



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

MISC. APPLICATION NO. 33 OF 2014

R M K.....APPLICANT

VERSUS

A M M.....RESPONDENT

RULING

THE APPLICATION

1. The applicant, seeks by his Notice of Motion dated 31st July, 2014, the following orders:

1. **THAT** This matter be certified as urgent and service in the first instance be dispensed with.
2. **THAT** there be stay of Execution of the Ruling delivered by the Honorable on 12/06/2014 in TTC No. (TONONOKA-Mombasa) **A M M =VS= R M K**, and all consequential orders thereto pending the hearing and determination of this Application.
3. **THAT** this Honorable Court be pleased to enlarge time **THAT** for filing an Appeal against the Ruling delivered on 12/06/2014 in TCC No. 316 of 2009 (**TONONOKA CHILDREN'S COURT; MOMBASA**) **A M M = VS= R M K**.
4. **THAT** Consequently, the Memorandum of Appeal annexed hereto be deemed to have been filed within time upon payment of requisite fees.
5. **THAT** Consequently there be a stay of execution of the Ruling delivered by the Honorable on 12/06/2014 in TTC No. 316/2009 (TONONOKA-Mombasa) **A M M =VS= R M K**, and all consequential orders thereto pending the hearing and determination of the Appeal Subject hereto.
6. **THAT** Costs of this Application be provided for.

2. The issue for determination in the application is simply whether the court will in the circumstance of the case make an order for stay of execution pending appeal from the decision of the trial magistrate's court and an order for extension of time to lodge an appeal.

3. In their respective written submissions, counsel for the parties — M/S Apollo Muinde & Ngonze Advocates for the Applicant and WS P. A. Osino & Co. Advocates for the Respondent — dated 23rd March 2015 and 20th March 2015, set out their cases as below.

4. The court greatly regrets the delay in delivery of this ruling which was occasioned by heavy workload at the court and subsequent transfer from the court station.

SUBMISSIONS

5. For the Applicant it was submitted:

"11. CRUX OF THE APPLICATION

Your Honour, it is the Applicant's contention that he was indeed, NEVER served with the Notice To show Cause dated 1/7/2013, which default of service thereof culminated in issuance of a warrant of Arrest against the Subordinate Court dated 14/10/2013, seeking, inter alia, setting aside of said Warrant of Arrest as well as Review of the Decree dated 12/11/2010.

The Applicant's contention before the subordinate Court and herein is that drastic changes having occurred in the circumstances pertaining to the minor 's maintenance, to wit, admission into boarding school, and the Applicant having continued maintaining the minor as per the decree dated 12/11/2010, other expenses claimed by the Respondent, and which Constitute the crux of the Notice to Show Cause and consequent Warrant of Arrest in issue herein, viz DSTV, Domestic Workers ' wages and food and utility bills CEASED to apply in respect of the Applicant, thereby resulting in the Application for Review.

In a nutshell, therefore, your Honour, the Applicant's position remains that the Respondent's claim to the absurd amount in the Notice to Show Cause subject hereof i.e **Ksh.535,458.00/-** which amount has inexplicably earned interest and ballooned to an amount over **Ksh.800,000.00/=** in eight **(8) months**, is nothing but an attempt to defraud the Applicant and/or unjustly enrich herself and/or ultimately, steal a match on the Applicant by settling old scores.

6. For the Respondent it was submitted:

"BRIEF BACKGROUND

This matter to proceed to full trial and after hearing both parties the court delivered judgment on 12th November 2010 under the following terms:-

- a. That the maintenance for the child is in the sum of Ksh.44,000/- per month.
- b. Each party shall contribute a sum of Ksh.22, 000.00 per month.
- c. That the plaintiff who has actual custody of the child shall contribute directly while the Defendant shall pay over his contribution of Ksh.22,000/- per month to the plaintiff before the 5th of every month starting December, 2010.
- d. Each party be at liberty to apply.

On 2nd December, 2010 the Appellant moved a motion application dated 2nd December, 2010 seeking:-

- a. Stay of execution of the judgment of the court delivered on 12th November,2010.
- b. Review of the said judgment

That after hearing both parties the court amongst other orders confirmed maintenance at Ksh.44, 000/- per month and parties were to share this amount equally and the Defendant was to pay the sums of Ksh.22,000.00 per month to the Plaintiff as earlier ordered.

That the breakdown of the Notice to Show Cause for the sum of Ksh.533,358.00 is to be found in Paragraph 6 of the Replying affidavit sworn 12th September, n2014 and which states as follows:-

Maintenance @ 22,000.00 as at 5th December, 2010 to date.

