



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL APPEAL NO. 17 OF 2014**

**WILFRED MUNA VIRAH .....APPELLANT/APPLICANT**

**VERSUS**

**MUMBE MUNA .....RESPONDENT**

**RULING**

Before me is a Notice of Motion dated 24/10/2014. The application was filed by Wilfred Muna Virah (hereafter called applicant) under Order 42 rule 6 of the Civil Procedure Rules. The applicant seeks the following orders -

1. That the application be certified urgent and heard exparte in the first instance and temporary execution of the orders of court appealed against to issue pending hearing and determination of the application.
2. That execution of the orders of the lower court appealed against be stayed pending the hearing and determination of this appeal.
3. That the court makes such other or further orders as the ends of justice may require.
4. That costs of the application be provided.

The application has grounds on the face of the Notice of Motion. The grounds are firstly, that the application was filed without inordinate delay. Secondly, that the applicant was likely to suffer substantial loss if stay of execution was not granted in that he might be committed to civil jail. Thirdly, that the applicant was willing to offer security for due performance of the order of the court in case the appeal was not successful. Fourthly, that the applicant had an arguable appeal with good probability of success. Fifthly, that if execution was carried out then the appeal would be rendered nugatory.

The application was filed with a supporting affidavit sworn by the applicant. It was deponed in the said affidavit, inter alia, that the applicant was ordered to continue paying monthly maintenance of Kshs. 20,000/= to the respondent after the court dismissed his application for review of those orders. It was also deponed that the court extended the age of majority in respect of Charles Kyalo Muna, who had attained age of majority to pursue education at Jomo Kenyatta University whose fees was close to Kshs. 200,000/=. That the said Charles Kyalo Muna applied for a self sponsored course at the university without consulting or involving the applicant. It was further deponed that the applicant was a retired civil servant whose monthly pension was Kshs. 5,000/= only. In addition, there were other children to be educated by him such as Faith Ndanu who was pursuing education at Moi University and Julius Muimi who was at Ikuu Boys Secondary School. It was also deponed that the monthly maintenance ordered on 13th December 2012 was not specific and, at that time the respondent was actually living with the children, unlike in the present situation where she was not staying with the children.

The application is opposed. The respondent filed a replying affidavit which she swore on 18th November

2014. It was deponed interalia that the applicant was not merely earning pension of Kshs. 5,000/= per month. He was infact earning more than Kshs. 108,000/= per month from the income from rentals of the buildings on plot Mwingi/Mwingi/570, which was a fully developed plot. It was deponed further that in addition, the applicant owned several plots of land and the respondent had no objection to the applicant selling some of the plots to pay for the education of the children. It was further deponed, that if the parental responsibility for Charles Muna was not extended, then that would amount to discriminatory treatment against the child.

The applicant in person and counsel for the respondent Kinyua Musyoki, agreed to prosecute the application through filing of written submissions. The applicant and counsel for the respondent filed written submissions.

The applicant submitted that the lower court made a ruling on 1<sup>st</sup> October 2014 in which the court declined to review its previous orders for payment by the applicant to the respondent of maintenance of Kshs. 20,000/=. In addition, the court extended parental responsibility against the applicant in respect of Charles Kyalo beyond his 18<sup>th</sup> birthday. The applicant submitted that he already had heavy financial commitments and felt aggrieved by the extension of parental responsibility in favour of Charles Kyalo. The extension of parental responsibility overburdened him as he had other children such as Faith Ndanu studying at Moi University and Julius Muimi studying at Ikuu Boys Secondary School to educate. He emphasized that Charles Kyalo had applied for a parallel degree course at Jomo Kenyatta University of Agriculture without informing him.

The applicant further submitted that his affidavit of means clearly demonstrated that he earned merely 5,000/ per month as pension. He submitted that he also earned business income of 56,000/= per month. With this income he had several obligations to honour such as payment of bills, school fees, statutory taxes and upkeep of two families. It was his contention that the maintenance figure of Kshs. 20,000/= was now serving no useful purpose, as the respondent was no longer living with the children and could comfortably live with monthly rent of Kshs. 8,000/=. In his view the respondent was unjustly enriching herself with the monthly maintenance of Kshs. 20,000/.

The applicant lastly, emphasized that he was eager not to be put into civil jail, because such action would mean that he would not be able to meet the necessary obligations for his family. He contended that the respondent had refused to allow him to sell some of the properties in order to meet the financial obligations.

The respondent's counsel submitted that Charles Muna was justified in getting maintenance and extension of parental responsibility orders because he was taking a Bachelor of Business Information Technology course at Jomo Kenyatta University of Agriculture having been admitted only on 8th January 2014. Counsel submitted that he was actually completing studies in early December 2014. In counsel's view if the applicant's request is granted the effect would be to destroy permanently the applicants son Kyalo Muna.

Counsel submitted further that the ruling dated 1/10/14 was in respect of the applicants application dated 19/08/14 and the respondent's application dated 6/08/14. Counsel stated that the two applications were heard together and that the ruling of the court was sound and should not be contested since the applicant would not suffer substantial loss. Counsel relied on a case of **Lalji Bhimiji Sanghani Builders & Contractors Vs. Golf Hotels Kenya Limited - High Court Civil Case No 1900 of 1995 at Nairobi**. In counsel's view the applicant had not demonstrated that he would suffer substantial loss if the stay of execution requested was not granted.

