



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL 67 OF 2013
IN THE MATTER OF A N M (MINOR)

F W N M.....PLAINTIFF

VERSUS

S M M.....DEFENDANT

RULING

1. The application for determination is dated 17th October 2013. It seeks one principal order, that this court do stay or set aside the orders made by the Children's Court on 26th September 2013 pending the hearing and determination of the pending appeal.
2. The applicant is the appellant in this case. The appeal was filed on 9th October 2013, arising from orders made in **Children's Case No. 1010 of 2013**. The appellant is named in the Children's Case as defendant, while the respondent in the appeal is the plaintiff.
3. According to the grounds set out on the face of the application dated 17th October, 2013, the appellant is the biological father of the child the subject of the proceedings, A N. He is also the husband of the mother of the child who is the respondent in the appeal. There is a pending divorce matter between the appellant and the respondent, as well as a suit for division of matrimonial property. The couple have four children between them, which include the child the subject of these proceedings.
4. To support his case, the appellant has sworn two affidavits, one on 17th October 2013 and the other on 18th October 2013. His principal complaint arises from orders that the Children's Court made on 26th September 2013 requiring him to pay a sum of Kshs.176,700.00, being school fees for the minor, within eight (8) days in default of which he should be arrested. He pleads that he is unemployed and that he has single handedly been paying school fees for three other children. He argues that the respondent is working and should meet the school fees for the subject child. He then makes several averments on the pending divorce and division of property suits.
5. The respondent has responded to the application by her affidavit sworn on 1st November 2013. She avers that if the orders sought are granted the child would be prejudiced. She accuses the appellant of disobeying court orders and of neglecting his duties to the child in question. She avers that the impugned orders were not made *ex parte* as alleged by the appellant. She asserts that the appellant is able-bodied

and should be able to provide for his children, and that he infact carries on farming at a six acre farm in Busia. She accuses the appellant of failing his duties as a husband and father, and issuing cheques that have bounced. She further avers that the divorce and division of property suits had no bearing whatsoever on the issue of the maintenance of the child.

6. The matter was placed before me on 28th October 2013 and I certified it as urgent, directed that the same be served on the respondent for *inter partes* hearing on 1st November 2013. I also granted a stay of the impugned order.

7. On 1st November 2013 both sides addressed me and gave vent to the arguments stated in their respective affidavits. The appellant argued that the ruling on the notice of show cause was made without an application for maintenance being made and therefore there was a gap in the information, and therefore the court made the order of 26th September 2013 in ignorance. It was emphasized that the trial court failed to take into account that the responsibility over a child ought to be shared as between father and mother. The respondent's stated that the orders in question related to school fees and were made way back in July 2013 and were not honoured hence the taking out of the notice to show cause. It was emphasized that a notice to show cause is taken out at the execution stage.

7. I have perused the record before me, I note the initial pleadings filed in the primary matter have not been placed before me. However, the appellant has filed certified copies of the proceedings of the lower court for the period running from 18th July 2013 and 26th September 2013.

8. I note that on 23rd July 2013 the court made or recorded the following orders in the presence of Mr. Madara for the appellant and Ms. Mogusu for the respondent:-

“I have considered the submissions made by both counsel, it is admitted by both parties herein that the home environment is tense. In this court's wisdom it would be unfit for the minor subject herein to be drawn into the issues as between her parents.

Thus to safeguard her interests (best). I direct interim orders to issue as follows:-

1. (a) The defendant (the appellant herein) is to provide school fees and related expenses for the minor pending hearing *inter partes*.
2. The defendant is with effect from today's date to provide 8,000/= towards upkeep of the minor. The amount shall subsequently be payable on every 10th day of the month.
3. The defendant is granted 7 days leave within which to file and serve a response with corresponding leave to the plaintiff.”

9. These orders were meant to be interim, pending the hearing of the Motion dated 16th July 2013 *inter partes*. The *inter partes* hearing was slated for 14th August 2013. The matter was not listed for hearing on 14th August 2013, prompting the respondent to obtain a date at the registry for hearing of the application dated 16th July 2013 on 3rd September 2013.

10. On 3rd September 2013, counsel for the respondent complained that the appellant had not complied with the orders of 23rd July 2013 by paying school fees and monthly maintenance as ordered. The court directed the respondent to take out a notice to show cause for service on the appellant for hearing on 10th September 2013. It would appear that a notice to show cause was indeed taken out and served on the appellant for the same was argued *inter partes* on 10th September 2013, when ruling was reserved for 26th September 2013. On the 26th September 2013 the appellant was given eight days to comply with the order of 23rd July 2013 by paying up the outstanding sums of money otherwise a warrant of arrest would

issue.

11. It is the orders of 26th September 2013 which prompted the filing of the present appeal. The memorandum of appeal dated 9th October 2013 is expressed as challenging the ruling delivered on 26th September 2013. Yet the grounds set out in the memorandum appear to be challenging the orders made on 23rd July 2013.

12. I note that the proceedings of 10th September 2013, which gave rise to the orders of 26th September 2013, were in the nature of execution proceedings. These were initiated to facilitate execution of the orders made on 23rd July 2013. The appellant had been ordered to pay school fees for the child and a monthly upkeep. The allegations made in September 2013 were that these orders had not been obeyed hence the proceedings of 10th September 2013 to enforce compliance. The orders of 23rd July 2013 were made in the presence of the appellant's counsel, yet by 10th September 2013 the said orders had not been appealed against nor varied by the court which made them nor complied with by the appellant. These were orders made by a court of competent jurisdiction. They must be obeyed and a party who is aggrieved by the same must first comply with them even as he moves the higher court on appeal.

13. The only matter for me to consider is stay of the order made on 26th September 2013 pending appeal. I have been invited by the applicant in the application dated 17th October 2013 to set aside or vacate the said orders pending appeal. That I cannot do since it these same orders that are the subject of the pending appeal. Whether or not the said orders ought to be vacated is a matter for determination at the hearing of the appeal. I will therefore only confine myself to considering whether to stay the said orders or not.

14. This court has in several decisions stated its reluctance to stay orders made for the benefit of minors. It has repeatedly been stated that staying an order made in favour of a child will not be in the best interests of the child. The orders I am invited to stay were made in that respect. The applicant has not satisfied me that the said orders were not geared to serve the interests of the minor.

15. I note too that the orders of 26th September 2013 were riding on the earlier orders made on 23rd July 2013. The earlier orders are still intact. They have not been vacated nor varied by the trial court, and are available for compliance by the appellant. I note that the appellant has not complied with them. He has neither paid school fees for the subject minor nor the money ordered for the monthly upkeep. He has not even made any partial payment. Quite clearly, the appellant has disobeyed and disregarded the orders of 23rd July 2013. He has come to me with unclean hands and is not entitled to the discretion of this court being exercised in his favour.

16. In view of the foregoing, I disallow the application dated 17th October 2013. The respondent shall be at liberty to move the Children's Court to enforce the orders of 23rd July 2013 and 26th September 2013. The respondent shall be paid costs of the application by the appellant.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF March, 2014.

W. M. MUSYOKA

JUDGE