KM v NMO (Family Appeal E031 of 2024)
[2024] KEHC 17011 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KEHC 17011 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E031 OF 2024

G MUTAI, J

SEPTEMBER 27, 2024

BETWEEN

KM .... APPELLANT

AND

NMO .... RESPONDENT

RULING

1. The respondent filed a cause in the Tononoka Children's Court seeking various reliefs against the appellant/applicant. Upon being satisfied that the appellant/applicant was served and that he had not entered an appearance or filed a defence, the court below heard the respondent's case, and being satisfied that it was merited, entered judgment in her favour, whose terms I shall summarize below:-

    a. A declaration was issued that both parties have equal parental responsibility towards the subject minor;

    b. Actual custody, case and control of the children was granted to the respondent with access to the appellant/applicant;

    c. The court ordered the appellant/applicant to cater for the educational needs of the minor;

    d. The appellant/applicant was required to make adequate contributions towards additional medical expenses, as and when the same arise; and

    e. Both parties were granted legal custody.

2. The appellant/applicant was aggrieved by the said decision and filed an application to set aside the judgment. The Hon Green Odera dismissed the application dated 22nd January 2024 on 15th May 2024. The appellant/applicant was aggrieved by this latter decision and filed an appeal against it.

3. The appellant/applicant also filed the notice of motion dated 24th May 2024. The application seeks to stay the execution of the judgment and orders issued by the trial court in Tononaka Children Cause No E137 of 2023; Nancy Mukhwana Otieno vs Kiiyo Munywoki.

4. The appellant/applicant averred that he and the respondent are the biological parents of Stephanol Musa Munywoki. He alleged that he had been in the custody of the said child since 2018, after the respondent abandoned him. He averred that the judgment entered by the lower court was unjust, as he was not served. The appellant/applicant was apprehensive that the respondent would execute the judgment of the lower court and thereby take custody of the subject child.

5. For the said reasons, he prayed for orders staying the execution of the judgment of the subordinate court pending the hearing and determination of the appeal.

6. The application is opposed. The respondent filed a replying affidavit sworn on 19th June 2024 in which she deposed that the appellant/applicant was made aware of the judgment after it was delivered and that he was informed that she intended to transfer him to a school in Mombasa for the 2024 academic year. She averred that the only reason the child was still in Laikipia Airbase Primary School was that the appellant/applicant deliberately refused to obey court orders even after being served with a decree in November 2023. This forced her to take out a notice to show cause. It was upon being served with the notice to show cause that he filed the impugned application, whose dismissal led to the instant appeal.

7. The respondent deposed that the minor was not in the custody of the appellant/applicant, but was being taken care of by third parties who were denying her access. She averred that the appellant/applicant resides in Mombasa and denied abandoning the child, dismissing the allegation as defamatory.

8. The respondent expressed the readiness to provide the child with a stable home environment and to find an appropriate school so that he could transition with minor intervention. She deposed that the appellant/applicant was afforded an opportunity to appear, but that he failed to do so.

9. The respondent thus prayed that the application be dismissed.

10. The appellant/applicant filed a further affidavit sworn on 9th July 2024 in which he denied the contents of the replying affidavit and reiterated the contents of his supporting affidavit.

11. The appeal was canvassed through written submissions pursuant to the directions I issued on 24th June 2024. The appellant/applicant filed written submissions dated 11th July 2024.

12. In his submissions dated 11th July 2024, the appellant /applicant urged that he had satisfied the test under Order 42, Rule 6 of the Civil Procedure Rules because the application was filed without undue delay.

13. Counsel submitted that in considering the test for the grant of a stay pending appeal, the court ought to consider the best interest of the child doctrine. Reliance was placed on the decision of the court in the case of MNN vs MOK and another (2017) eKLR.

14. Counsel submitted that the ruling was delivered on 13th May 2024, while the memorandum of appeal and the instant application were filed on 31st May 2024, which was within 16 days.

