



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
Civil Appeal 26 Of 2013

N MAppellant/Applicant

Versus

S U W M.....Respondent

(SUING FOR & ON BEHALF OF THE MINOR)

RULING

The appellant filed an appeal in this matter on 20th April 2013 vide a Memorandum of Appeal of even date. The appeal challenges the order of Hon. Ms. Gichana, R.M, made on April 2013 in Nairobi Children's Case No. 484 of 2013. He complains that orders were made on a date when the matter was coming up for mention, that in making the orders the court did not take into account his reply and that the orders were oppressive.

Contemporaneously with the Memorandum of Appeal, the appellant also filed the Motion dated 29th April 2013 founded on Order 42 rule 6(1) and (2) and Order 51 of the Civil Procedure Rules, 2010. He prays for stay of execution of the orders made on 18th April 2013. He says that he would suffer irreparable loss if the order is not stayed, that the application has been brought timeously and that he is ready and sitting to furnish such security as the court may order for the due performance of the orders. He has supported his case for stay with an 85 paragraph affidavit.

The application was served on counsel for the respondent on 29th April 2013. The respondent filed grounds of opposition dated 28th May 2013. She argues that stay of the order of 17th April 2013 was not sought at the lower court, that the appellant did not seek leave of the lower court before filing appeal, that the appellant had not come to court with clean hands as he had not complied with the order of the lower court, and that the application was counter-statute and an abuse of the court process.

The respondent did not file a replying affidavit. Leave was granted on 6th May 2013 for the respondent to reply to the application and the application fixed for *inter parties* hearing on 23rd May 2013. It was not listed on 23rd May 2013, "*whereupon*" counsel for the appellant, Dr. Kuria, caused the matter to be mentioned before me. The court gave Dr. Kuria a date for hearing for 28th May 2013 at 2.30pm.

Counsel for both sides appeared before me on 28th May 2013, when counsel for the respondent, Mr. Esuchi, prayed for an adjournment on the grounds that Miss. Kabage who was to argue the application was engaged at the American Embassy and that the respondent had not managed to file an affidavit in reply. He sought another date. The application was opposed, but Dr. Kuria was willing to concede to an adjournment provided stay was granted. Mr. Esuchi opposed stay. I fixed the matter for *interparties* hearing on 29th May 2013.

Counsel for both sides addressed me on 29th May 2013. Dr. Kuria submitted first. The gist of his submissions were that the court which made the order sought to be stayed was biased against the appellant and that the orders were complained of were oppressive. He submitted that the trial court did not consider or take into account the affidavit of the appellant nor the submissions of his counsel. He stated that the appellant's case was that he was being compelled to maintain his children in South Africa at a standard of living much higher than what he can afford. He submitted that the appellant's affidavit had not been responded to and invited the court to treat the facts deponed to as proven and determined. He submitted that the appellant would suffer substantial loss as he would be made to make payments that are unattainable financially. He contended that the amendments of 2009/2010 to the Civil Procedure Rules had brought a broad view of justice; and that the principles introduced by those amendments apply to stay applications. He cited the decision of the Court of Appeal in ***African Safaris Club Ltd -vs- Safe Rentals Ltd*** (2010) eKLR, where it was held in an application for stay that the court has to weigh the relative hardship of the parties. He asserted that the appellant was not running away from his responsibilities but that he wanted the children to come back to Kenya so that he could educate them according to his means, yet his wife is opposed to this and would like them to remain in South Africa, and appears bent on having the children educated at means that she is dictating.

Mr. Esuchi for the respondent opposed the application. He submitted that the application failed to meet the conditions set out in Order 42 rule 6 of the Civil Procedure Rules. He submitted that these conditions are precedent to the making of stay orders. He reiterated that the orders complained of were made after the parties had been heard. The orders were made in the best interests of the children. Mr. Esuchi further submitted that the appeal before the court is incompetent as it was lodged without leave of court. He cited Order 43 of the Civil Procedure Rules, to assert that as an appeal from an order of the Children's Court on a right of application of the nature that culminated in the orders complained of was not automatic, leave ought to have been sought before the appeal was lodged. He said stay orders cannot be granted on an incompetent appeal. He further argued that stay should have been sought in the first instance at the lower court. He said that according to Order 42 rule 6 stay should only be sought at the High Court following refusal of stay by the lower court. The other issue raised by Mr. Esuchi was that the appellant was seeking an equitable remedy, yet he had come to court with unclean hands as he had failed to comply with a valid order of the lower court.

