**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO.21 OF 2015**

**G D O…..APPELLANT/APPLICANT**

**VERSUS**

**P M ……...RESPONDENT**

***(An appeal from the Ruling and Order of Hon. N. Njagi – PM dated and delivered on the 12th day of February 2015 in the original Nyamira CMCC Children's Case No.7 of 2014)***

**RULING**

By a Notice of Motion dated 16th February 2015, the applicant herein G D O brought an application seeking from this court orders:-

1. **Spent.**
2. **Spent.**
3. **Spent.**
4. **The Honourable Court be pleased to grant an order of stay of proceedings and on further proceedings including, but not limited to the application for Notice to show dated 13th February 2015 vide Nyamira CMCC Children's Case No.7 of 2014 pending the hearing and determination of the appeal herein.**

5. **The Honourable Court be pleased to grant an order of stay of execution of the judgment and decree tendered on the 14th day of November 2014 vide Nyamira CMC Children's Case No.7 of 2014 together with all consequential orders pending the hearing and determination of the appeal herein.**

6. **Costs of this application do abide the appeal.**

7. **Such other and/or further orders as this Honourable court may deem just and expedient be granted.**

The application is brought under the provisions of **Order 42 rule 6, sections 1A, 3A & 63(e)** and **articles 50(1) & 159 (1)** of the **Constitution**.

The application is supported by the affidavit of the appellant G D O deposing that in the year 2001, the respondent and himself entered a marital relationship proceeded to cohabit as husband and wife which cohabitation was sanctioned and blessed by their respective parents. Apparently, by the time they both started cohabiting, the respondent had a child born out of wedlock, the said child was brought into the marriage and in fact the child is currently aged 13 years.

However, on the 17th April 2014 the respondent commenced proceedings before the subordinate court at Nyamira vide Nyamira CMC Children's Case No.7 of 2014 seeking various orders inter alia custody and maintenance. Simultaneously with filing the custody and maintenance application the respondent also filed an application seeking interim custody and maintenance which application was heard before the subordinate court and determined vide a ruling dated 20th June 2014. After the ruling, the matter was fixed for hearing on 16th October 2014 on which date the respondent tendered her evidence and closed her case.

Upon close of the respondent's case the suit was adjourned and fixed for defence hearing on 31st October 2014 and on that day the appellant's case was closed for want of attendance. Thereafter, the suit in the trial court was listed for judgment on 14th November 2014 and on the said date judgment was rendered against him.

The appellant now contends that on the day of defence hearing was fixed in the trial court, he was still in Southern Sudan where he works as a volunteer with the United Nations hence he travelled to Kenya on 29th October 2014 oblivious of the scheduled hearing date for defence hearing. Thus his defence case was closed without him giving evidence. On realizing that the defence case had been closed without his participation, he instructed his advocates on record to mount suitable proceeding varying the exparte proceedings and judgment. However, the trial magistrate declined to hear the same and proceeded to render judgment on the 14th day of November 2014. That notwithstanding, he engaged his advocates to file another application setting aside the *exparte*-judgment which application was heard and vide ruling rendered on 12th February 2015, the same was dismissed on allegations by the trial magistrate that (appellant) had been duly notified of the scheduled date of defence hearing but had failed to attend court without cause.

Being dissatisfied by the judgment and decree of the lower court, the appellant has now mounted an appeal which according to him raises salient and pertinent issues hence he contends the appeal has overwhelming chances of success. Furthermore, that upon the dismissal of his application seeking to set aside the *exparte* judgment, the respondent herein has since filed an application for committal to civil jail and owing to the contents of the ruling of the learned trial magistrate and the instructions therein, it is apparent and evident that he is exposed of being committed to civil jail on account of non-payment of monies which are well beyond his known earning.

Therefore, he contends that on being threatened with imminent committal to civil jail which was bound to deny and deprive him of his fundament right of liberty, he is bound to suffer substantial loss, prejudice, unless this Honourable court intervenes in the instant matter and on the other hand, the respondent shall not suffer any prejudice and/or loss if the exorbitant award on account of maintenance are suspended. Furthermore, that he has continued to render maintenance in favour of the children of the marriage within his means and he is still prepared to do so, save for the suit judgment and he is ready and willing to offer such security as this honourable court may deem just, reasonable and expedient in the obtaining circumstances.

The respondent on her part opposed the above application by the appellant vide replying affidavit dated 11th May 2015. In her replying affidavit the respondent has contended that the appellant has never taken court proceedings seriously given that:

a. **He has never attended court and when ordered despite having appointed an advocate.**

b. **He has never filed his affidavit of means despite the honourable court having ordered him to do.**

c. **He has brought this application in bad faith, it is a blatant abuse of the court process and it is aimed at defeating the ends of justice.**

The respondent has also deposed that the appellant's appeal does not raise any salient issues hence an

abuse of the court process since the matter before court is sensitive as it touches on welfare of children who have been neglected since filing of the suit in April 2014.

Lastly, the respondent contends that she will suffer harm if the judgment is suspended as the minors continue to lack food, shelter, clothing, school fees and other necessities. That the appellant's averments that he is working as a volunteer are meant to mislead the Honourable court into believing he is not paid a salary yet the appellant is putting up several properties both in Nyamira and Kisii County.

