant/Respondent filed the Appeal herein together with an application dated 24.6.15 seeking stay of the order which was declined by this Court by its ruling of 23. 2.16. On 1.4.16, Chepkwony, J stayed the orders of the lower Court of 28.5.15. To the Applicant, these orders contradict the orders of Thande, J. of 23.2.16 and were made without considering the best interests of the minor children. The Respondent/Applicant further contends that the Application is an abuse of the Court process as the interests of the Interested Parties can be represented by the Appellant/Respondent's.

4. The Appellant/Respondent in his Replying Affidavit sworn on 10.5.16, avers that he is married to P K N with whom he has 5 children (the Interested Parties) who are all in school and dependent on him. His said wife suffers from a chronic ailment and takes care of their 1st born daughter who is mentally and physically impaired. He denied that he has blatantly failed to comply with the order to attach his salary. He asserts that he is struggling to comply cater for his own family's basic needs as the sole bread winner. According to him, the Respondent/Applicant is at liberty to seek assistance from the respective fathers of her children. He filed the Appeal herein which has been pending due to unavailability of the proceedings of the lower Court. The Appellant/Respondent prays that the Application be dismissed.

5. In her Replying Affidavit, P K N, the Interested Party, on behalf of the Interested Parties avers that the Interested Parties got to know of the proceedings, judgment and attachment in March 2016. Both Appellant/Respondent and Respondent/Applicant have kept their illicit affair from the knowledge of the Interested Parties and they both failed to disclose o the Court that the Appellant/Respondent had 5 children whose interests ought to have been considered. In view of the illicit behavior between the parties herein, the Appellant/Respondent cannot represent the interests of the Interested Parties. According to the Interested Parties, the interests of the 2 minor children are not superior to those of the biological children of the Appellant/Respondent. According to the Interested Parties, no loco parentis relationship exists between the Appellant/Respondent and the 2 minor children. Given that this Court must bear in mind the best interests of the child, the Interested Parties have *locus standi* herein notwithstanding that they were not parties in the proceedings in the lower Court. The Interested Parties urged that the application be dismissed.

6. In their submissions, the Respondent/Applicant and the Appellant/Respondent reiterated their respective positions in the matter. The Respondent/Applicant abandoned prayer c). I have given due consideration to the submissions and the following are in my view the issues that fall for determination:

a) Should the Order of 1.4.16 be reviewed, varied or set aside

b) Whether Chepkwony, J. misdirected herself in issuing the stay orders of 1.4.16

c) Whether or not the intended parties stand to suffer substantial loss;

d) Whether prayer d) should be allowed;

e) Who should bear the costs.

Should the Order of 1.4.16 be reviewed, varied or set aside

7. The jurisdiction of the Court for review of orders is provided for in Order 45 Rule 1 (1) of the Civil Procedure Rules provides:

"1. Application for review of decree or order

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

8. The basis for an application for review, variation or setting aside of an order may be the recovery of new and important matters or evidence which after due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. An application may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The Respondent/Applicant has not placed any new and important matter or evidence before this Court for consideration. She has not demonstrated that there is an error apparent on the face of the record and no other sufficient reason has been placed before the Court to warrant the review, variation or setting aside the order of 1.4.16.

Whether Hon. Chepkwony, J. misdirected herself in issuing the stay orders of 1.4.16

9. It was submitted for the Respondent/Applicant that Hon. Chepkwony, J. misdirected herself on the law on the wrong presumption that the attachment of the Appellant/Respondent's salary was made under Section 25 of the Children Act which was. She argued that the lower Court found the Appellant/Respondent to be in loco parentis to the 2 children and to have acquired parental responsibility under Section 94 of the Children Act. Further the stay was granted without the Appellant/Respondent being required to furnish security contrary to the provisions of

Order 42 Rule 6 of the Civil Procedure Rules.