15. It was argued that there was a sufficient cause warranting the issuance of the orders sought. Counsel stated that the child would suffer substantial loss if the custody were varied, as the child was with

the appellant/applicant. Reliance was placed on the case of EAO vs MMO and SKO (minors) (suing through their guardian ad litem PWO) [2021]eKLR , where the court stated as follows:-

> “(14) Hence, with regard to the best interest of the minors, there is no dispute that the subject children are minors aged 10 and 5 years respectively. They are already in the custody of the respondent, and it would neither be in their interest nor in the interest of justice to reverse that order before hearing the parties on the appeal, particularly in the absence of concrete evidence that the respondent is unsuitable to look after the welfare of the girls in the interim. Conversely, it has not been demonstrated that the appellant is unable to meet the interim maintenance payment of Kes.10,000/= per month or the minors' school fees.”

16. It was stated that variation of custody would be injurious to the child, as if the appeal were successful, the child would be disturbed again.

17. Given the nature of the application, it was urged that provision of security and the award of costs were not necessary or suitable, respectively.

18. The respondent's submissions are dated 26th July 2024.

19. The respondent's counsel submitted that the parties previously lived in Mombasa, but that the appellant obtained custody of the child forcefully and took him to Laikipia, where she couldn't access him.

20. It was urged that despite being served, the appellant/applicant did not enter an appearance, nor did he file a defence. As a result, judgment was entered against him, ordering him to surrender custody of the child. Despite being served with the impugned orders, he failed to comply, leading to the issuance of warrants of arrest against him and his committal to civil jail.

21. The application to set aside the judgment was denied, resulting in the filing of this instant appeal.

22. Regarding the application, it was argued that the test for granting a stay pending appeal had not been met.

23. Counsel urged that in considering the application, this court ought to consider, in addition to the grounds specified in Order 42 Rule 6 of the Civil Procedure Rules, the best interest of the child. Reliance was placed in the decision of the court in M N N v M.O.K & another [2017] KEHC 8076 (KLR) where it was stated that: -

> “... 6. As observed in Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.), in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 rule 6 of the Civil Procedure Rules, must be complemented by a an overriding consideration of the best interest of the child in accordance with Article 53 (2) of *the Constitution*.”

24. It was conceded that the application was made without unreasonable delay. In a similar vein, the respondent conceded that the provision of security did not arise.

25. Regarding whether the child would suffer a substantial loss, it was argued that there was no basis for the court to rule that he would. Counsel stated that the contents of the medical report relied on by the appellant/applicant needed to be examined first before it could be relied upon.

26. It was urged that the appellant/applicant had not permitted the respondent access to the minor.

27. Based on the foregoing, counsel for the respondent urged that the application be dismissed with costs to her.

28. I have considered the application, the supporting affidavit, the replying affidavit and the written submissions of the parties. At this point, the court is required to determine whether to stay the execution of the ruling of the court below, and if so, on what terms.

29. The principles upon which the stay may be granted are provided in Order 42, Rule 6 of the Civil Procedure Rules which provides that: -

> " (2) No order for stay of execution shall be made under subrule (1) unless—
>
> (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

30. The judgment in the court below was exparte. The appellant/applicant did to testy. He avers that he was not accorded an opportunity to defend himself and that his Article 50 rights were infringed.

31. The child has been with the appellant/applicant since 2018 and is educated by him. It has been stated that the child has special needs and that disturbing his residence and schooling at this point would not be in his best interest. In my view, the appeal is arguable. Considering all the factors, I am convinced that it would serve the greater interests of justice to grant the stay of execution of the impugned ruling.

32. Based on the foregoing, I am persuaded that the appellant/applicant and the child will suffer substantial loss unless the stay is granted. The ruling sought to be appealed against was delivered on 15th May 2024. This application is dated 24th May 2024. Thus, the application was filed without undue delay. As this is a matter about a child, I do not think that it is necessary to give undertakings as to damages. It is sufficient that the court may retain or vary the custody orders.

33. I am thus satisfied that the conditions set out in Order 42 rule 6 (2) of the Civil Procedure Rules have been satisfied. The applicant has merit and is allowed. In the interests of justice, I order that the appeal be fast-tracked.

34. As this is a children's matter, I make no orders as to costs.

It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 27TH DAY OF SEPTEMBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE