



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 24 OF 2014

D G M.....APPELLANT

VERSUS

L M M.....RESPONDENT

RULING

The Appellant was aggrieved by the decision rendered by the Children's Court regarding the maintenance of a minor child that was the subject of the case. The order was made on 18th March 2014. The Appellant has filed an appeal challenging the said decision. Contemporaneous with filing the appeal, the Appellant filed an application under **Order 42 Rule 6** of the **Civil Procedure Rules** seeking to have the order stayed pending the hearing and determination of the appeal. In grounds in support of the application, the Appellant conceded that he owed parental responsibility to the minor child. He stated that he was the one who was paying for the medical, educational, clothing and food for the child. In that regard, he was paying the sum of Kshs.5,000/- per month to the Respondent. He was aggrieved that on the said 18th March 2014, the Children's Court increased his financial contribution to Kshs.15,000/- without assessing each party's means. He lamented that this requirement exceeded his financial capacity. It was his case that if the order was allowed to stand, he would suffer legal execution and financial ruin. In the premises therefore, he urged the court to stay the execution of the said order pending the hearing and determination of the appeal. The application is supported by the annexed affidavit of the Appellant.

The application was opposed. The Respondent swore a replying affidavit in opposition to the application. She deponed that the Appellant had failed to pay monthly maintenance of Kshs.10,000/- with effect from 23rd August 2013 when he was ordered to pay the same by the court. The order made by the court on 18th March 2014 was to take effect from April 2014. She stated that the Appellant had continued to avoid his parental responsibilities despite the orders issued by the court. She took issue with the assertion made by the Appellant to the effect that he would suffer substantial loss when in fact he is being called upon to take care of the needs of his child. She stated that if the order issued by the Children's Court is stayed, the child would be deprived of parental care and support which is critical at this stage of her life. She urged the court to look at the Appellant's past conduct, especially the fact that he had deliberately failed, ignored and neglected to maintain the child even when confronted with court orders. She was of the view that the application had been made in bad faith with a view to frustrating and avoiding the orders that were issued by the Children's Court.

During the hearing of the application, this court heard oral rival submission made by Ms Munga for the Appellant and Mr. Kariga for the Respondent. Learned counsel essentially reiterated the contents of the affidavits sworn by the parties to this appeal in support of their respective opposing positions. 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 an 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 or order. 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 rendered 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.”

In the present application, the Appellant is seeking to stay the order compelling him to pay maintenance for the support of the child. The Appellant does not dispute that he is the father of the child. However, he is of the view that the order of maintenance issued by the Children’s Court was onerous taking into account his source of income. The Appellant annexed a copy of his payslip to support his assertion that if he were ordered to pay the sum of Kshs.15,000/- per month he would not be able to. This court has perused the said payslip. It became apparent to this court that the Appellant has committed a substantial part of his net income towards repaying loans which the Appellant himself took for his own benefit. It was not clear to the court whether the Appellant took the loans to avoid his financial responsibility to maintain the child whom he acknowledges paternity. Be it as it may, this court is under a constitutional duty, in determining any issue concerning the welfare of a child, to put the best interest of the child to the fore.

In the present application, it was an acknowledged fact that the Appellant accepts his responsibility to provide for the upkeep of the child, including her educational and medical needs. While the Appellant is entitled to his constitutional right of appeal, nevertheless, this court cannot ignore the fact that during the pendency of the appeal, the child will have to be fed, clothed, taken to school and when the need arises, to be provided with medical attention. The figure offered by the Appellant as monthly maintenance pending the hearing and determination of the appeal is not sufficient to sustain the child. In the premises therefore, this court will grant stay of execution pending the hearing and determination of the appeal on condition that:

- I. The Appellant takes sufficient medical cover for the child
- II. The Appellant pays directly to the school, the school fees of the child
- III. The Appellant pays the sum of Kshs.10,000/- per month to the Respondent for the food and clothing of the child.
- IV. The Appellant shall also pay the entire arrears of Kshs.10,000/- per month from the time the Children’s Court issued the original order in August 2013.
- V. In default of complying with the above orders, the order of stay granted shall automatically lapse.

There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2014.

L. KIMARU

JUDGE