The only record from the Nairobi Children's Court Children's Case No. 484 of 2013 which has been placed before me is the order made on 17th April 2013 and extracted on 19th April 2013. The order reads as follows:-

- “1. That in the interim the defendant do send Kshs.100,000/= directly to the children through a wire transfer to E W M account held at 1st National Bank South Africa.***
- 2. That the defendant do forthwith pay school fees and related expenses for the 3 minors in their current schools.***
- 3. That such payments be made to the school directly in any event within reasonable time to enable them continue with their schooling.***
- 4. That further and in the interim the defendant do ensure that the rental amount payable for the minor's shelter is paid forthwith and it be paid promptly as per the tenancy agreement entered.***
- 5. ...”***

These are the orders that the appellant has appealed against. As mentioned

earlier the record relating to the proceedings conducted before the learned magistrate which led to the making of these orders has not be placed before me. All that I have before me, apart from the order of 17th April 2013, are the pleadings and the interlocutory applications and replies filed in the matter.

It would have been prudent to have these proceedings before me for consideration given that the appellant is complaining that the court was biased against him and that the submissions of his counsel were not taken into account.

The application before me is for stay of execution of court orders. It is premised on Orders 42 rule 6(1)(2) and Order 51(1) of the Civil Procedure Rules. The critical provision here is Order 42 rule 6(1)(2) of the Civil Procedure Rules. The respondent argued that the application before me does not meet the requirements of Order 42 rule 6 of the Civil Procedure Rules. She has go on to argue that the appeal is itself incompetent as the requirements of Order 43 of the Civil Procedure Rules have not been satisfied.

It would appear to me that before I consider the application on merits, I should decide whether it is founded on a competent appeal.

The proceedings that gave rise to the orders appealed against were commenced and conducted at the Children's Court in accordance with the provisions of the Children Act, Cap 141, Laws of Kenya. The Children's Court is established and conferred with jurisdiction by **Section 73** of the said Act. Part VI of the Act gives guidelines on conduct of proceedings at the Children's Court. Decisions of the Children's Court are appellable. **Section 80** of the said Act provides:-

“Unless otherwise provided under this Act, in any civil or criminal proceedings in a Children's Court, an appeal shall lie to the High Court and a further appeal to the Court of Appeal.”

The procedure at the High Court governing appeals emanating from the Children's Court is not dealt with under the Children Act and the subsidiary legislation to it. The effect of this is that the provisions of the Civil Procedure Act on appeals apply **Section 1(2)** of the Civil Procedure Act states that the Civil Procedure Act applies to proceedings in the High Court. Hence a civil appeal from the Children's Court

to the High Court by virtue of **Section 80** of the Children Act, will be subject to the Civil Procedure Act. It follows that the appellant in this case was entitled by virtue of **Section 80** of the Children Act to file an appeal at the High Court.

An issue has been raised as to whether the appeal before me satisfies Order 43 of the Civil Procedure Rules. Since the law to be followed so far as civil appeals from decision of the Children's Court to the High Court are concerned is the Civil Procedure Act, the Civil Procedure Rules, being subsidiary to the said Act is applicable to such appeals. An appeal emanating from the Children's Court must meet the requirements of Order 42 of the Civil Procedure Rules. Order 43 of the Civil Procedure Rules is on appeals from Orders of the Civil Procedure Rules. The subsidiary legislation made under the Children Act, called the General Rules and Regulations, applied through Legal Notice No. 77 of 2002, has imported some processes of the Civil Procedure Rules to the civil process in the Children's Courts. The imported provisions are:-

