



IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 3 OF 2014

P M M.....APPELLANT/APPLICANT

VERSUS

R S K (On behalf of L. K.S).....RESPONDENT

RULING

Background

This application arises out of Mwingi Children's Case No. 30 of 2011. The issue before the lower court was maintenance of the minor child. Paternity of the minor child L.K.S was also contested but the issue was laid to rest after the DNA test confirmed that the applicant is the father of the minor. The lower court awarded Kshs 5,000 per month payable by the applicant towards the maintenance of the minor. This order aggrieved the applicant and he has filed an appeal and pending the hearing and determination of that appeal, the applicant has filed this application.

The application

The application was brought by way of Chamber Summons under certificate of urgency seeking stay of execution pending the hearing and determination of this application. The applicant also so seeks to be allowed to pay Kshs 2,000 per month towards the upkeep of the minor pending hearing and determination of this application and the appeal.

The application is anchored on Order 42, Rule 6 and Sections 3A and 63 of the Civil Procedure Act. It is supported by the grounds found on the face of the application and in the affidavit dated 27th March 2014.

I have read the application and the supporting affidavit. The gist of the application is Kshs 5,000 ordered by the lower court to be paid by the applicant for the upkeep of the minor. The applicant contends that he has other six children he is supporting and that he earns approximately Kshs 15,600 per month as a driver and after paying Kshs 5,000 ordered by the court, this will leave him with inadequate money incapable of supporting the other six children. He has listed the other six children and attached their birth certificates as proof.

Mr. Nyaga, counsel for the applicant submitted that the applicant will suffer substantial loss if the order of the lower court is executed and that the order is against the interest of the other children. It was further submitted that the application was made without delay and the applicant proposes to provide security by paying Kshs 2,000 pending hearing and determination of the appeal.

The application was opposed by the Respondent, Rachael Sala Kilungu who is the mother of the subject minor. She filed an affidavit of means showing that she earns Kshs 3,000 from her dressmaking business

compared to the applicant's Kshs 25,000 per month. She asked this court not to interfere with the lower court order.

Determination

Order 42 Rule 6(2) of the Civil Procedure Rules is specific on what an applicant seeking stay pending the appeal must demonstrate to the satisfaction of the court. The applicant must:

- i. Satisfy the court that substantial loss may result to him unless the order is made.
- ii. The application for stay has been made without unreasonable delay.
- iii. Provide such security as the court orders for the due performance of such decree or order.

The applicant filed this application on 7th April 2014. The decree of the lower court is dated 10th March 2014 and therefore there was no delay. This court has taken into account the proposal to pay Kshs 2,000 per month as maintenance pending hearing and determination of this application and appeal. The applicant cites the fact that he is taking care of six other children as the main reason why he has appealed. The appeal itself is challenging payment of Kshs 5,000 per month as maintenance.

This court has considered the grounds and submissions. I have also considered the overriding objective of the Civil Procedure Act and the best interest of the subject minor child. It is the finding of this court that to allow the applicant to pay Kshs 2,000 per month instead of Kshs 5,000 ordered by the lower court would defeat the purpose of the appeal before it is heard. The issues being raised by the applicant that he supports six other children was not one of the issues pleaded during the hearing in the lower court. In my view, the applicant has not demonstrated substantial loss and most importantly granting stay and ordering payment of Kshs 2,000 per month instead of Kshs 5,000 per month will go against the best interest of the child and will defeat the appeal before it is heard and determined.

I find that the applicant has not satisfied the court that he deserves the orders he is seeking. In the discretion of this court, the prayers sought are denied. Consequently, the application dated 27th March 2014 is hereby dismissed with costs to the respondent. I make orders accordingly.

Dated, signed and delivered this 7th day of July 2014.

S.N.MUTUKU

JUDGE