

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 61 OF 2015

D M.....APPELLANT

VERSUS

R W.....RESPONDENT

RULING

1. The respondent is the former wife of the applicant. Their marriage resulted into two children who are in school and stay with the respondent. There is a dispute in the children's court in which the applicant was advised to pay Kshs.30,000/= for maintenance and upkeep of the children in the interim and also to cater for their medical expenses, school fees and school related expenses. When the applicant left the bill to accumulate to Kshs.1,252,625/= without paying, the respondent took out a notice of him to show cause why he should not be committed to civil jail. The applicant challenged the notice. The children's court heard the matter and ruled that, because the money had not been paid, the warrant of arrest would issue for the arrest and incarceration of the applicant. He has not been arrested. He appealed against the ruling. In the appeal he filed the present application seeking stay of the execution of the order pending the hearing and determination of the appeal. I heard the submissions by Mr. Saende for the applicant and Mrs. Wangombe for the respondent.

2. I have looked at what happened at the Children's Court. By the time the notice to show cause was being heard the applicant was admittedly in arrears. In his replying affidavit to the notice to show cause he stated that he was not able to meet his obligations because he had run into financial difficulties. He stated that he was still committed to ensuring his children's welfare but he was having "financial constraints and hardships". He stated as follows:-

"22. Further to the above, I pray that this Honourable court grants me six (6) months so that I can regularize the issues of arrears and be up to date with my payments within that period."

He further stated that:-

"24. THAT by having me committed to jail, the welfare of the minors herein would be highly prejudiced since they stand to suffer more as I will be unable to fend for them and meet their expenses."

3. The trial court noted that the non-payment of fees was denying the children the right to education. It found that the applicant had the means, according to the documents he had shown, but that he was simply ignoring to meet his obligations. It was observed that the order for payment was still subsisting, and that the applicant had not gone back to the court to seek its review. It is these findings that the applicant seeks to attack by the appeal. This is not the occasion to deal with the merits of the appeal.

4. This is a matter that touches on the interests of the children. The children have to go to school and their maintenance and upkeep catered for. These are not matters that can be postponed, or delayed. **Section 4** of the **Children Act 2001** and **Article 53(2)** of the Constitution of Kenya 2010 commanded the Children's Court, and indeed this court, to treat the interests of the children as the first and paramount

consideration in dealing with this issue. The court has an obligation to safeguard and promote the rights and welfare of the children.

5. Stay of execution is a discretionary matter. It cannot be granted to a party who has not met his part of the bargain. The order that the applicant pays for the upkeep and education of his children still stands. He is in arrears and that will substantially affect the rights of the children. There would be no legal, or other basis, to stay the execution of the order of the lower court. I consequently dismiss the application with costs.

DATED and DELIVERED at NAIROBI this 20th July 2015.

A.O. MUCHELULE

JUDGE