

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 30 OF 2016

S N N.....APPELLANT

VERSUS

M W M.....RESPONDENT

RULING

1. The application dated 17th March 2016 seeks stay of execution pending appeal. It is at the instance of the appellant, and the facts upon which it is based are deposed in the affidavit sworn by the appellant on 17th March 2016.
2. The applicant hinges his case on the allegation that he is being required to pay school fees for a child who has since attained the age of majority but parental responsibility has not been extended. He also argues that he is not in arrears for he has paid the fees in full.
3. I have perused the court file from the trial court. I have noted that parental responsibility was extended by the lower court *suo moto* on in the ruling that was delivered there on 1st March 2016.
4. I have noted too that although the applicant alleges to have settled fees through MPesa, no evidence has been provided. There are no annexures to the affidavit of the applicant sworn on 17th March 2016. I have noting therefore before me to establish whether there is any truth in the applicant's assertion.
5. There was lodged simultaneously with the Motion a document headed list of documents dated 17th March 2016. It is a bundle of an MPesa statement, payslip, birth certificate, among others. Unfortunately, there is no reference to this document in the affidavit in support of the application. It is not marked as an annexure to the affidavit, and no nexus has been drawn to it.
6. There is need to mention that a list of documents is to be filed only in respect of processes where evidence is to be taken *viva voce*. The documents in the list would then be the documents that the party filing the list would be propose to rely on at the trial. There would be the documents to be referred to by the witnesses to be called at the hearing. They would be produced and marked as exhibits.
7. Where trial is by affidavit evidence only, with parties merely making oral submissions founded on the affidavits, as opposed to them calling witnesses, a party wishing to place certain documents before the court, must swear an affidavit and refer specifically to the documents sought to be relied upon. The documents must not only be referred to in the affidavit, they ought to be marked, a copy attached to the affidavit and the same commissioned by a Commissioner for Oaths.
8. Motion before me was not for disposal by *viva voce* evidence, and it was not so disposed of. Consequently, the list of documents was of no value at all. The fact that the documents in the bundle were commissioned by a Commissioner of Oaths does not salvage the situation.
9. I need not say more, there is no merit in the Motion dated 17th March 2016. It is for dismissal, and I do hereby dismiss the same with costs to the respondent. The lower court file shall be returned to the Children's Court forthwith.

DATED, SIGNED and DELIVERED at NAIROBI this 1ST DAY OF JULY, 2016.

W. MUSYOKA

JUDGE