- (i) Order V, service of summons, now Order 5.
- (ii) Order V1A, on amendment of pleadings, now Order 8.
- (iii) Order XI, on consolidation of suits, now spent.
- (iv) Order XIII, on production, impounding and return of documents, now Order 14.
- (v) Order XV, on summoning and attendance of witnesses, now Order 16.
- (vi) Order XVI, on prosecution of suits and adjournments, now Order 17.
- (vii) Order XVII, on hearing of the suits and examination of witnesses, now Order 18.
- viii. Order XVIII, on affidavits, now Order 19.
- ix. Order XX, on judgment and decree, now Order 21.
- x. Order XXII, on attachment of debts, now Order 23.
- xi. Order XXXIX, on injunction, now Order 40.
- xii. Order XLIV on review, now Order 45.
- xiii. Order XLIX, on time, now Order 50.
- xiv. Order IXA – On non-appearance and default of defence, now Order 10.
- xv. Order IXB, on hearing and consequences of non-attendance, now Order 12.

Of the provisions of the Civil Procedure Rules imported by the General Rules and regulations, 2002, only Orders 8,10,12,19,23,40, 45 and 50 are the subject of Order 43 rule 1(1) of the Civil Procedure Rules. An appeal lies as of right from the said Orders. In respect of any other Order of the Civil Procedure Rules, by virtue of Order 43 rule 1(2), leave of court is mandatory. Order 43 rule 1(2) of the Civil Procedure Rules would apply too to any other orders of the trial court which are not the subject of Order 43 rule 1(1). Order 43 rule 1 should be read in conjunction with **Section 75** of the Civil Procedure Act which provides for orders from which an appeal lies. By virtue of **Section 65** of the Civil Procedure Act an appeal lies as a matter of right from any original decree of a lower court.

The appeal in the instant case does not arise from a decree, but from an order. The said order was made in an application dated 12th April 2013. The matters the subject of that application do not fall under any of the matters set out in Order 43 rule 1(1) of the Civil Procedure Rules and **Section 75** of the Civil Procedure Act. Consequently, by virtue of Order 43 rule 1(2) of the Civil Procedure Rules, leave of court was necessary before appeal could be filed against the orders made on 17th April 2013. To that extent the appeal before this court is incompetent and the application founded on it, for stay, is without foundation.

The respondent argued that Order 42 rule 1 was not complied with in the sense that the application for stay ought to have been sought first at the Children's Court and if denied then sought before this court. A close reading of Order 42 rule 1 tells me that that the stay order must first be sought from the trial court,

and it is only after that court has either granted or refused stay that it can be sought from the appellate court. I note that the execution provisions in the Civil Procedure Rules, that is to say Order 22 (formerly Order XXI), have not been adopted by the General Rules and Regulations, 2002, into the civil process at the Children's Court. This would mean that the appellant's apprehension that there will be execution of the orders of 17th April 2013 following the processes set out in Order 22 of the Civil Procedure Rules is unfounded. Execution under Order 22 cannot happen as the Children's Court has no jurisdiction to allow execution following these processes. I note that Rule 4 of the General Rules and Regulations, 2002, applies the forms under the Civil Procedure Act to the Children Act, but Rule 4 should be used with Rule 5 of the said General Rules and Regulations. The forms imported by Rule 4 can only be those relating to the processes that are adopted by Rule 5.

I have held in other cases similar to this one, that stay of execution of orders made by the Children's Court, for the maintenance of a child, is not available. A Children's Court is guided by **Section 4(3)** of the Children Act in making such orders. **Section 4(3)** reads:-

“(3) All judicial institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to -

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promotion the welfare of the child...”

The orders made on 17th April 2013 were for payment of school fees and rent for the premises where the children are residing in South Africa. The court specifically directed that the fees ought to be paid to the school directly to enable the children **“continue with their schooling.”** These were orders made in the interim, pending the full hearing of the dispute, to secure the position of the children so far as education and shelter are concerned. To stay the orders will result in the children's education being disrupted and it will also expose them to the risk of being without shelter in a foreign land. A stay order will in the circumstances not be in the best interests of the children.

Whether the orders were made fairly or that they were oppressive, are matters that I cannot devolve into at this interlocutory stage. These matters are the subject of the appeal. To get into them now would be tantamount to determining the appeal before the parties have had occasion to address me exhaustively on its merits.

In upshot, the application before me is not merited and I hereby dismiss it with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 1st DAY OF July, 2013.

W. M. MUSYOKA

JUDGE