When the matter came before me on 9th June 2015 Mr. Ochwangi for the appellant submitted that they were requesting for orders appearing on the face of the application and the supporting affidavit.

Mr. Owenga for the respondent in opposing the above submission submitted that the appellant was afforded facility to defend the case but did not utilize that opportunity. That he is now bringing an application to block execution proceedings that have been filed in the lower court. That the appellant never took the proceedings seriously and even after being requested to file affidavit of means, the appellant refused. In addition to this, he submitted that the appellant wants the court to believe he is a volunteer in U.N. He referred to **Order 12 of CPC** on attendance and submitted that the trial court already gave appellant 3 chances of being heard in court and as long as he was represented the court cannot set aside the judgment. On this point he referred to **Stanley Kuria v. JKUAT**. He also relied on **article 159** of the **constitution** and submitted that willful and deliberate non attendance was not a technicality. Lastly, he relied in the case of **CMC Motors Group Limited v. City Council of Nairobi Civil Case No.79 of 2007 (***unreported***)**.

I have considered the above application by the appellant, the replying affidavit by the respondent and the oral submissions in court by advocates representing each of the parties. The appellant relies on **Order 42 rule 6 of the Civil Procedure Rules** and the principles set out in the said provisions are outlined as:-

1. **The application must be made without undue delay.**

2. **The applicant must demonstrate that he will suffer substantial loss unless the order sought staying execution is granted.**

3. **That the applicant should provide such security as may be ordered by the court.**

On the first condition and whether the appellant herein has filed this application without undue delay. It should be noted that the ruling in SPMCC at Nyamira Child case No.7 of 2014 was delivered on 12th February 2015 and in my view the application was filed within reasonable time within 30 days of the date of the ruling which is also statutory period under **Section 79(6) of the Civil Procedure Act**, within which an appeal from the subordinate court should be filed to the High Court as a matter of right. I am therefore satisfied that the application was filed timeously.

Regarding the second condition of substantial loss that is likely to be suffered by the applicant if stay is not granted, the appellant through his advocates has stated that he works in South Sudan as a volunteer with the U.N. and the therefore risks being thrown to civil jail if the said judgment and decree made by the Principal Magistrate in Nyamira is not stayed. Furthermore, this court notes that the appellant works in South Sudan meaning that if this court dismisses this instant application and the judgment and decree of the lower court is executed, it will only mean that the appellant will be unable to travel to South Sudan and earn a living.

Indeed, demonstrating what substantial loss is likely to be suffered, is the yardstick to granting a stay of execution of decree pending appeal. In **Jeny Luesby vs. Standard Group Ltd {2014] eKLR** it was held that granting of stay pending appeal is at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the applicant.

> ***'' ……sufficient cause being a technical as well as legal requirements will depend entirely on the applicant satisfying the court that the substantial loss may result to the applicant unless the order is made, and therefore the court may direct for the deposit of such security for the due performance of the decree or order as may ultimately be binding on the applicant where an applicant has been able to satisfy the court that the application has been made without unreasonable delay…..the fact that execution process is in motion or the attached properties have been sold does not in itself amount to substantial loss under Order 12 Rule 6 of the Civil Procedure Rules.''***

This court has also pronounced itself in several decisions that under **Order 12 rule 6(2) of** the **Civil Procedure Rules**, the applicant seeking orders of stay pending appeal from the subordinate court to the High Court, the applicant is not required to prove that they have an arguable appeal unlike if it was an application before the court of appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. This was held in several decisions including Nakuru HCCC No.211 of 1998 – **Martha Njeri Wanupite & 3 others vs Peter Machewa Mwangwi Mwangi & 3 others**

Nonetheless, what was stated in the case of **Absalom Dord vs Tarbo Transporters [2013] eKLR** is relevant as well that;

> **'the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves this in recognition that both parties have rights, the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing right focuses on their reconciliation which is not a question of discrimination.'**

Noting that the appellant has offered to deposit security of any amount for due performance of decree and also noting that this is a children's matter where the amount deposited should not be punitive in nature, I order that the sum of Ksh.50,000/= should be deposited in this court within 21 days from the date hereof, as a condition precedent to stay of execution of decree in CMCC at Nyamira Children's Case No.7 of 2014 pending hearing and determination of the appeal, upon which the said monies shall be held as security for performance of decree which may ultimately be binding upon the appellant. In default, the orders of stay herein granted lapses and the respondent shall be at liberty to execute decree. I further order that upon depositing of such decretal sum in court, the appellant shall take all the necessary steps to complete the process of readying this appeal for hearing and disposition within the next 90 days from the date of such deposit and in default, the orders of stay shall automatically lapse after 90 days from the date of deposit and the respondent may apply for release of the deposited funds.

**Dated, signed and delivered at Kisii this 17th day of July 2015**

**HON. C. B. NAGILLAH**

**JUDGE**

**In the presence of:**

- M/S Muguche holding brief for Oguttu for the Appellant/Applicant
- M/S Nyawencha holding brief for Omwanza for Respondent
- Samuel Omuga: Court clerk