



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 34 OF 2017

F K M.....APPELLANT/APPLICANT

VERSUS

N K M.....RESPONDENT

RULING

1. By a Notice of Motion dated 14.11.17 and filed on even date under Certificate of Urgency, the Appellant/Applicant seeks the following:

1. spent.

2. spent.

3. THAT the court do stay any further proceedings and or execution of proceedings in CHILDREN CASE NO. 25 OF 2014, F K M =VERSES= N K M.

4. THAT the Order of Committal to civil jail be set aside and the court reviews the maintenance order.

5. THAT, the cost of this Application be provided for.

2. There is on record the Appellant/Applicant's Memorandum of Appeal dated 14.11.17 and filed on even date. The Appeal is against the committal to civil jail of the Appellant/Applicant which has now been overtaken by events.

3. The Court called for the lower Court file to better understand the matter herein. The brief background of this case as gleaned from the record is that the parties herein cohabited for a period of about 2 years. In the duration of their cohabitation they were blessed with a baby girl born on 15.11.12. The relationship between the parties however fell apart and they separated. The Appellant/Applicant filed suit in the Children's Court, (the Children's Case) seeking joint custody of the child and unlimited access. He also stated that he was willing to pay monthly maintenance of the child of Kshs. 15,000/= and sought an order to that effect. By an order of 7.4.14, the lower Court granted joint legal custody to the parties with actual physical custody with the Respondent. The Appellant/Applicant was to have unlimited access every alternate weekend from 2pm to 5pm on Saturday and Sunday. The Appellant/Applicant was directed to pay monthly maintenance of Kshs. 15,000/= by the 5th day of each month.

4. It would appear that default on the part of the Appellant/Applicant began as early as October 2014 as the Respondent filed a notice to show cause dated 17.10.14. In her ruling, Hon. Koech, directed that the Appellant/Applicant clears the decretal amount within 3 months and in default his salary would be attached. It would appear that there was further default because 2 years later, another notice to show cause (NTSC) was filed by the Respondent dated 29.11.16. The fate of this NTSC is not clear. The proceedings in the lower Court of 14.2.17, show that the Appellant/Applicant was paying Kshs. 10,000/= instead of the amount ordered of Kshs. 15,000/= and that since November 2016, he had paid nothing. In his defence, the Appellant/Applicant claimed that he was no longer working and was unable to pay the amount due. On 13.4.17, the Appellant/Applicant was given a last opportunity to comply with the Court order failing which the "N.T.S.C dated 23.1.17 to be allowed." The Appellant/Applicant was granted 7 days to respond to the NTSC. The hearing of the NTSC took place on 13.4.17 and ruling was reserved for 12.6.17. In the ruling, the learned Magistrate noted that the Appellant/Applicant left employment knowing very well that he had the obligation to comply with the Court order. The Appellant/Applicant was given 2 months to pay the arrears amounting to Kshs. 113,000/= and in default he would be committed to civil jail. On 7.11.17, the Appellant/Applicant having not paid the arrears was committed to civil jail for a period of 14 days. The foregoing in a nutshell are the circumstances leading to the matter herein.

5. The present Application is premised on the grounds set out therein and in the Affidavit sworn by the Appellant/Applicant on 14.11.17. The Appellant/Applicant has been unemployed for a year and has made effort to pay school fees and medical cover for the child. On several occasions, the Appellant/Applicant did explain to the lower Court of the fact of his unemployment. In particular, on 23.2.17, he asked for a

review of the order based on his changed circumstances but the Court did not address itself to the issue. His financial situation is so bad that his landlord has levied distress against him for nonpayment of rent. He is housed by his brother. It was his view that the Respondent was being vindictive and that the interests of the child could not be served by his incarceration which only makes matters worse. He averred that the Respondent has 2 other children whose fathers are also supporting her with rent and food. The overriding objective in children's matters is the best interests of the child and not punishing a father. He prayed that the orders sought be granted.

6. In her Replying Affidavit sworn on 17.11.17, the Respondent avers that the Appellant/Applicant was committed to civil jail after rudely failing to pay the maintenance arrears of Kshs. 314,500/= for a period of over 3 years. According to the Respondent, the Appellant/Applicant voluntarily resigned from his previous employment. It is not true that the Appellant/Applicant is unemployed. He has worked for several institutions including Volcanny Holdings in Cannon Towers and operates an m-pesa outlet as well as a *tuk tuk* which enable him to pay the child's school fees. According to the Respondent, the Appellant/Applicant lives in a house where he pays Kshs. 20,500/= per month and is not in arrears. The exhibited distress for rent notice is a fabrication. He continues to enjoy life with his wife while the Respondent struggles with their child. She further claims that the Appellant/Applicant is able to pay a lawyer when he was committed to jail but refuses to obey Court orders to pay the arrears he owes. According to the Respondent, the Appellant/Applicant is just misusing the Court by filing applications to enable him avoid complying with the orders of the Children's Court. She urged the Court to dismiss the Application.

