



REPUBLIC OF KENYA

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.103 OF 2014**

**IN THE MATTER OF THE ESTATE OF PETER IGAMBA NJOROGE - (DECEASED)**

**JOSEPH WAIGANJO NGATIA.....APPELLANT/ APPLICANT**

**VERSUS**

**MARGARET NG'ENDO.....RESPONDENT**

**RULING**

By way of a notice of motion dated 12th October, 2015, Joseph Waiganjo Ngatia (hereinafter the applicant) seeks orders:

1. Spent
2. Spent
3. That the Honourable court be pleased to issue an order for stay of execution of part of the judgment and decree in Nyahururu children's Court Children Case No.61 of 2013, whereby the appellant/applicant was ordered to pay a monthly sum of Kshs.7,000/= to the Respondent towards food for the children herein pending the hearing and determination of this appeal or until further orders of this court.
4. That pending the hearing and determination of this application inter-parties and the instant appeal, the appellant/applicant be allowed to continue paying school fees and all other educational needs of the children herein and providing for the children's health needs.
5. THAT the costs of this application be provided for.

The application is based on the supporting affidavit of the applicant and on grounds as seen on the face of the application the gist of which is that Nyahururu Children's Court passed a judgment in children case No.61 of 2013 ordering the applicant to pay a monthly sum of Kshs.7000/= to the Respondent herein towards food for the children herein.

The applicant was aggrieved by the said order and has lodged the appeal herein. The grouse of the applicant is that all parental responsibilities were placed on the applicant with the Respondent shouldering only one parental responsibility of providing clothing to the children.

The court is blamed for failure to consider the applicant's financial means to pay for the same and still shoulder other responsibilities in education costs, medicare and others.

The Respondent is accused of using the criminal justice system to enforce the orders.

The application is opposed and in a replying affidavit the Respondent avers that the application has not met the well settled principles of invoking the jurisdiction of the court in granting the prayers sought.

It is her case that the court considered that she was unemployed and as such she has no consistent income whereas the applicant is a police officer with a stable income. It is urged that the applicant has overcommitted his salary to avoid meeting the requirements of the court order.

The Respondent contends that the Kshs.7000/= ordered is not enough to meet the needs of 5 children and she has had to supplement this to ensure the children as well fed. The applicant failed to comply with the orders of court until forced to do so through the execution process.

The application is said to be brought in bad faith coming seventeen (17) months after the judgment and is meant to harm the children.

At the hearing, the parties invited the court to consider their affidavit evidence and proceed to make a finding.

I have had occasion to consider the application, the supporting grounds, the affidavit in support and the replying affidavit.

At the outset, I note that both parties appear to have misapprehended the limit of evidence or material required in the disposal of an application of the nature of the one before me and in the process ended up arguing substantive grounds of appeal.

The principles applicable in an application of this nature were well laid down in the decision in **Machira t/a Machira & Company Advocates V. East African Standard**, Civil Case No.612 of 1996. It was held:

**“1. In such applications for stay of proceedings, the court cannot proceed on initial presumption that the appeal or intended appeal shall succeed and so *prima facie* the applicant is the preferred party. The matter must remain in the discretion of the court to be exercised upon considering all material circumstances and not the interests of one party.**

**2. In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage**

**3. A successful party at whatever stage should have access to the consequences of that judicial finding and decision. Any subsequent decision which tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in exceptional circumstances.**

**4. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or other evidential material that substantial loss may result.**

**5. In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars.**

**6. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.**

**7. The applicant will obtain a stay of further proceedings if he can show that an impecunious party may squander what may be needed restitution or that the subject matter may be destroyed if the appeal succeeds.**

**8. In granting a stay of proceedings the court may consider the delay in making the application**

**and the requirement of security for due performance.”**

In our instant case, the applicant seeks a stay of execution of the judgment requiring him to pay Kshs.7000/= towards food for his children. He feels burdened with almost the entire responsibilities over his children. Indeed, his main pillar to his application is the alleged inability to pay.

The reply by the Respondent is that the applicant is able to pay and on her part she is unemployed thus the lower court was right in its finding. Again there is the complaint that the applicant has deliberately over committed his salary to evade meeting the requirements of the judgment.

Granted, one need to appreciate that the decree complained of is a special one in the sense that it is one about upkeep of children as opposed to a monetary decree requiring one off payment of a specific sum.

It is incumbent upon this court to ensure that the successful party (in our case the children) be entitled to the fruits of the judgment of the court to realise the right provided for under **Article 53** of the **Constitution**.

At the same time, the court must guard against the applicant suffering substantial loss by being required to pay what he cannot afford. The applicant has provided specific details and particulars of payment of fees for the children and the medical expenses. Whether he is able to shoulder these and the food expenses of Kshs.7000/= per month are matters I would leave for the court to decide at the appeal stage.

Suffice to say that during the pendency of the appeal, the children's lives will not be at a halt. They will continue requiring daily necessities of life. They surely will not live on oxygen alone awaiting the outcome of the appeal.

In the circumstances therefore and within the exercise of the discretion of this court, I am satisfied that a good case has been made for a stay of execution. That stay however, has to factor in as stated above that the children's daily needs do not stop awaiting the resolution of the appeal. I must therefore, attach a reasonable condition for the stay. I note that at the *ex parte* stage in this application, I had granted a conditional stay that the applicant pays Kshs.3,500/= for the upkeep of the children pending further orders. I am persuaded that the condition above suffices even now.

Consequently, the application dated 12th October, 2015 is allowed in terms of prayer 3 on condition that the applicant remits Kshs.3,500/- to the Respondent monthly towards food for the children. Prayer 4 is allowed requiring the applicant to continue paying school fees and all other education needs of the children and providing for health needs.

In view of the nature of the application and the need for the parties to harness resources to meet their parental responsibilities, each party is to bear its own costs.

**Dated, Signed and Delivered at Nakuru this 10th day of March, 2016.**

**A. K. NDUNG'U**

**JUDGE**