



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 26 OF 2013

N A A.....APPELLANT

VERSUS

C M.....RESPONDENT

RULING

By this notice of motion dated 31st July, 2013 the Applicant/Appellant N A A seeks *inter alia* the following orders

- “1. **THAT** this Honourable court be pleased to order stay of execution against the ruling of the Honourable Magistrate in Children’s Case No. 126 of 2012 delivered on 31st July, 2013 requiring the condemning of the appellant in civil jail and refusing to hear the application dated 5th July, 2013 pending the hearing and determination of this application *inter partes*.
2. **THAT** this Honourable court be pleased to order stay of execution against the ruling of the Honourable Magistrate in Children’s Case No. 126 of 2012 delivered on 31st July, 2013 requiring the condemning of the Appellant to civil jail and refusing to hear the application dated 5th July, 2013 pending the hearing and determination of this appeal.
3. **THAT** the costs of this application be provided for.”

The application was opposed by way of a replying affidavit dated 10th March, 2014 sworn by the respondent C N M. By consent of the parties the application was disposed of by way of written submissions.

Prayer (1) of the application having been dispensed with the court now has to consider prayer (2) and (3) only. This application arises from a decision made by the Honourable Magistrate in Children’s Case No. 126 of 2013. The matter was heard *ex parte* and the Hon. trial magistrate directed that the applicant pay a monthly maintenance of Kshs. 15,000/= per month towards the maintenance of the two children born out of his marriage to the respondent. The applicant failed to make the payments and execution proceedings were commenced. On 31st July, 2013 the trial magistrate committed the applicant to civil jail for his failure to pay the court ordered amount. He therefore filed this matter before the High Court.

I am satisfied that this application for stay has been brought to court in a timeous manner. I have considered the submissions filed by both parties. It appears that the two children are currently residing in Meru with the parents of the respondent whilst the respondent herself resides in Mombasa. I am mindful

of section 4(a) of the Children Act which obliges a court to give priority to the best interest of the children. To have their father committed to civil jail from where he will be totally unable to earn any income would not in any way serve the best interests of the children. However, the applicant is under a legal obligation to obey all lawful court orders whether he agrees with them or not. His only remedy is to appeal which he has done in this case. I therefore allow prayer (2) of this application staying the ruling in the Children Court of 31st July, 2013 **subject** to the following conditions

1. That the applicant clears all outstanding arrears of maintenance due and arising from the orders made in the Children Court upto and including August, 2013.
2. From January, 2013 when a temporary stay was granted by this court the applicant will pay a maintenance of Kshs. 6,500/= until further orders of the court.
3. The above to remain in force until the appeal is heard and determined.

Dated and delivered in Mombasa this 5th day of May, 2014.

M. ODERO

JUDGE

In the presence of:

Ms. Osino for Applicant

Mr. Mutisya for Respondent

Mutisya Court Clerk