2010 December I month 22,000

2011 January to December 12 months 264,000. 00

2012 January to December 12 months 264, 000.00

2013 January to June 20136 moths 132,200.00

682,000.00

Payments made directly as per bank deposits to [particulars withheld] School.

1. Invoice No. 781 [02.01.2011]	7,500.00
2. Invoice No/ 1670[02.05.2011]	31,810.00
3. Invoice No. 2683[02.09.2011]	35,060.00
4. Invoice No. 3637[02.01.2011]	41,385.00
5. Invoice No. 4763[02.05.2012]	28,110.00
1. School uniform	6,779.00

148,642.00

533,358.00

That after the Notice to Show Cause was taken out there has been further accumulation as shown in paragraph 7, 8, 9, 10, 11, 12, 13 and 14 of the replying affidavit sworn on 12th September, 2014 and paragraph 13 of the replying affidavit sworn on the 13th March, 2015 now totalling the sum of Kshs. 817,066.50.

The eight month fixed for payment lapsed on 12th February, 2015 and warrant of arrest was issued pursuant to the orders made by the Children's court,

It is against the said warrant of the Children's Court passed that is now sought to be stayed. "

DETERMINATION

7. The Court of Appeal and he High Court have jurisdiction to grant order for stay of execution or injunction pending appeal respectively under Rule 5(2) (b) of the Court of Appeal rules and Order 42 rule 2 of the Civil Procedure Rules, respectively. The general principles for the grant of application for stay have since the 1979 case of **Bhutt v. Rent Restriction Tribunal** [1982] KLR 417 (which applied the in *Wilson v. Church* (No. 2) 1879 12 ChD 454 that "when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory " and **Eriuford Properties Limited v. Chesire County Council** [1974] 2 ALL ER 448) in Kenya) relied upon by the Counsel for the applicant been settled as follows:

1. That there is an arguable appeal

2. That the appeal would be rendered nugatory if stay is not granted

See also **Madhupaper International Limited v. Paddy Kerr**, (1986) KLR 923, where the Court of Appeal.

8. In the High Court, Order 42 rule 6 of the Civil Procedure Rules makes more exacting provisions for the grant of stay with a further requirement of security in terms of Rules (6) 2 thereof as follows:

"[Order 42, rule 6.1 Stay in case of appeal.

6. 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

2. No order for 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.

3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with. "

9. Accordingly, while the general principles of arguable appeal and avoidance of appeal being rendered nugatory, the specific principles for the grant of stay of the execution by the High Court and the subordinate courts bound by the Civil Procedure Rules, are as follows:

1. The court is satisfied that substantial loss may result to the applicant unless the order is made and

2. That the application has been made without unreasonable delay; and

3. 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.

General Principles for stay of execution pending appeal

10. On the general principles, I find that the applicant has an arguable appeal, which as noted in does not

have to be one that must eventually succeed, in the question presented on the application for review of the maintenance order that on account of -

"drastic changes having occurred in the circumstances pertaining to the minor's maintenance, to wit, admission into boarding school, and the Applicant having continued maintaining the minor as per the decree dated 12/11/2010, other expenses claimed by the Respondent, and which constitute the crux of the Notice to Show Cause and consequent Warrant of Arrest in issue herein, viz. DSTV, Domestic Workers ' wages and food and utility bills CEASED to apply in respect of the Applicant

11. The appeal, if successful, would be rendered nugatory as the monies once paid would be unrecoverable by any adjustments in future maintenance payments as that would be hurting the child and not the respondent who now seeks the past contributions and payments. If the applicant is jailed in default of payment, there can be reversal of the imprisonment, if the appeal is eventually successful. Such would be substantial loss in the Order 42 rule (6) assessment standard.

Whether application brought without unreasonable delay

12. The ruling on review application from which an appeal is preferred was made on 12th June 2014 and the present Notice of Motion was made on 31st July 2014. Section 79 provides as follows:

"79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. "

13. I do not find the application for stay of execution here to have been inordinately delayed as to disentitle the applicant to the discretion of the court in exercise the general powers of extension of time to file an appeal under section 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules.

Provision of security

14. The applicant is bound by the order of the court on security as an applicant who brings an application for stay of execution brings himself within the ambit of the provisions of Order 42 rule (6) (2) and it is immaterial that he has or has not offered to provide security, as the rule on provision of security is in mandatory terms, as shown above.

