

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.7 OF 2014

IN THE MATTER OF J O, M O AND A O (SUING THROUGH THEIR FATHER)

AND

IN THE MATTER OF AN APPLICATION FOR CUSTODY, CARE AND CONTROL OF THE CHILDREN

BETWEEN

W M O.....APPELLANT

VERSUS

M O.....RESPONDENT

RULING

By Notice of Motion made under **Order 42 Rule 6** of the **Civil Procedure Rules**, the Appellant sought orders of this court to stay the execution of the orders issued by the Children’s Court on 3rd October 2013 and 23rd December 2013 respectively. The Appellant prayed for the said orders to be stayed pending the hearing and determination of the appeal. In the affidavit in support of the application, the Appellant stated that he was aggrieved by the order issued by the Children’s Court which required him to return the custody of one of the children to the Respondent and further pay the sum of Kshs.49,500/- per term for the children’s education. The Appellant stated that the child was in his custody because he had run away from the mother. The child was unwilling to return to the mother. He further deponed that he was not in position to pay the sum that he was ordered to pay by the Children’s Court taking into account the salary that he earns as a matatu driver. He took issue with the fact that the said court had issued the orders *ex parte* before he was served. He was of the view that his appeal had merit; he should therefore be given an opportunity to ventilate the same.

The application is opposed. The Respondent filed a preliminary objection to the application. She stated that the order sought by the Appellant cannot be granted because leave of the Children’s Court had not been sought. She further stated that the appeal, as filed, was fatally defective and an unsustainable in law. She urged the court to disallow the application.

During the hearing of the application, the court heard oral rival submission made by Mr. Oyugi for the Appellant and Mr. Odero for the Respondent. The issue that emerged for determination that will dispose of this application was the question whether there was a competent appeal before this court. **Section 79G** of the **Civil Procedure Act** provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. ”

In the present application, the orders that the Appellant wishes to appeal against were issued by the Children's Court on 3rd October 2013 and on 19th December 2013. The Appellant filed the present appeal on 30th January 2014. It is clear that the said appeal was filed out of time. The Appellant was required to seek the leave of this court to file the appeal out of time.

Instead, the Appellant lodged the appeal without such leave. On the face of it, the appeal is incompetent as it was filed out of time. **Order 42 Rule 6** of the **Civil Procedure Rules** can only be invoked where there is a competent appeal challenging the decision of the subordinate court. An order staying the execution of the order or decree of the subordinate court can only be issued pending the hearing and determination of a competent appeal. An application for stay of execution of an order or decree of a subordinate court cannot be granted in the absence of an appeal. In the premises therefore, the Appellant's application seeking stay of execution pending the hearing and determination of a non-existent appeal cannot stand.

This court will invoke its inherent jurisdiction and strike out the purported appeal together with the Notice of Motion dated 13th January 2014. The Respondent shall have the costs of the application and of the appeal. The Appellant must go back to the drawing board and seek leave of this court to appeal out of time as required by the law. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2014

L. KIMARU

JUDGE