

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 92 OF 2016

G N N.....APPELLANT

VERSUS

M W K.....RESPONDENT

RULING

1. The appellant has filed a Notice of Motion dated the 27th September 2016 seeking a stay of execution of the ruling of Honourable B. Kituyu (MS) Senior Resident Magistrate delivered on 5th September 2016 in the original Children's Case No. 313 of 2016 at Children's Court, Milimani Law Courts, Nairobi directing the appellant to pay Kshs.50,000 for upkeep and food and denying the appellant full access to the minors pending the hearing inter partes and determination of this appeal.

2. The appellant also seeks to set said the said ruling delivered on the 5th September 2016. He further seeks that the court be pleased to review and/or vary and/or modify ruling of Honourable B. Kituyi (MS) Senior Resident Magistrate, delivered on 5th September 2016 in the original Children's Case number 313 of 2016 at Children's Court, Milimani Law Courts, Nairobi.

3. The respondent too filed an application dated 5th October 2016 seeking to review, vary and set aside the orders issued on the 30th September 2016 issued by this court pending the hearing and determination of the application. She has also sought that the court exercises its unfettered discretion to enhance the amount ordered by the lower court of 300,000/-.

4. I have read the affidavits filed by the parties and also considered the oral submissions of counsels. The Children's Court ordered the appellant to pay 50,000/- every month being the amount for maintaining the minors until final orders in the matter. He was further ordered to continue paying school fees as he has always been doing until final order. The court further granted him supervised access of the minor every Saturday from 9 am to 6 pm and the venue to be agreed by the parties for as long as the respondent will either send their minder with him or any other adult that the respondent will be comfortable with.

5. The appellant's arguments in his affidavit is that he has been mishandled, he is paying fees of about 400,000/- and he is aggrieved by the court's decision ordering him to pay upkeep of 50,000/- per month. That he cannot manage to raise another 50,000/- for the upkeep of the minors as he already has a big burden. That the respondent works for NEMA and earns a salary of 208,000/- and can comfortably take care of the food and minors. That he has been denied access to his children which is against his constitutional rights. That he loves his children, he has a cordial relationship with them and it is unfair to bar him from accessing his children. He has attached a lease of the property the respondent resides to show that he owns it, his pay slips for August, September and October 2016 which show that he earns a net pay of 143, 612/- and the respondent pay slip for January 2016. He further opposes the respondent's application to vary the maintenance amount from 50,000/- to 300,000/-

6. The respondent seeks to have orders that were issued on the 30th of September 2016 staying execution of the orders of 5th September 2016. In her affidavits she claims that the appellant makes over 5,000,000/- over family investment, a fact the appellant denies. She has mentioned returns to KRA submitted by the

appellant. She further argues that the children have a right to live, eat and get educated which rights are likely to be severely affected in the event that the orders are varying or reviewed. That the payment of 50,000/- by the appellant towards maintenance of the child was not an onerous task.

7. This court on the 27th of October 2016 varied the amount from 50,000/- to 25,000/- pending the hearing of the two application. From the affidavits of the appellant I note that he bears the burden of fees to the tune of Kshs. 400000/- together with his own expenses. The court ordered that the Children's Court Judgments and proceedings be provided. This was not done and therefore this court has not had the benefit of evaluating the evidence and affidavits filed in the Children's Court that led the court to impose the amount of 50,000/- as maintenance. The appellant did not object to paying Ksh.25,000/- as was ordered on the 27th of October 2016. I am not persuaded that a stay is in order, this court therefore varies the sum given by the Children's Court from 50,000/- to 25,000/- for maintenance. From the Children's Court order the appellant was allowed access to the minors every Saturday on condition that the venue is agreed and an adult accompanying the child. The respondent in her application seeks to set aside the stay orders issued on the 30th September 2016. Having varied the orders of 5th September 2016, I set aside the stay orders granted on the 28th September 2016. The respondent has failed to persuade this court why the amount should be enhanced to 300,000/- she has attached nothing to show that maintenance cost for the children has risen to that amount. This is a matter that should be set down for hearing before the Children Court so that the issues raised on maintenance and access are fully determined. The parties shall set down the matter for hearing as was ordered by the Children's Court. No orders as to costs. It is so ordered.

Dated, signed and delivered this 10th Day of February 2017

R. E. OUGO

JUDGE

In the Presence of:

..... For the Appellant

.....For the Respondent

Ms. Charity Court Clerk.