



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO.85 OF 2013

C I NAPPELLANT

VERSUS

J N N.....RESPONDENT

R U L I N G

The Appellant was aggrieved by the decision of the Children’s Court that ordered him to pay the Respondent the sum of Kshs.30,000/- per month as maintenance for a minor who was at the material time aged 1 $\frac{1}{2}$ years old. The Appellant filed an appeal to this court challenging the said decision. Contemporaneous with filing the appeal, the Appellant filed an application pursuant to **Order 42 Rule 6** of the **Civil Procedure Rules** seeking to stay the execution and enforcement of the order of the Children’s Court pending the hearing and determination of the appeal. The grounds in support of the application are stated on the face of the application. In essence, the Appellant states that the amount that he was ordered to pay as monthly maintenance was beyond his net income and therefore his means. The application is supported by the annexed affidavit of the Appellant. The application is opposed. The Respondent filed a replying affidavit in opposition to the application. She stated that the order that was made was in respect of two minor children, one of whom the Appellant had willingly and knowingly acquired parental responsibilities. She deponed that she had no dependable source of income and depended on the maintenance paid by the Appellant. She was of the view that the Appellant had made the application in bad faith with a view to avoiding his responsibilities as a father. She urged the court to dismiss the application with costs.

At the hearing of the application, this court heard oral rival arguments made by Mr. Ochola for the Appellant and by Miss Mukururi for the Respondent. Mr. Ochola submitted that the Children’s Court made an error when it made an order of maintenance requiring the Appellant to pay the sum of Kshs.30,000/- per month to the Respondent. He explained that the amount was excessive and did not take into account the age and the needs of the minor. He took issue with the fact that the income levels of the Appellant and the Respondent were not taken into account before the said decision was reached. He submitted that the Appellant was currently in his first job and was earning a net income of Kshs.18,000/-. His payslips were attached. He stated that the Appellant did not have any other source of income and therefore was not in a position to meet the maintenance order made by the Children’s Court. He urged the court to take into consideration the fact that from the same salary, he also needed something for his upkeep. He told the court that the Appellant was willing to pay Kshs.5,000/- per month for the upkeep of

the child. Learned counsel submitted that the Appellant was not willing to support nor had he acquired parental responsibility for the child who the Respondent had from a previous relationship. He therefore urged the court to stay the order pending the hearing and determination of the intended appeal.

Miss Mukururi for the Respondent opposed the appeal. She submitted that the stay of the orders issued by the Children's Court will not be in the best interest of the children. She submitted that Kshs.5,000/- was not enough to maintain the children. She explained that the Respondent worked on a commission basis in a salon in Kimathi Street. She was not in a position to maintain the children solely from her own income. She urged the court to consider the fact that the Appellant took a loan with the Barclays Bank of Kenya with a view to frustrating the order of maintenance that was issued by the Children's Court. She submitted that the court should not rely on the particulars in the payslip alone. She was of the view that the Appellant had used the loan to invest and therefore he now had another source of income. She submitted that the Appellant himself had assessed the cost of bringing up a child at Kshs.19,200/- per month. She urged the court to find that the Appellant had not come to court in good faith: he had not taken the medical cover but he had undertaken to provide; he had not consistently paid even the conceded monthly sum as maintenance. She urged the court to look at the totality of the circumstance of the application and make an appropriate order dismissing the application with costs.

This court has carefully considered the matters in issue in this application. The issue for determination by this court is whether the Appellant made a case for this court to stay the execution of the order that he wishes to appeal against before this court. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** requires any applicant who wishes to have an order or decree stayed pending the hearing of the intended appeal to establish that he would suffer substantial loss if stay is not granted. Such applicant must also be prepared to provide security for the due performance of the decree. Finally, the application for stay must be made without undue delay. In **Butt –vs- Rent Restriction Tribunal [1982] KLR 417** at page 419, Madan JA (as he then was) held thus:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No.2) 12 Ch D (1879) 454 at p.459. In the same case, Cotton LJ said at p.458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

In the present application, in addition to the above requirement, is the duty imposed on this court under **Section 4(3)** of the **Children Act** that requires this court, in considering any matters in dispute involving children, to always treat the best interest of the child as of primary consideration. This Section echoes **Article 53(2)** of the **Constitution** which states:

“A child's best interests are of paramount importance in every matter concerning the child.”

The Appellant has sought to stay execution of the order of maintenance that was issued by the subordinate court. He explained that the order issued was beyond his means and therefore he is not in a position to comply with the said order. He annexed copies of his payslips which showed that he earned a net of Kshs.36,000/- excluding the commitments that he made in form of taking salaries in advance and repaying the loan that he had taken from Barclays Bank. It was the Appellant's case that to require him to pay the sum of Kshs.30,000/- per month would even deprive him of means of livelihood. In the premises therefore, he urged the court to stay the execution of the maintenance order issued by the Children's Court pending the hearing and determination of the appeal. He was willing to pay the sum of Kshs.5,000/- per month pending the hearing and determination of the appeal.

On her part, the Respondent argued that the sum offered by the Appellant cannot and is not sufficient to maintain the children. She told the court that her income was uncertain as she worked in a salon on

commission basis. She was of the view that the Appellant was hiding his income, and infact was able to comfortably pay the said sum ordered by the Children's Court. She urged the court to take into consideration the Appellant's past conduct in determining whether or not the present application has been made in good faith or is meant to frustrate the order that was issued by the Children's Court.

Having evaluated the facts of this application, it is this court's holding that the Appellant established a case for this court to stay the execution of the maintenance order issued by the Children's Court pending the hearing and determination of the appeal. The Appellant established that he would suffer substantial loss if he were to be compelled to pay the said sum of Kshs.30,000/- per month, taking into consideration that his net monthly income was about Kshs.36,000/-. There is also another issue which requires ventilation by this court when it will hear the appeal: whether the Appellant assumed parental responsibility of the Respondent's child born of another relationship as provided under **Section 24** of the **Children Act**. The determination of this issue would of necessity resolve the question whether the Appellant's responsibility is restricted to maintaining the child that he sired with the Respondent or the two children born of the Respondent. This court also took into consideration the fact that under **Article 53(1)(e)** of the **Constitution**:

“Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”

It will not do for the Respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the Appellant. The Respondent must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children. The above constitutional requirement is a game changer. Parties seeking the intervention of the Children's Court to secure maintenance for the upkeep of the child or children must also indicate what contribution they are making towards the support of the child or children. This is because both the mother and the father of the child have equal responsibility towards the upbringing of the child or children. Of course, in making such orders of maintenance, the Children's Court must take into consideration the unique aspect of parenting that nature has endowed on the mother of the child. This includes the role that the mother plays in nursing and nurturing a child or children of young and tender years. This function does not accrue naturally to fathers.

In the present application, this court holds that the order of maintenance issued by the Children's Court shall be stayed pending the hearing and determination of the appeal. However, the Appellant, as security for the due performance of the order, shall pay monthly maintenance of Kshs.10,000/- to the Respondent pending the hearing and determination of the appeal or until further orders of the court. The Appellant shall also be required to pay for the medical cover of the younger child. That sum shall be paid with effect from March 2014 when the original order of stay was issued by this court. The said sum shall be paid on or before the 5th of each succeeding month. Costs shall be in the cause. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF OCTOBER, 2014

L. KIMARU

JUDGE