



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL 9 OF 2018**

**L A O.....APPELLANT/RESPONDENT**

**VERSUS**

**O K ARAP M.....RESPONDENT/APPLICANT**

**RULING**

1. By an application dated 15.8.18, the Respondent/Applicant seeks in the main, stay of execution of the *ex parte* orders of this Court of 26.3.18 staying the judgment of Tononoka Children's Court Case No. 233 of 2013 of 11.6.13 pending the hearing and determination of the Appeal. He also seeks variation review or setting aside of the said order. He further seeks the nearest available hearing date for the application dated 16.3.18 as the fixed hearing of 19.12.18 is too far.

2. The background of this case is that the L A O (the **Appellant/Respondent**) and O K arap M (the **Respondent/Applicant**) are the parents of a child known as R K (the child). The child who was born on 5.10.09 is the subject of the proceedings herein. The **Appellant/Respondent** Pursuant to suit filed in Tononoka Children's Court Case No. 233 of 2013 against the **Respondent/Applicant** seeking a declaration that the **Respondent/Applicant has parental responsibility over the child, custody of the child, monthly maintenance of Kshs. 127,167/= and an attachment of salary order for the same as well as costs. By an order of 8.10.14, the Respondent/Applicant's employer was directed to deposit 1/3 of his salary in the Appellant/Respondent's account each month. The sum was Kshs. 52,639/=.** By its judgment (the Judgment) delivered on 24.1.08 however, the lower Court set the monthly maintenance at Kshs. 10,000/=. This provoked the **Appellant/Respondent to file the Appeal herein.**

**3. Following the Appellant/Respondent's application dated 16.3.18 this Court on 31.3.18 did grant a temporary stay of execution of the Judgment. It is this order that the Respondent/Applicant seeks to have stayed, varied, reviewed or set aside. The Respondent/Applicant prays that *status quo ante* be restored.**

4. It is the Respondent/Applicant's case that the Appellant/Respondent obtained *ex parte* interim orders staying the Judgment which in effect reinstated the order attaching his salary in the sum of Kshs. **52,639/= being** monthly maintenance for the child. **The Appellant/Respondent** obtained the orders by misleading the Court that the child suffers from a terminal illness and needs the money for treatment. The child is adequately covered in the Respondent/Applicant's medical cover of Kshs. 3,000,000/= provided by his employer. The orders attaching his salary were issued without him being given an opportunity to be heard. **The Respondent/Applicant** contends that he is a father of 3 other children who solely depend on him. The orders if not stayed will be against the interest of the other children as his salary is not sufficient. He prayed that the orders be varied so that he pays monthly maintenance of Kshs. 10,000/= or be set aside entirely.

5. The application is opposed. The Appellant/Respondent avers that the *ex parte* orders were issued in the best interest of the child. The Respondent/Applicant has failed to comply with maintenance orders thereby causing the child to suffer. She further alleges that the Respondent/Applicant's employer failed to comply with the salary attachment orders and a notice to show cause was filed to enforce the same. She alleges that the Respondent/Applicant removed the child from his medical cover causing the Appellant/Respondent to pay in cash for consultation and treatment for the child. She denies that misleading the Court that the child suffers from a terminal illness. She works for her elderly father and earns Kshs. 40,000/=. In sum she states that the Respondent/Applicant has neglected his parental responsibility over the child which the Appellant/Respondent is bearing single handedly. The Respondent/Applicant has come to Court with unclean hands. She contends that the Respondent/Applicant has not made out a case to warrant the grant of the orders sought and granting the orders will not be in the best interest of the child.

6. I have considered the Application and the submissions made before me by the parties' respective counsel. The Respondent/Applicant seeks a change of hearing date for the application dated 16.3.18 from 19.12.18 to the nearest available date. This date was fixed in Court in the presence of counsel for both parties. There was no protestation from either party concerning the date. The availability of dates is governed by the Court's diary. The Court is unable to grant an earlier date due to unavailability. Consequently the Court retains 19.12.18 as the date for hearing of the Application dated 16.3.18.

7. The prayers sought herein are discretionary and they concern a child. I am mindful that the Constitution of Kenya 2010 and the Children Act oblige the Court to give paramount importance to the best interest of the child. Article 53(2) of the Constitution provides:

***“(2) A child’s best interests are of paramount importance in every matter concerning the child.”***

The foregoing 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.”***

8. A party seeking stay of execution as well as variation, review or setting aside the orders of a Court affecting a child must satisfy the Court that the orders sought are in the best interests of the child. The paternity of the child is not disputed. It is also not disputed that the child is living with a medical condition that requires constant medical. The orders sought would result in the reduction of the maintenance amount which in my view would militate against the best interest of the child.

9. The Appellant/Respondent has filed an appeal herein which is yet to be heard. The amount of maintenance for the child and financial capacity of the parties are matters for consideration and determination in the said Appeal. To delve into the rival arguments of the parties herein in respect of the said matters and to determine which of them have merit will in my view, preempt the outcome of the Appeal pending before this Court. Reducing the maintenance amount before the Appeal is heard and determined cannot be in the best interests of the child. This issue will best be considered at the hearing of the Appeal. In this regard, I am persuaded by Musyoka, J. in the Z M O v E I M case (supra) where he observed:

***“The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children’s Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”***

10. Section 76 of the Children Act sets out the general principles with regard to proceedings concerning children. Subsection (2) provides:

***In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.***

11. Having taken all factors into consideration I draw the conclusion that the grant of the orders sought herein would not be in the best interests of the child. Accordingly I dismiss the Application dated 15.8.18 but with no order as to costs. In keeping with the foregoing general principle I find that any further delay in this matter will be prejudicial to the welfare of the child. I therefore direct that the Appeal herein be fixed for hearing on priority basis, for the expedited hearing and disposal of the same.

**DATED, SIGNED and DELIVERED in MOMBASA this 2<sup>nd</sup> November 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**