



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 21 OF 2013

M.N.K.....APPELLANT

VERSUS

E.G.K.....RESPONDENT

(Being an Appeal from the Ruling of P.C. BIWOTT Senior Principal Magistrate Embu in Chief Magistrate's Children Case No. 23 of 2007 on 3/04/2013)

RULING

This is the Notice of Motion dated 21/6/2013 brought under Section 3A and 1A of the Civil Procedure Act and unnamed provisions of the Children's Act. The Respondent/Applicant prays for among others:-

- (a) ***That the appellant be ordered to pay outstanding balance of Kshs.26,000/= pending the hearing of this application.***
- (b) ***That the appellant be ordered to meet the education needs every term, unpaid Shs.55,180/= as ordered on 3/04/2013.***

The same is supported by the grounds on the face of the application plus the respondent/applicant's affidavit.

The appellant through his advocate Mr. E. Njiru filed grounds of opposition and preliminary objection based on the following points:

1. ***The supplementary affidavit dated 24/6/2013 has been filed without leave.***
2. ***The prayers sought in the application cannot be sustained in the cause of a pending Appeal.***
3. ***No interlocutory proceedings can be sustained in an Appeal save for applications under Order 42 Rule 6 and 7 of the Civil Procedure Rules.***
4. ***The prayers sought in the application are tantamount to an indirect execution of the ruling appealed from.***
5. ***The application is therefore calculated to prejudice and render the pending Appeal inconsequential.***
6. ***The application is frivolous or vexatious; it is unreasonable or meant to defeat justice; it is otherwise an abuse of the process of the court.***

I certified the matter urgent on 25/6/2013 and fixed it for hearing on 2/7/2013. Both the respondent/applicant and Mr. E. Njiru were in Court on 2/7/2013 and made oral submissions. Each relied on the filed affidavits/grounds.

A brief background to this matter is that the Chief Magistrate's Court vide Children's Case No. 23/2007 had on 3/04/2013 delivered a Ruling which is the subject of this present appeal. After filing this appeal the appellant filed an application in the Children's case for stay of execution pending appeal of the orders of 3/04/2013.

The said application was duly heard and a Ruling delivered on 17/6/2013. From what is before me the respondent/applicant was aggrieved by the said orders of 17/6/2013, and filed this application. In effect she is asking this court to enforce the order of 3/04/2013 which was in her favour. This is procedurally wrong for the following reasons.

1. ***The High Court does not enforce orders on behalf of the magistrate's courts.***
2. ***The order she wants enforced is the subject of this appeal. The appellant is aggrieved by the said order and has appealed. Even if it were to be enforced it is the lower court to enforce it and not this Court.***
3. ***The lower court which could have enforced it has vide its Ruling of 17/6/2013 ordered for stay of the said order.***

Unless the order of 17/6/2013 is reviewed or set aside, the order of 3/04/2013 can not be enforced. I have read the Ruling of 17/6/2013 and the learned trial magistrate clearly indicates that if there is inordinate delay of the appeal the respondent/applicant can move that same court to set aside the order of stay. She has not done that. The issues that the respondent/applicant is fronting here ought to have been dealt with in the lower court which dealt with the application for stay of execution pending appeal.

I therefore find that this application is an abuse of the process of the Court. This Court cannot be used to execute orders/decrees of the Magistrate's Courts. The application is dismissed with costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 4TH DAY OF JULY 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Njiru for Appellant/Respondent

Respondent/Applicant

Njue CC