10. An order of stay of execution is discretional. The learned Judge being seized of the new facts no doubt considered the above principle with regard to the 5 children of the Appellant/Respondent and exercised her discretion in granting stay. I am not persuaded that the learned Judge misdirected herself in exercising her discretion to grant stay. Accordingly I decline to interfere with the exercise of her discretion. I am duly guided in this regard by the injunction in Mbogo v Shah (1968) EA 93, 96 where Sir Charles Newbold observed:

> ***"Trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifested from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

11. Further, this Court cannot purport to fault the decision of a Court of concurrent jurisdiction. Nay, this would be arrogating to myself jurisdiction that I do not possess. The redress of the Respondent/Applicant being aggrieved by the decision on Hon. Chepkwony, J. lay in an appeal to the Court of Appeal and not the setting aside by this Court. I am fortified by the decision of the holding in the case of Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & another v City Council of Nairobi [2015] eKLR where the Court of Appeal had occasion to consider issue of the setting aside an order of a Court of concurrent jurisdiction. The case of Stephen Mwaura Njuguna vs Douglas Kamau Ngotho Civil Appeal No. 90 of 2005 consolidated with Civil Appeal No. 247 of 2007 was cited, where the Court held:

> ***"the learned Judge had no jurisdiction to determine a matter that was decided by a fellow Judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi J, a Judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court but not by a Judge of the High Court as the appellant sought."***

The Court of Appeal in the Joseph Nditangu Waweru case (supra) had this to say:

> ***"We reitereate (sic) this Court's findings in the Stephen Mwaura Njuguna case (supra) that a Judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow Judge of concurrent jurisdiction. If the respondent was aggrieved by the ruling and preliminary decree, its recourse was in appealing against the same….The learned Judge was in error in assuming jurisdiction where she had none and setting aside a proper, regular judgment of a judge of concurrent jurisdiction where such jurisdiction was non-existent"***

Whether or not the intended parties stand to suffer substantial loss

12. In the Application dated 24.3.16 the Interested Parties brought to the attention of the Court the existence of the Interested Parties being the 5 children of the Appellant/Respondent and his wife the 1st Interested Party. They also brought to the attention of the Court the needs of the 5 children as well as their dependence on the Appellant/Respondent and their needs. These facts were not within the knowledge of the Court when the Ruling of 23.2.16 was delivered. When considering this matter, the Court must not close its eyes to the best interests of the biological children of the Appellant/Respondent who also depend on him. The fact that the Appellant/Respondent had a clandestine and illicit relationship with the Respondent/Applicant and placed himself in a situation where he was directed by the Children's Court to pay school fees for the 2 children does not absolve him from the responsibility of maintaining his own biological children.

13. The guiding principle in all matters relating to children is that the best interests of the child is the first and paramount consideration. This principle is set out in article 53(2) of the Constitution of Kenya 2010 as follows: Article 53(2) of the Constitution provides:

> ***"(2) A child's best interests are of paramount importance in every matter concerning the child."***

The principle underpins and reinforces the provisions of section 4(2) of the Children Act which provides:

> ***"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.***

14. In the present case, this Court must balance the interests of the Respondent/Applicant's 2 children as well as the biological children of the Appellant/Respondent with the 1st Interested Party. To lift the stay order granted on 1.4.16 would impact result in the Appellant/Respondent paying school fees for the Respondent/Applicant's 2 children the direct consequence of which would in my view be substantial loss to the Appellant/Respondent biological children who depend on him. In the circumstance, I find and hold that the justice of the case lies in the expedited hearing of the Appeal herein.

Whether prayer d) should be allowed

15. Prayer d) seeks an order directing the branch manager Co-operative Jomo Kenyatta Avenue branch (Mombasa) to release the financial records of A/C number [Particulars withheld] in the names of the Respondent/Applicant and the Appellant/Respondent. This indeed is a curious prayer. Where a bank account is held jointly, it follows that the joint account holders have access to the same. If indeed the account is in the names of both the Respondent/Applicant and the Appellant/Respondent, why would the Court's intervention be necessary? It is also not clear to the Court what bearing this bank account has on the present matter. Further no document has been produced to show that the account is indeed in the name of the parties. In the circumstances, I am not persuaded that this is a prayer that should be granted.

Who should bear the costs

16. In matters such as the present case, parties initially are in good terms. However when the relationship falls apart, they become hostile to one another. This Court does not wish to further antagonize the parties hereto by condemning either to bear all the costs.

17. The upshot of this Ruling is that the Application dated 12.4.16 lacks merit and the same is hereby dismissed. Each party to bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 6th day of April 2018

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M. THANDE

JUDGE

In the presence of: -

.....for the Respondent/Applicant

.....for the Appellant/Respondent

.....for the Interested Parties

.....Court Assistant