

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 50 OF 2014

J N M.....APPELLANT

VERSUS

V K (MINOR) (SUING

THROUGH MOTHER & NEXT FRIEND, M

N K).....RESPONDENT

RULING

The appellant filed in this court a memorandum of appeal on 24th July, 2014 appealing against the judgment delivered in Nyeri Children's Case No. 52 of 2012 (Hon. Wambilyanga, J) on 24th June, 2014. Neither the judgement nor the decree was filed together with the memorandum of appeal but it would appear from the subsequent motion filed by the appellant that the suit against the appellant was about child maintenance and judgment had been entered against him to make certain periodic payments towards maintenance of his child.

The motion aforesaid was filed on 10th March, 2015; it was brought under **section 3A** of the **Civil Procedure Act** and **Orders 22 Rule 22, Order 42 Rule 6** and **Order 51 Rule 1** of the **Civil Procedure Rules** and in it, the applicant sought for stay of the execution apparently of the decree issued against him in the magistrates court.

When the application came up for hearing on 15th May, 2015, counsel for the applicant undertook, on behalf of his client, to make some payments in settlement of decretal sum and based on this undertaking I directed the applicant to make all the outstanding payments due from him up to May 2015 and to continue making such payments as directed by the lower court pending the hearing and determination of the appeal. These sums were to be collected from the appellant's counsel's offices and they were necessary since that subject was, and still is, a child in need of maintenance and education. Parties were granted liberty to apply should they find it necessary.

On 15th December, 2015, the applicant filed an application under **Order 42 Rule 12** and **35** of the **Civil Procedure Rules** in which she sought dismissal of the appeal for want of prosecution and secondly, that the orders which this court granted on 15th May, 2015 be vacated.

The application was supported by the affidavit of the applicant in which she swore that the appellant has neglected, ignored and or refused to comply with the order of the court of 15th May 2015 because he has not been making the payments towards the child's upkeep and education as directed. In any event, so the applicant swore, the appellant has never served her with the appeal since it was filed in the year 2014.

The appellant did not file a replying affidavit to the applicant's application; I would take it that in the absence of any response to matters of facts alluded to by the applicant in her affidavit, her depositions are true, or are in the least, uncontroverted.

Counsel for the appellant submitted at the hearing that he had served the appeal but said that he had not filed the affidavit of service to that effect. Without the affidavit of service, there is no evidence that the

appeal was served.

It follows that if it is true that the appellant has not complied with the orders granted by this court on 15th May, 2015 and that he has not served his appeal, and so far he seems not to have taken any step towards prosecution of his appeal apart from filing a bare memorandum of appeal more than one and a half years ago, I am satisfied that the applicant has made out a case for discharge of the orders granted by this court. I therefore vacate those orders forthwith; this means the applicant is at liberty to proceed with execution of the decree issued by the magistrates' court.

As for the appeal, I direct that the appellant files and serves the record of appeal within thirty (30) days of the date hereof failure of which the memorandum of appeal filed herein stands struck out. It is so ordered.

Signed, dated and delivered in open court this 8th April, 2016

Ngaah Jairus

JUDGE