



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 20 OF 2017

SK.....APPELLANT

-VERSUS-

CP.....RESPONDENT

JUDGMENT

The Notice of Motion application dated 19th September 2018 and which is expressed to be brought under order 42 rule 6(1) and 2(1) (a) (b) (c) rule 4, order 9 rule 9 of the Civil Procedure Rules S 3A of the Civil Procedure Act seeks the following orders.

i. Spent

ii. Spent

iii. That this court do make an order that the applicant to appeal out of time against the whole judgment and decree delivered on 7th July 2018.

iv. That there be a temporary stay of execution of the judgment delivered on 3/7/2018 and decree of this honourable court pending hearing and determination of the application interpartes.

v. That there be a stay of execution of the judgment and decree of this court pending hearing and determination of the plaintiff/applicant's appeal in the court of appeal against the whole judgment delivered by this court on 30/7/2018.

The grounds are

(a) That failure to appeal in time was due to unavoidable circumstances as the applicants previous advocate on record failed to communicate to him the judgment and supply him with certified copy for his record and further action to file appeal on time.

(b) That the applicants Advocate is disinterested in advising and pursuing the intended appeal for the appellant hence leave be granted to the incoming advocate.

(c) That the applicant is dissatisfied with the judgment passed by the court and unless stay of execution is granted the appeal shall be rendered nugatory if successful.

(d) That the appeal has high chances of success considering that the DNA as ordered by the court has not been done and yet the appellant is now called to cater for the subjects.

(e) That parental responsibility is equal yet the judge has lumped it on the appellant hence subjecting a huge substantial loss to the applicant.

(f) That the application has been made without undue delay.

Order 42 rule 6 of the civil procedure rules provides”-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in

so far as the court appealed from may order but, the court appealed from any for sufficient cause order stay of execution of such decree or order..."

2. No order for stay of execution shall be made under sub rule (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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

In its judgment dated 30th July 2018 this court observed:-

"I do not fault the learned magistrate for having been convinced that the appellant was not a man of straw as he alleges, and was able together with the Respondent to provide for their two children albeit in different capacities owing to their income differentials"

In the lower court the learned magistrate had made several orders.

1. The plaintiff to continue to have custody of the two children and to buy their food and civilian clothes.
2. The Defendant to meet all their school fees, uniform and books till they complete their education.
3. That the Defendant to meet the medical needs of the two issues and as when they arise as well as pay rent of Kshs.1500/= to the plaintiff monthly.

Article 53 of the Constitution provides for the rights of children thus:-

"Every child has the right (...) to parental care and protection, which includes equal responsibility of the mother and father to provide for the children whether they are married or not."

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

To my mind, the magistrate had this in mind when she made the now contested orders. She did place the burden of buying food on the mother which is quite onerous.

She also placed the burden of buying clothes for the children on the Respondent.

The applicant was ordered to pay school fees, uniform and books, cater for the medical needs which are not a daily affair. He was to pay monthly rent of Kshs.1500/= which is a measly sum in these days.

In the lower court it was contended that the applicant was a successful businessman running a fleet of motor vehicles namely

KBR xxxA, KBV xxxQ, KBZ xxxL

Tractor registration No. KAP xxxL and also operates a shop at Sotik.

The Respondent had told the court that she runs some business at Chebole trading centre. She did not disclose what this business is, although in the judgment the magistrate states that the Respondent operates a saloon at Chebole. The learned magistrate observed that the Defendant had filed a defence admitting that he was the father of the two children.

Before this court, the applicant did raise paternity issues. This court did note that no substantial loss would be occasioned to the applicant in maintaining his two children.

The judgment sought to be appealed from is dated 3/7/2018. In that judgment the court did revise the paternity issue and ordered a DNA test to be conducted on the child whose paternity was contested. It was further ordered that this be at the expense of the applicant. It was incumbent upon him to have the tests carried as soon as possible.

He was granted leave to make any application before the lower court. He cannot be heard to say that he should not support the two children when he has failed to have the DNA test done.

He cannot claim to have suffered substantial loss. He did not deny paternity in the defence filed in the lower court.

He has not given plausible reason on the delay to file his appeal in time. The explanation that his former advocate was not willing to file an

appeal, goes to show that he appreciated that there were no good grounds to file one. This application has no merit and its dismissed with costs to the Respondent.

Ruling delivered dated and signed this 10th day of December 2018 in the presence of learned counsel for the applicant absent. Applicant present

The respondent in person present.

Court Assistant.

M. MUYA

JUDGE

10/12/18