



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 5 OF 2015

CIVIL APPEAL NO 564 OF 2014

SEPARATION CAUSE 2 OF 2008

J G M.....APPELLANT

VERSUS

G W G.....RESPONDENTS/APPLICANTS

RULING

The Appellant filed under certificate of urgency on 17th December, 2014 an application for stay of execution under order of the order of the Magistrate's Court on the following grounds;

1. The Appellant is aggrieved by the orders of the Magistrate's Court demanding payment for money that is already paid
2. The Appellant stands to lose if the order regarding the Separation Cause decretal sum is paid.
3. The Appellant will have substantial dues.
4. The Court ruling was biased and unfair.
5. The orders run against the due process of the law and procedure executed against Appellant

The Notice of Motion is on the stay of execution of the decree in **Separation Cause No. 2 of 2008** which ought to be consolidated with **Civil Appeal No. 9 of 2009**.

In the supporting affidavit of 17th December 2014, the Appellant stated that the matter is Separation Cause 2 of 2008 relating to him and the 2nd wife G W G who left the home and he took care of the children.

On 26th March, 2008 the Respondent obtained Court orders and confronted him with her daughter and it was then a Police matter. He was adamant to vacate the premises which he did although this house is registered in his name.

In the **Separation Cause 2 of 2008**

- a. On 26th March, 2008 Hon. Were SRM granted orders that he was to pay children school fees and attend to educational needs
- b. The same orders were deponed on 13th January, 2009
- c. A Consent was filed before Hon. A.K. Ndungu on 1st October, 2010 and duly adopted as an order of the Court.

The Applicant complied with the order to pay school fees, school expenses and for the children who are now in university level. The Applicant has since retired and relies wholly on pension.

The orders for the remittal sum include these expenses that he duly paid for education of the children and expenses. The amount was not to be paid directly to the Respondent. To execute the decretal amount would amount to double payment of the said amount.

The Court orders were to effect payment of school fees and expenses and medical care be paid and this was done as evidenced by attached copies of documents to the application. Both parties have shared parental responsibility to the children. The Respondent has not shown the items that she dealt with at the time regarding the upkeep care and responsibility for the children.

The appeal has high chances of success and if the stay of execution is not allowed then the appeal would be rendered nugatory. The matter also generated **Constitutional Application Number 44 of 2010** to determine why he would cater for the needs of a grandchild whose biological parents are alive, well and responsible.

The Appellant attached the relevant Court orders **“GUG 1 and 2”** and the copies of medical documents at page 7-19. The matter proceeded by way of written submissions by Counsel for both parties as consented by the parties.

The Appellant’s submissions are;

1. That the Appellant has paid school fees expenses and medical care expenses for the children and annexed receipts to confirm the same. Therefore the decretal sum would not include such sums as they were paid to the respective schools and hospitals thrice
2. The Appeal is to tackle the discrepancies whether the Appellant is to pay the same fees twice for the said children. He contests the actual sum sought is the decretal sum which should be determined after deducting school fees expenses and medical care.
3. **Order 42(6) CPR 2010** stipulates grounds which court ought to consider in granting the stay of execution.
4. Whether the lack of stay of execution will result in substantial loss to the Appellant and render the appeal nugatory.

The applicant states he is in compliance of these requirements as he continues paying school fees and expenses for the children.

The Respondent’s submissions filed on 5th July, 2015, the Respondent objects stay of execution of the decree arising from the **Separation Cause No. 2 of 2008**. The judgment was rendered on 10th December, 2014 as attached **“GWG 3”**

The decretal sum is of maintenance arrears and the Appellant has never remitted maintenance arrears to date. The amount due and owing stands at Ksh. 10,166,055/=. The Appellant was engaged in frivolous litigation and the present application is an abuse of the Court process.

The Respondent states with regard to **Order 42 6(2) CPR 2010** the Court was referred to **Civil Appeal No. 9 of 2009**. Relying on the following cases;

1. **KING MUTHUA VS JAMES ICHARIA KUNGU 2015(eKLR)**
2. **R Vs THE COMMISSIONER FOR INVESTIGATIONS AND ENFORCEMENT (2014) eKLR**
3. **ANTOINE NDIAYE VS AFRICAN VIRTUAL UNIVERSITY (2015) eKLR**

The Respondent juxtaposed the position with regard exercise of judicial discretion in granting stay of execution and states in submissions to the Court;

“the Court will as of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are to be met”.

ISSUES

The issue before this Court is whether there should be stay of execution of the decree from the Magistrate’s Court judgment and subsequent orders.

ANALYSIS

Relying on **Order 42 6(2) CPR 2010** this Court finds that there are number of issues pertaining to the order issued and the application for stay of execution. These are;

- a. The multiplicity of cases in Court;
 - i. High Court Civil Appeal 5 of 2015
 - ii. High Court Civil Appeal 564 of 2014
 - iii. Separation Cause 2 of 2008
 - iv. Constitutional Reference 44 of 2010
 - v. High Court Civil Appeal 9 of 2009
- b. The multiplicity of Court Orders; The orders of
 - i. Hon. Were SRM 26th March, 2008
 - ii. Hon Were SRM on 13th January, 2009
 - iii. Hon R. Kimingi SRM 13th January,2009
 - iv. Hon Murage CM on 10th October, 2014
- c. The import of these orders, what was to be paid as school fees, school expenses medical expenses for the children is not clear. Who and how was it to be paid? Is

These are issues arising from the various matters and orders that go to the root of the intended appeal. Is the decretal amount due and owing from arrears of school fees, school expenses and medical expenses for the children and /or the arrears of maintenance of the Respondent?

The Court has perused the Court files **Civil Appeal 5 of 2015 and Separation Cause 2 of 2008** and there is no sufficient information to confirm the breakdown of the decretal sum of the same. These were orders made about seven (7) years ago. It is not clear what happened during the intervening period? Did the children go to school and have access to medical care? if so who paid?

The children are now in universities. Are there any arrears due and owing to the schools? All these questions have not been answered in the pleadings and submissions so as to confirm the basis of the decretal sum. This can only be determined upon evidence being adduced to prove the claim one way or the other.

The Court finds that substantial loss may result to the Appellant if the stay of execution is not allowed to determine all these issues that inform the arrears of maintenance and in breach of which Court orders.

The Appellant filed the application for stay of execution on 17th December, 2014 after the judgment of the Court on 10th December, 2014. There was unreasonable delay.

The security of performance that the Appellant should deposit in this case if the appeal is not successful in that he continues to pay for the children's education and expenses. The Court considers that these children of the marriage that are still going to school and the Appellant is responsible for their school fees and expenses and medical care.

FINAL ORDERS

The Court orders as follows;

1. The stay of execution of execution of the decretal amount as per the order of the Magistrate's Court is granted
2. The conditional stay is for the Applicant to continue paying school fees expenses and medical for the children.
3. No orders as to costs.

READ AND SIGNED IN OPEN COURT AT NAIROBI ON THIS DAY OF 9TH OCTOBER, 2015

M. W. MUIGAI

JUDGE

In the presence of;

Mr. Kiwende holding brief Mr. Wambugu for the Respondent