



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, GITHINJI & WAKI, JJ.A)
CIVIL APPLI NAI 119 OF 2004 (68-04 UR)
BETWEEN

DR. PAUL MAKAU WAMBUAAPPLICANT

AND

DIANA NDELE WAMBUARESPONDENT

**(Application for stay of further proceedings pending the
filing hearing and determination of an intended appeal
from the ruling and order of the High Court of Kenya at
Nairobi (Koome, Ag. J.) dated 24.05.2004
in
H.C.C.C NO. 30 OF 2003 (OS)

RULING OF THE COURT

This matter arises from a relatively new Act of Parliament, the **Children Act 2001** and it is not surprising that it would raise novel issues. It involves a 22 year-old daughter (hereinafter “Diana”) who was the applicant in the superior court, and her father (hereinafter “Dr. Wambua”) the respondent there. Both Diana’s parents are separated through a separation and maintenance order issued by a court of law in 1996.

By way of an originating summons taken out on 22.12.03, Diana, who had been admitted to the parallel programme of the University of Nairobi to study medicine and was on her second year of study, sought leave to file an application seeking an order for her maintenance by her father, Dr. Wambua. He is a Medical Doctor lecturing in the same university and faculty. She also sought in the same application, an order that Dr. Wambua pays the whole or part of the University fees. In seeking those orders she invoked sections 23 and 91 of the Children Act, which define parental responsibility and donate the power to make maintenance orders respectively.

Opposition to the application came fast and furious, mainly on the ground that the High Court had no jurisdiction to deal with the matter as it was a preserve of the Children’s Court. In any event the **Children Act** applies to human beings under the age of 18 years whilst Diana was born in 1982 and was thus over

18 years. Dr. Wambua said he had borne all the basic educational needs of Diana up to form IV when she attained 18, and he was under no legal obligation to maintain her further. All that remained was a moral and social duty which was not legally enforceable and which for reasons he made clear, he was not prepared to discharge in favour of Diana.

The superior court, Martha Koome, Ag. J (as she then was) found that the Children's Court had jurisdiction under section 73 of the Act to deal with the matter, the monetary value of it notwithstanding. She however made a further finding that the High Court had concurrent jurisdiction being a court of record with unlimited jurisdiction granted under the Constitution of Kenya. The matter also related to the right to education under section 7 of the Children Act which under section 22, only the High Court has jurisdiction to determine. She therefore proceeded to hear the application and granted leave as sought. The learned judge further went ahead to make a finding that parental responsibility may be extended when it comes to education which both the relevant section of the Children Act and articles of the United Nations Convention on Children define beyond mere basic "*reading, writing and calculation*". In the end she concluded: -

"I am satisfied that the applicant should be granted leave to file an application for an order of maintenance against the respondent. I would however wish to add that the said maintenance should not go beyond what is provided under the SESF and as long as the respondent remains an employee of Nairobi University."

"SESF" is "Staff Education Support Fund" which Dr. Wambua enjoyed solely for as long as he remained a lecturer at the university. Dr. Wambua was dissatisfied with those findings and the order made by the superior court. He filed a Notice of Appeal to this Court and took out an application under rule 5(2) (b) of our Rules seeking one substantive order as follows: -

"Stay of further proceeding (sic) pursuant to the orders (sic) under the ruling of 24th May, 2004 by the Honourable Lady Justice Koome in (sic) pending the filing, hearing and final determination of an intended Civil appeal from the Ruling of the High Court of Kenya at Nairobi dated 24th May, 2004 Honourable Lady Justice Koome."

That is the matter argued before us and the subject-matter of this ruling. The order sought is not happily worded but learned counsel for Dr. Wambua, Mr. A.N. Ngunjiri clarified that the superior court granted the prayer for leave only which left it open to Diana to urge the main claim for her maintenance. A date had been fixed before the superior court for those proceedings and hence the necessity to obtain a stay of further proceedings pending the hearing of the intended appeal. Mr. Ngunjiri was alive to the twin requirements on applications under **rule 5(2)(b)** and he sought to persuade us, firstly, that the intended appeal is not frivolous or unarguable, and secondly, that if the application is not granted, the intended appeal, if successful, will be rendered nugatory.

The intended appeal will principally be attacking the jurisdiction of the superior court to grant leave under **section 91(b)** of the Children Act which is in **Part VII** of the Act and therefore within the jurisdiction of the Children's Court under **section 73**. It will further be argued that Parliament in its wisdom legislated for parents' legal duty on the maintenance of a child up to 18 years but did not envisage the enforcement of a moral obligation to maintain persons over that age. A substantive order also appears to have been made directing Dr. Wambua to utilize his "SESF" without any consideration for the objections raised on oath by him and before the main application was heard. In Mr. Ngunjiri's view, these were weighty legal issues and if the application in the superior court proceeds before they are determined on appeal, then there would be nothing further to pursue, and the intended appeal would be rendered nugatory.

The response by learned counsel Ms. Muteti was forthright that both the intended appeal and this application were unnecessary because the superior court merely granted leave and there was still the substantive application to be urged. If any adverse orders were ultimately made against the applicant, he would be at liberty to challenge them on appeal. There was nothing to challenge yet, as there was no order made which was capable of execution against the applicant. Simply put, there was no arguable appeal and

even if there was, it would not be rendered nugatory if the matter before the superior court proceeded to its conclusion.

We have carefully considered this matter in view of our observation that it relates to untested provisions of recent legislation. In the interests of development of the law we would be slow to find in this particular case that the intended appeal, is frivolous or unarguable. On the contrary we think it is imperative that the issue of jurisdiction in matters relating to the Children Act be spelt out with finality at the earliest opportunity by the highest court. Having said that however, we do not consider that the failure to grant a stay at this stage would render the intended appeal nugatory. The order made by the superior court is not capable of execution against the applicant and there is no telling whether the rest of the application before the superior court would succeed. At any rate if the intended appeal succeeds it will render to nought any orders made by the superior court.

In the circumstances, the application is not for granting and is hereby dismissed. Costs will be in the intended appeal.

Dated and delivered at Nairobi this 18th day of March, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR