

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.63 OF 2014

R K MAPPELLANT

VERSUS

M N KRESPONDENT

RULING

By a Notice of Motion dated 19/05/2014 and supported by the applicant's affidavit and annexure, the court is urged that pending hearing and determination of appeal it issues orders staying execution the orders of Hon. P.O. Muholi in **Nyahururu PMC Protection & Care No.172 of 2013**, made on August 2013 requiring the applicant to pay Kshs.3000/= towards the upkeep of L.K., a child less than one year then, and also to pay Kshs.2000/= towards the house help, to make a total of Kshs.5000/= per month.

It is premised on grounds that there were orders made pursuant to a one sided and biased Children Officer's report dated 07/08/2013. The trial magistrate is accused of making those orders without hearing the parties on oath, or having any evidence tendered and parties being cross-examined, contrary to the provisions of the Children Act, which provides that the mother should have parental responsibility in the first instance, and notwithstanding the loud and sustained protestation by the appellant regarding the paternity of the subject, or even having maintained or acquired parental responsibility over the subject.

Further, the orders were not made pursuant to any plaint or suit being instituted by the respondent, nor were they made under section 20 of the Children Act as a penalty, nor under Section 127 of the Children Act pursuant to a criminal process at all.

The appellant filed a suit, alongside an application under certificate of urgency on 19/9/2013, in **Nyahururu Children's Court Case No.53 of 2013**, praying that the orders therein be stayed, and a DNA test be done to determine paternity of the minor. Although the application which was served on the respondent was unopposed, the court only granted the prayer for a DNA test but did not stay other orders and no reason was given.

The DNA results were negative and excluded the applicant as the father of the child. When the said DNA report was presented to the trial court, the trial magistrate declined to stay the orders in P & C No.172 of 2013 or order the respondent to refund half the cost of Kshs.7500/=. He instead opted to disqualify himself from the matter citing lack of an independent mind as he was privy to certain information.

The file was sent to a different court, which heard the application for adoption of the DNA report and although there were no prayers for execution, notice to show cause or warrant of arrest in execution of the orders in P & C No.172 of 2013, the court orally ordered the applicant to pay arrears of Kshs.12,500/= for January, February and March 2013 without fail or else face stern action. The applicant obliged.

To date ruling on the application for adoption of the DNA report has not been delivered, and the applicant is apprehensive that he may be ordered to continue paying the monthly sum or lose his liberty, yet he is not the subject's father - he has so far paid a sum of Kshs.40,000/= towards maintenance of the subject.

The respondent did not file any response to the application.

The applicant fears are well founded because there is a valid court order, and unless some legal form of intervention takes place, then he is expected to keep on paying the sum he had been ordered to pay. The basis of that order was that he was believed to be the father of the subject and therefore was under a legal duty to provide for his upkeep. This was fortified by a report from the Children's Officer in Nyahururu, one Gladys Langat who purportedly carried out a social inquiry and established that the applicant was the subject's father and ought to undertake parental responsibility. The DNA report dated 3rd January 2014 and signed by A.W Nderitu a Government Analyst, excluded the applicant as the subject's biological father. From that report I would say that the applicant has an arguable appeal with higher chances of success.

The continued payment of the sums ordered by the court, therefore is prejudicial to the applicant's interest especially because should he default, then he risks being punished by the court. What's more, the trial court seems to be dragging its feet in delivering the ruling which sought to adopt the DNA report - which then confirms the applicant's assertion that the court seems to want to see him part with money in support of the subject.

My finding is that the applicant deserves to be granted orders of stay pending hearing of the appeal and I so grant. Costs of this application shall be borne by the respondent.

Delivered and dated this 11th day of July, 2014 at Nakuru.

H.A. OMONDI

JUDGE