



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**HIGH COURT APPEAL 5 OF 2016**  
**(CHILDREN COURT 297 OF 2015)**

**E N K.....RESPONDENT**

**C M M.....APPELLANT**

**RULING**

**APPELLANT'S CASE:**

Appellant /Applicant filed Notice of Appeal from original judgment of Honorable Mrs. Z. W. Gichana delivered on 8th December 2015.

Attached was an application under certificate of urgency filed on 27th September 2016 seeking stay of execution of the Children Court judgment and orders.

The Appellant /Applicant was aggrieved by the entire Trial court judgment but more particularly the Appellant should undertake the child's education and also tertiary education beyond his 18<sup>th</sup> birthday, the monthly payment of Ksh. 17,000/= towards upkeep of the child and ensure comprehensive medical cover for the child.

There was warrant of arrest issued against the Appellant on 29th March 2016. The Appellant deposited Ksh. 50,700/= which on the Respondent's application was released to her for the upkeep and school fees and school expenses for the child.

The Appellant stated that he could not afford and comply with the payment of the maintenance, school fees and expenses and medical cover. the Respondent is a person of means and has chosen to harass the Appellant who is not formally employed but is a priest.

The Respondent has moved from Mwea to Naivasha and is married to a Credit Officer in a bank and they live in Naivasha. Therefore this matter was filed by the Respondent to intimidate, harass and mistreat him.

The Appellant filed a further application on 22<sup>nd</sup> November 2016 and reiterated similar grounds except he now included the fact that he denied paternity of the child. A further similar application was filed on 9<sup>th</sup> December 2016.

This Court on 13th December 2016 granted stay of execution of the judgment and ruling of the Trial Court on condition the Appellant deposited Ksh 50,000/ as security in the Children Court within 7 days.

The Appellant filed Replying Affidavit on 31st January 2017 and denied all allegations with regard to the applications filed in both Courts.

### **RESPONDENT'S CASE:**

The Respondent filed Replying Affidavit on 29th November 2016 and outlined chronology of events that led to the matter filed in this Court as follows;

The Appeal and application are premature as there is an application filed on 17th February 2016 for stay of execution pending before the Trial Court;

The Appellant was granted time to file written submissions to the application by 21st October 2016 and the Appellant did not comply.

The Appellant was granted opportunity to serve reply or objection to the current Notice to Show Cause;

Therefore the Respondent is of the view that there will be 2 conflicting Rulings emanating from parallel applications on stay of execution of the Judgment of 8th December 2015.

The Appeal is not to further the best interests of the child who is in School and requires upkeep pending the hearing and determination of the application and appeal.

On 17th January 2017 the Respondent filed an application under certificate of urgency and reiterated the facts in the Replying Affidavit and also brought to the fore certain crucial facts as follows;

The *ex parte* orders of 13th December 2016 issued by this Court were issued in the absence of material disclosures that make the said application abuse of the Court's process.

The stay of *ex parte* orders are in hindrance of the minor's risk to being sent home due to nonpayment of school fees and related expenses.

The Appellant abdicated his role to provide for the child's upkeep and as granted by the Court order of 8th December 2015.

Therefore the Respondent /Applicant sought the said *ex parte* orders vacated and set aside and the monies deposited in Court be released to the Respondent for the minor's education and upkeep.

### **HEARING**

The Respondent/Applicant relied on pleadings filed and raised 2 issues. The first is with regard to abuse of Court process as enumerated in the Respondent's Replying Affidavit of 29th November 2016.

Secondly; the *ex parte* orders should be vacated and set aside as they impede the best interests of the child. The Respondent cannot take care of the minor child alone and the Trial court orders are lawful orders of the Court and are to safeguard the best interests of the child. The Appellant is a habitual defaulter and he should not be allowed to benefit from these orders at the expense of the child.

The Appellant through Counsel informed Court that the conditional stay orders of 13th December 2016 were complied with; Ksh 50,000/- was deposited on time but the receipt was issued later.

The main contention of the Appellant is that when the 1st Warrant of arrest was issued; he deposited Ksh 50,700/- in Court as security. Thereafter on application by the Respondent the same was released to her for upkeep of the child. Soon thereafter another NTSC and warrant of arrest were issued without knowledge and participation of the Appellant and he decided to appeal the judgment and order of 8th December 2015 in the High Court.

The Appellant complained that they tried to obtain the judgment and order of 8th December 2015 and the same was not availed to them but surprisingly, the Respondent has availed them to Court.