7. The present application was filed while the Appellant/Applicant was in civil jail and was subsequently released a day before the expiry of the 14 days. The Court did direct that a social inquiry be undertaken by the Director of Children's Services to establish the circumstances of the child and the ability or otherwise of the Appellant/Applicant to pay the upkeep for the child.

8. At the hearing, it was submitted that the Appellant/Applicant is not running away from his responsibilities but has been paying school fees for the child for the last 2 years and has been making periodic payments to the Respondent. He however lost his job in 2016. The Appellant/Applicant argued that had the lower Court made an inquiry as required under Section 101(4) of the Act the enforcement orders would not have been made. The Appellant/Applicant contends that the social inquiry report ordered by this Court shows that Respondent has 2 other children supported by their fathers and lives in a 2 bedroomed house and is thus not destitute. In his view, this is a good case for variation of the order of the Children's Court and prayed that the same be varied.

9. The Respondent submitted that the order for monthly maintenance of Kshs. 15,000/= was given when the child was only 2 years old. As the child grows, the needs increase. The Appellant/Applicant needs to respect Court orders. The Respondent stated that she works very hard and is struggling alone with the child and does both her part and the Appellant/Applicant's part of maintaining the child.

I have considered the Application and the rival submissions together with the social inquiry report filed by the Likoni Sub-county Children's Officer. As I consider this matter I am required to give regard to the best interests of the child as required by Article 53(2) of the Constitution which sets out the principle of the best interest of the child being of paramount consideration as follows:

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

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."

10. The Appellant/Applicant has prayed for a stay of proceedings in the lower Court. The law does not provide for application for stay of proceedings. However Order 42 rule 6 (1) does state that no appeal or second appeal shall operate as a stay of execution or proceedings. The learned authors of Halsbury's Laws of England, 4th Edn, Vol 37 pages 330-332 while discussing the court's general practice with regard to stay of proceedings stated:

"The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue."

In the present case, nothing has been laid before the Court to persuade the Court that the proceedings in Children's Case No. 25 of 2014 beyond reasonable doubt should not be allowed to continue. Besides the Court is enjoined by Section 76(2) of the Children Act to have regard to the general principle that any delay in determining the matter in the Children's Court is likely to be prejudicial to the welfare of the child. I accordingly decline to stay proceedings in the lower Court.

11. The Appellant/Applicant has prayed for a review of the maintenance order. The Court did order that a social inquiry be done and a report was duly filed. The Children Act empowers the Court to review a maintenance order made under Section 98 of the Act. Section 99 provides:

"The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit."

12. The Appellant/Applicant claims that his circumstances have changed as he has lost his job. The record shows that the maintenance order was given on 7.4.14. The Court notes that contrary to what the Appellant/Applicant averred, he did not lose his job but rather he wilfully resigned by his letter to his employer dated 1.12.16. This information is contained in the letter from his employer Multiple [Particulars withheld] Ltd exhibited by Appellant/Applicant. The Appellant/Applicant has not explained why the maintenance order up to the date of his resignation was not complied with thus compelling the Respondent to commence execution proceedings.

13. The Respondent on the other hand claims that the Appellant/Applicant has worked in several institutions and operates an m-pesa outlet as well as a *tuk tuk*. However, no evidence was produce to confirm this allegation. The social inquiry report did not also yield much in this regard. The report recommended that an investigation be done to establish whether indeed the Appellant/Applicant has other sources of income.

14. Article 53 of the Constitution provides that every child is entitled to parental care and protection of both parents. Parental care is an equal responsibility of both parents whether they are married to each other or not.

“53. (1) Every child has the right—

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;”

15. The child herein requires *inter alia*, adequate diet, shelter, clothing, medical care, education and guidance. These needs are to be provided by both parents who are the parties herein. Effort must be made by both parents to provide for the child. Having taken all factors into consideration, I do review the maintenance order on terms that the monthly maintenance payable by the Appellant/Applicant is hereby reduced to Kshs. 7,500/= with effect from the date hereof. Payment shall be made to the Respondent on or before the 5th day of each month. For the avoidance of doubt, the arrears due and owing to the Respondent of Kshs. 113,000/= remain recoverable from the Appellant/Applicant. Each party shall bear own costs.

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

M. THANDE

JUDGE

In the presence of: -

.....**for the Appellant/Applicant**

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

.....**Court Assistant**