Best interests of the Child

15. Section 4 (2) of the Children Act is an elaboration in statute of the Article 53 right to protection of best welfare of the child, as follows:

"4(2) In all actions concerning children, whether undertaken by public or private persons, social institutions, courts of law, administrative authorities or legislative bodies the best interest of the children shall be primary consideration.

16. Both counsel submitted on the impact of the best interest of the child in this matter. I respectfully agree with Sitati, J. in **Rambo Coloucane Ltd. v. I.B.S Trading**, Nairobi HC Civil Appeal No. 340 of 2014 that in matters concerning children, the court should go beyond the general principles of arguable appeal and avoidance of nugatory appeal to consider the best interest of the child in the matter.

17. I find that while the child would not benefit from the incarceration of her father, whose imprisonment may, even if temporarily disable his capacity to pay the monies towards her maintenance, she stands to benefit from the refunds of monies already incurred by the mother, the reimbursement of which puts her in a position to continue with the payment of her right contributions to the child's maintenance. I would however, consider that reimbursement of the monies spent by the mother is not as **direct** a payment as the **actual payment** of maintenance dues that would, if not paid directly adversely affect the immediate welfare of the child as to brook no delay in its payment. In this regard, I would respectfully accept the strength of holdings in the rulings in **Edward Mwangi Kamau v. Jane Wairimu** [2004] eKLR (Koome, as she then was), **Vedder Gathua v. Grace Nyokabi Gathua** [2005] eKLR (Koome, as she then was) and Hillary Kibet Melly v. Jane Nzula Kioko HC Civil Appeal No. 51 of 2003 (Khaminwa, J) that the maintenance dues of a child should not be stayed as a child must be provided for in her daily life by way of food, clothing, shelter and other basics including education. This is however, not the case in this matter: it is a claim for refund of past payments made by the mother the order for which the applicant seeks to appeal rather than payment of present maintenance dues.

18. In this case, I would accept that a short delay in the payment of the disputed amounts to allow the applicant to challenge the order on maintenance in the changed circumstances of the child's situation by admission into boarding school and therefore requiring, in the view of the applicant, lesser maintenance amount related to home expenditure. To guarantee payment of the money should the appeal be unsuccessful, the applicant must, however, provide suitable security there for.

CONCLUSION

19. The monies the subject of the execution proceedings are a claim by the mother respondent for the contribution of child's father for maintenance sum decreed by the trial Court to be shared equally between the parties, and not for direct maintenance of the child. The amount was unsuccessfully is challenged by way of review application by the applicant on the grounds of alleged change in circumstances which, in view of the applicant ought to reduce the maintenance dues. It might have been different, consistently with the best interest of the child, and urgent to have the payments recovered if they were for the direct benefit of the child. There was no dispute that the appellant has been paying due maintenance for the child. The delay in bringing the appeal has not been inordinate. The contest is on the monies claimed in reimbursement for monies spent in the past contributions for the maintenance ordered for the child. It is in the nature of a debt rather than maintenance. As the payment is for reimbursement for the benefit of the mother respondent, assuming she met the maintenance due single handedly. The respondent's interest unlike that of the child of direct maintenance, which is not the case here, is in the assurance that the money will be repaid, if due, with full compensation by way interest for any delay until payment in full. As the applicant seeks to challenge the amounts ordered by the trial court in view of alleged changed circumstances, the Court should permit him to proceed to urge the appellate court on the merits of the appeal. In the meantime, in accordance with the requirement for security, the appellant shall provide suitable security for the eventual payment of any monies that may be found due from him upon determination of the appeal. In the end, the Court agrees that committal to jail of the appellant may jeopardise the ability of the appellant to meet the maintenance dues for the child's welfare to the detriment of the very cause on which that the respondent's claim hinges. This would not be in the best interests of the child, as directed by section 4 of the Children Act.

ORDERS

20. The Notice of Motion for stay of execution dated 31st July 2014 is granted as prayed for in Prayers 3, 4 and 5 conditional upon the provision of security by the appellant, in terms below.

21. The appellant shall file his appeal within fourteen (14) days.

22. The appellant shall within fourteen (14) days will deposit into court the decretal sum of Ksh. 533,358/- the subject of the appeal or in the alternative file a suitable banker's or insurance bond to pay such sums as may be found payable by him under the decree on determination of the appeal.

23. Costs in the Cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 14TH DAY OF MARCH, 2017

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JUDGE

Appearances:

M/S. Apollo Muinde & Associates, Advocates for the Applicant.

M/S P. A. Osino & Co. Advocates for the Respondent.