



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 8 OF 2018

A F D.....APPELLANT

VERSUS

F H.....RESPONDENT

RULING

1. Before me is a Notice of Motion dated 28th March, 2018 filed by A F D the Appellant under section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) and Order 42 Rule 4 of the Civil Procedure Rules. It seeks the following orders:-

(1) That the Honourable Court be pleased to certify this matter urgent and service thereof be dispensed with and the same be heard exparte.

(2) The Honourable Court be pleased to grant an order of staying execution of the decree of the lower court subject of the intended appeal pending hearing and determination of the appeal.

(3) Costs be provided for.

2. The application has grounds on the face of the Notice of Motion and is supported by an affidavit of the Appellant sworn on 28th March, 2018. In brief the grounds of the application are that the appellant is dissatisfied with the judgement delivered by the Children's Court at Garissa on 22nd March, 2018 as there was no fairness in the orders made by the trial court.

3. This court certified the application as urgent and ordered that it be heard interparties after service. Prayer 1 of the application has thus been dispensed with.

4. On the hearing date, both the appellant and the respondent attended court. The appellant said that he had eight (8) children, another wife and took care of his mother. He stated that he owned a butchery and that the respondent who was his former wife had in her custody two daughters from him, but that he lived with the son.

5. In response, the respondent stated that the orders of the trial court were justified as the appellant had many sources of finance including three (3) butcheries in town. She acknowledged that the appellant had another wife with seven (7) children. She further added that she lived with two (2) of the three (3) children which they bore with the appellant who lived with the male child.

6. This is an application for stay of an execution of judgement or order of the court pending appeal. It is thus governed by the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules which states as follows:-

“6 (2) No order of stay of execution shall be made under subrule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

7. The parties herein were the husband and wife and they have children. The appellant is married to another woman with seven (7) children. He has three children with the respondent and is living with one of those children and the other two children are living with the respondent. The respondent is now married to another man.

8. From the record of the trial court, the appellant had agreed to pay the respondent Kshs.5,000/= per month for the upkeep of the children but the learned magistrate enhanced that amount to Kshs.10,000/= per month.

9. Though I have today seen a communication dated 3rd May 2018 signed by Benjamin Kinyua, the Garissa Sub-County Children Officer, on I A F a ten years old daughter of the appellant and the respondent, who is now said to have shifted to the home of the appellant to live there, I will not consider it because the other side (respondent) is not a party to the report.

10. Having said so, this application for stay of execution was filed on 28th March 2018 and judgement was on 22nd March 2018. In my view the application was brought without unreasonable delay.

11. With regard to substantial loss to be suffered by the appellant if stay is not granted, the learned magistrate doubled the monthly figure from Kshs.5,000/= to Kshs.10,000/= per month. In my view, since the figure is double the previous amount and is challenged, I will stay the execution of payment of Kshs.10,000/= as ordered by the trial court provided that the appellant pay to the respondent Kshs.5,000/= per month as earlier agreed including any arrears currently outstanding by 15th of this month (May) and thereafter on every 5th day of the month till determination of the appeal filed herein.

12. With regard to security, since the appellant is required to pay the previous agreed amount Kshs.5,000/= per month to the respondent for the upkeep of the children, I find no reason to require him to provide security.

13. I thus allow the application and stay the order of the magistrate for payment of Kshs.10,000/= per month and order that the appellant will pay the respondent Kshs.5,000/= per month for the upkeep of the children and all arrears due by 15th of this month (May) and thereafter to pay the respondent Kshs.5,000/= every 5th of the succeeding month until determination of the appeal. If the appellant does not pay all arrears by 15th May, 2018 to the respondent, the stay herein granted will automatically lapse.

14. The costs of this application will follow the decision in the appeal.

Dated, Signed and Delivered at Garissa this 8th May, 2018.

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George Dulu

JUDGE