Counsel also relied on section 28 (1) of the Children's Act. Counsel submitted that special circumstances existed for the extension of the parental responsibility of the applicant with respect to Charles Kyalo Muna to enable him continue with education, as he was pursuing education beyond his 18th birthday. Those were the submissions on both sides.

I have considered the application, documents filed and the submissions on both sides.

This is an application for stay of execution of the courts orders in the ruling delivered on 1/10/14 pending hearing and determination of appeal. Prayer (1) of the application was spent as stay was granted pending this ruling. Such applications are governed by the provisions of Order 42 rule 6 (2) of the Civil Procedure Rules, which states as follows:-

*“6 (2) no order for stay of execution shall be made under sub rule (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 bind him has been given by the applicant.”*

There is no dispute that this application was made without undue delay. The ruling of the court was delivered on 1st October 2014. This application was filed on 26th October 2014. No issue of delay has been raised by the respondent. In my view, the delay of three or so weeks was not unreasonable delay. In any case none of the parties has said that there was delay in filing this application. I am satisfied that the application was filed without unreasonable delay.

Has the applicant satisfied the requirement that he will suffer substantial loss if the stay of execution orders sought are not granted? I will start by saying that this is a family matter involving a husband, a wife or former wife, and children. Several applications and rulings have been made and determined in this matter.

The orders have a history. On 13th of December 2012 the trial court delivered its judgment, and stated in its conclusion as follows:-

1. The plaintiff and the defendant to share equally for school fees and other related learning materials for Faith Ndanu Muna, Charles Kyalo Muna and Julius Muimi.
2. The defendant to contribute a sum of 20,000/= to the plaintiff being monthly maintenance for the minor plaintiff.
3. Each party to bear his or her costs.”

For the sake of clarity the plaintiff was Mumbi Muna (the respondent) and the defendant was Wilfred Muna Virah (the applicant).

Thereafter a ruling was delivered to an application brought by the respondent by the same court on 11th June 2014.

In the ruling the court ordered as follows:-

**“I find that the defendant {Wilfred Muna Virah}has at 10.4.14 is in arrears of Kshs. 60,000/= being monthly maintenance of the minors. He is also in arrears of 11,150/= being fees for Faith Ndanu Muna and a further sum of Kshs. 4,000/= as ordered by court on 3/11/2012. The court hereby issues an order that the defendant be committed to civil jail for 28 days unless the whole outstanding amount is paid.”**

Thereafter in August 2014 both the applicant and the respondent filed two applications which were heard together by the court. After hearing submissions for the parties the court delivered its single ruling to those two applications on 1st of October 2014. The court decided that special circumstances had been established for extension of parental responsibility of the applicant in favour of Charles Muna for purposes of education at JKUAT. Secondly, the court held that the maintenance for the children cannot be interpreted narrowly, in that there should be no different levels of maintenance to be applied during school holidays. The court thus declined to review the maintenance orders as sought by the applicant in his application. It is from the above decision of the court delivered on 1<sup>st</sup> October 2014 that this present application for stay of execution has been filed by the applicant in court.

In my view, the applicant has not demonstrated that he will suffer substantial loss if the orders of stay of execution requested are not granted. This is because with regard to the education for Charles Kyalo, the court has been told, which has not been disputed by the applicant, that the training at JKUAT is only for one year terminating this December of 2014. In addition, the cost of educating the children according to the original judgment delivered by the court on 13<sup>th</sup> of December 2012 is that the same be shared equally between Mumbe Muna (the respondent) and Wilfred Muna Virah (the applicant). In effect therefore the applicant will only pay half the fees for Charles Muna. The other half will have to be paid by respondent. Since the course ends this December, the payment is a one off payment. I take it that the payment of Kshs. 200,000/= or whatever amount for the course up to this December is all that is due. As such I find no substantial loss to be suffered by the applicant. Charles Muna is in any event his own son after all.

With regard to the order for payment of maintenance of Kshs. 20,000/= per month, the applicant has not shown any changed circumstances in his income or earnings that would put him in such financial distress due to that order, which would justify the grant of stay of execution pending appeal. I agree that the appeal is an arguable appeal and the decision of the appeal court may go either way depending on the facts and the law as interpreted by that court. However, I do not see any substantial loss that will be suffered by the applicant at this stage, if stay of execution is not granted. In any event, in my view if there will be an overpayment by the applicant it may be deducted from future maintenance payments, as he himself suggests a figure of Kshs. 8,000/= per month.

On the above reasons therefore, in my view, the applicant has not demonstrated that he will suffer substantial loss if the stay of execution orders requested by him are not granted.

As for security, the applicant in my view has demonstrated that he is willing to abide by the orders of the court and provide necessary security. However, since I have found that he will not suffer substantial loss if stay orders are not granted, I will disallow this application.

In my view the most appropriate action is for the applicant to take steps to fix the appeal for hearing at an early date, for the issues between the parties to be substantively canvassed and determined.

Otherwise this application is not merited and I will dismiss the same.

Consequently I dismiss the application as it lacks merit. I order that costs of this application be in the cause, since an appeal is still pending.

**Dated and delivered at Garissa this 10th day of December 2014**

**GEORGE DULU**

**JUDGE**