



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

**AT NAIROBI**

**MISC. APPLICATION NO. 76 OF 2014**

**S M K.....APPLICANT**

**VERSUS**

**E W N.....RESPONDENT**

**RULING**

1. The Notice of Motion before me is dated 16<sup>th</sup> April 2014. It is brought under **Section 3A, 79G, and 95** of the **Civil Procedure Act, Order 50 Rule 6, Order 42 Rule 6 and Order 51, of the Civil Procedure Rules, Section 99** of the **Children's Act** and **Article 53** of the Constitution. It seeks for orders that the time to file an appeal on the court's ruling delivered on 14<sup>th</sup> January, 2014 be extended to allow the Applicant to file appeal out of the time stipulated by the court. That in the interim, the warrant dated 14<sup>th</sup> March, 2014 be stayed and stay of execution be granted pending the hearing and determination of this application and of the appeal itself.

2. The application is based on grounds that the court delivered its ruling on 14<sup>th</sup> January, 2014 on a Notice to Show Cause taken out by the Plaintiff, requiring *inter-alia*, the Applicant to pay a sum of Kshs.152,810/= and court collection fees of Kshs.1,500/= within seven (7) days, failure to which warrant of arrest to issue. The Applicant alleges that the said ruling was delivered without notice to him and several attempts to retrieve the file from the Chambers of the trial magistrate yielded no fruits, as the court was on leave.

3. The Applicant states that he only became aware of the ruling upon service by the Respondent, of a court order dated 28<sup>th</sup> February, 2014 on 12<sup>th</sup> March, 2014. Upon perusal of the file he found that indeed a ruling was delivered on 14<sup>th</sup> January 2014 in which the court notified him of the right of appeal within thirty (30) days. The Applicant had been served with court orders issued ex-parte on 24<sup>th</sup> May, 2013 requiring him to pay a monthly sum of Kshs.15,000/= together with school fees, school related expenses and medical expenses. That since he did not have means to comply he applied for review, variation and/or setting aside of the ex-parte orders in his application dated 13<sup>th</sup> September 2013.

4. The Applicant urged that the court did note that the Applicant's application for review dated 13<sup>th</sup> September, 2013 was urgent and ruled that it would be heard simultaneously with the Notice To Show Cause. Subsequently however, the court only proceeded to hear the Notice to show cause and delivered its ruling, hence the application dated 13<sup>th</sup> September, 2013 is still pending and has not been heard. That there is a serious miscarriage of justice as the Applicant does not have the means to comply and risks being arrested, which shall not be in the best interest of the children and which is also against the rules of

natural justice as he has been condemned unheard.

5. The Applicant in his supporting affidavit reiterated his grounds of the application and averred that the court did certify his application urgent and ordered that it would proceed simultaneously with the Notice to Show Cause on 11<sup>th</sup> October 2013. On that date the court did not sit and the two advocates on opposing sides fixed the matter for hearing on 5<sup>th</sup> November 2013, on which date the court heard the Notice to Show Cause only and proceeded to give orders without hearing the application for review.

6. M/s Tindi Munyasi, learned counsel for the Applicant filed written submissions in which she set out the chronology of events that provoked this application. On the prayer for enlargement of time, counsel contended that the court gave the Applicant right of appeal within 30 days of its ruling, but that the Applicant was not aware of the delivery of the ruling since it was delivered without notice to the parties. That the ruling was initially scheduled for delivery on 13<sup>th</sup> November, 2013, but on that date it was not ready as the court was on leave. That several visits to the registry met with the response that the court had not resumed and the file could not be retrieved from chambers to enable the counsels fix a date for the pending application for review. Counsel urged that despite being vigilant, the Applicant had no way of knowing of the delivery of the ruling till March, 2014 when they were served with the court order.

7. Counsel asserted that the Applicant moved with speed and without inordinate delay to seek for enlargement and extension of time to file appeal out of the time stipulated by the court. She prayed that the court would enlarge and extend the time to allow the Applicant to file the appeal.

8. In her replying affidavit the Respondent deponed that on 24<sup>th</sup> May 2013 an order was made by the Children's court in cause No. 704 of 2013 requiring the Applicant to pay a sum of Kshs.15,000/= per month, towards the upkeep of the three minors, from the 21<sup>st</sup> May 2013. That the court also ordered the applicant to provide for school fees and school related expenses for the minors. The Respondent averred that the Applicant blatantly disobeyed, neglected and/or ignored the said order, occasioning extreme mental anguish and suffering to the minors.

9. The Respondent further deponed that the applicant thereafter, in a ploy to evade parental responsibility, filed an urgent application dated 13<sup>th</sup> September 2013, seeking to vary the orders of the court dated 24<sup>th</sup> May, 2014. That a Notice to Show Cause scheduled for hearing on 11<sup>th</sup> October 2013 did not proceed on the said date but on 5<sup>th</sup> November, 2013 both parties appeared and argued the cause. The ruling which was reserved for 13<sup>th</sup> November, 2013 was deferred to 20<sup>th</sup> December 2014 and to 14<sup>th</sup> January 2014, when it was finally delivered. It is the Respondent's averment that it is not therefore true, that the appellant was not aware of the ruling date.

10. The Respondent contended that in the ruling of 14<sup>th</sup> January, 2014 the Applicant's application for review dated 13<sup>th</sup> September 2013, was considered and the Appellant was ordered to pay the sum of Kshs.152,810/= to the respondent. The Respondent asserted that the application by the Applicant was an afterthought and no valid reason had been proffered for the failure to appeal in time. She urged that it was in the best interest of the minors for this court not to interfere with the lower court's orders.