The issue of paternity is not determined and the Appellant can only pay Ksh 2,000/- as a well wisher towards maintenance of the child.

The child has been moved to a different location and therefore he should not shoulder the maintenance of the child.

### **ISSUES**

1. Is the application and or appeal upheld, compromised or dismissed?
2. Is the Appellant biological father of the minor child in the instant case?
3. Should the Appellant exercise parental responsibility over the minor child and cater for his educational needs and subsistence?
4. What is the Respondent's contribution to parental responsibility over the child?
5. Should *ex parte* orders of this Court of 13th December 2016 be vacated and set aside?

### **DETERMINATION**

The Court record of Civil Suit No.297 of 2015 was not availed for this Court's perusal and confirmation of certain pertinent facts with regard to the matter in Court.

However, in spite of now availability of Court file; the Respondent's outline of various applications filed by the Appellant in the Trial Court and subsequently in this Court have not been controverted at all by evidence and proof. Therefore, the multiplicity of pending applications is a clear case of abuse of the Court process and the appeal remains pending, the application filed on 31st January 2017 upheld to the extent of abuse of Court process.

The judgment of 8th December 2015 hereby attached confirms that the Trial Court tried to resolve the issue of paternity and the Appellant declined and cited traditional and religious concerns.

In this Court the same issue was raised and the Appellant declined on the same grounds.

**With respect Article 32(4) Constitution 2010 protects one's right thus;**

***a person shall not be compelled to act, or engage in any act that is contrary to the person's belief or religion.***

In the same Constitution the rights of the child are protected thus in Article 53 (1) (e);

***Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married or not;***

**The court is to give effect to both Articles of the Constitution 2010 while protecting the Appellant's rights the Court must also uphold the child's right as stipulated in Article 53 (2) of the Constitution;**

***a child's best interests are of paramount importance in every matter concerning the child.***

**Whereas the Appellant insists on protection of his right to privacy and religion, the best interests of the child are paramount. In the absence of DNA testing to determine paternity of**

**the minor child, the Respondent cannot be asked to procure and produce proof of paternity as her position is that the Appellant is the biological father. The only recourse until determination by DNA of paternity is conducted, that the Appellant shall provide for the minor child as father and not as well wisher of the Child.**

With regard to the stay of execution of the Children Court judgment and orders of 8th December 2015, the law on stay of execution is outlined under Order 42 Rule 6 of the Civil Procedure Rules in the following terms:

***(1) 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 may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

The *ex parte* orders were granted based on the prima facie facts presented at the time. The stay of execution was conditional to deposit of funds so that if the minor was destitute the same would be released on application in order to secure best interests of the child pending hearing and determination of the application and appeal.

It has since been brought to the attention of this Court the various pending applications filed; the non compliance of Court orders, inordinate delay in filing pleadings and or non attendance by the Appellant. to this situation this Court will refer to **ECONET WIRELESS KENYA LTD VS MINISTER FOR INFORMATION & AND COMMUNICATION OF KENYA AND ANOTHER [2005] 1 KLR 828**, where the Learned Judge expressed the view thus:

***“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”***

## **DISPOSITION**

- 1. The Court orders of the Trial Court of 8th December 2015 are upheld subject to inclusion of the Respondent's parental responsibility to provide food shelter and clothing while the Appellant provides for School fees and school expenses, medical care and Ksh maintenance at Ksh 17,000/= each month.**
- 2. The Appellant is at liberty to seek visitation and access rights to the child now or in the future.**
- 3. The Appellant shall be involved in choice of affordable education for the child with the Respondent.**
- 4. If there are any variations of the payments and upkeep of the child, each party Appellant and Respondent shall file affidavit of means to the Trial Court for hearing and determination.**
- 5. With regard to Ksh 50,000/- deposited in Court on 20/21/12/2016 the same shall be released to the Respondent for school fees and school expenses of the child on condition all warrants of**

arrest are suspended until the hearing and determination of any pending applications or variation of payments due to new developments and evidence is presented to the Trial Court.

6. An account of ksh 100,000/- already disbursed to the Respondent shall be filed with the Trial Court before further warrants of arrest are issued.

7. The *exparte* orders of 13th December 2016 are hereby vacated and set aside, the application of 27th September 2016 and 22nd November 2016 are compromised and the appeal is left pending the conclusion of the various applications in the Trial court.

8. Each party to bear its own costs.

**DELIVERED DATED & SIGNED IN OPEN COURT ON 13TH FEBRUARY 2017.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

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