11. Mr. Muthomi, learned counsel for the Respondent submitted that the Applicant's application slated for hearing on 11<sup>th</sup> October, 2013 together with the Notice to show Cause were argued and ruling was set for 13<sup>th</sup> November, 2013. He contended that the Applicant cannot claim that he was not heard on his application of 13<sup>th</sup> September, 2013, if he was present in court, and being well aware that his application was to be heard together with the Notice to Show Cause, did not inform the court that his application had been overlooked.

12. Mr. Muthomi confirmed that the ruling set for 13<sup>th</sup> November, 2013 was not ready and was rescheduled for 20<sup>th</sup> December 2013 and to 13<sup>th</sup> January, 2014 when it was finally delivered. He argued that the applicant should have been more diligent in following up on the ruling as did the Respondent, especially considering that it was a ruling, on his application.

13. Mr. Muthomi also urged that the court did give leave to appeal within 30 days against the ruling. That upon being served with the court order on 12<sup>th</sup> March, 2014, the Applicant took more than a month to file the application dated 16<sup>th</sup> April, 2014 seeking review and did not give sufficient reason for the delay in filing the said application. Counsel cited section **79G** of the **Civil Procedure Act, Chapter 21 laws of Kenya** which provides the time within which an appeal from an order or decree from a subordinate court can be made.

14. Counsel therefore urged the court to dismiss the prayers sought by the Applicant, for reasons that the Applicant has refused to obey court orders and that the minors continue to suffer yet the Applicant is a man of means who is financially able to provide for them.

15. This court having carefully considered the application, the affidavits for and against, as well as the respective oral arguments, finds that the issues for determination are whether the Applicant has satisfied the court that he had good and sufficient cause for not filing the appeal in time and whether he has made out a case for setting aside the orders of the Children's court to warrant the exercise of the discretion of the court in his favour.

16. First and foremost the court notes that the orders that the Applicant has asked the court to stay relate to children. Under **Article 53(2)** of the **Constitution** the best interests principle should be applied in all cases concerning the child. **Article 53(2)** provides that:

**“A child's best interests are of paramount importance in every matter concerning the child”**. The said Constitutional provision should be read together with **Section 4(3)** of the Children's Act, which reads thus:-

***“(3) All judicial institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to -***

***(a) safeguard and promote the rights and welfare of the child;***

***(b) conserve and promote the welfare of the child...”***

As stated above the orders made by the Children's Court, which this Court has been invited to stay, were made in favour of the Children and were meant to serve the interests of the said Children.

17. When Children's Court made the impugned orders, it considered the welfare of the children and the Applicant has not established that this was not the case. What this court has been told by the Applicant is that the sum of Kshs. 15,000 ordered by the Children's Court is beyond his means. He has not told this Court what he can offer, or how he will clear the pending arrears of Kshs. 152,810/=, besides telling the court that he cannot pay. Needless to say, the appellant brought these children into the world and it is his duty to fend for their survival.

18. Secondly, the court notes that to date the Applicant has not obeyed the orders made on 24<sup>th</sup> May 2013 in any way howsoever. Court orders are made to be obeyed as soon as they are issued and it matters not whether one agrees with them or not. See ***Hadkinson vs. Hadkinson (1952) All ER 567***, in which the court addressed this issue thus:

***“Court Orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up”***.

19. The Applicant has not endeavored to make any part payment, to convince this Court to take him seriously. It has taken a long period of disobedience of court orders to get the Applicant to this position.

To blatantly choose to disobey orders made by a Court of competent jurisdiction is to abuse the dignity of the court, and to have no regard whatsoever for the rule of law. These were the sentiments of Ibrahim J (as he then was) in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828**, wherein he stated as follows:

**“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.**

20. Lastly, the court has addressed itself on the time it took for the Applicant to file the application for extension of time to his appeal. Section 79G of the Civil Procedure Act, Chapter 21 laws of Kenya which provides the time within which an appeal from an order or decree from a subordinate court can be made as follows:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order;**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

21. The court notes that the Applicant took four months to file an application for review after the first orders were served upon him on 24<sup>th</sup> May 2013. Following the subsequent orders served upon him on 14<sup>th</sup> January 2014 the Applicant did not come to court until a month later. Nothing in the supporting affidavit explains the delay of one month from the time of service of the order to the time of filing this application. While the court may accept his reasons for the delay between the delivery of the judgment to the time it came to his notice the court finds no reason in any of his explanations for the delay of a month to the time of moving the court.

22. Having so found however, the court in the exercise of its discretion will give the Applicant a chance to prosecute his application and therefore grants the following orders:

a. The court grants stay of execution and orders that the warrant dated 14<sup>th</sup> March 2014 be stayed on condition that:

i. the Applicant pays to the Respondent half of the sum ordered by the court on 24<sup>th</sup> May 2014, being Kshs.76,400/= within 7 (seven) days of this ruling.

ii. the Applicant files his appeal within 7 days of this date.

Failure to which these orders shall be vacated and the Respondent shall be at liberty to proceed with execution.

Costs to the Respondent.

**SIGNED DATED and DELIVERED** in open court this **14<sup>th</sup> day of July 2015.**

.....

**L. A. ACHODE**

**JUDGE**

**In the presence of ..... for the Applicant**

**In the presence of ..... for the Respondent**