SAK v NSY (Family Appeal E28 of 2022) [2023] KEHC 1169 (KLR) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1169 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E28 OF 2022

JN ONYIEGO, J

FEBRUARY 24, 2023

BETWEEN

SAK .... APPELLANT

AND

NSY .... RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated September 1, 2022 and filed on September 2, 2022. It is supported by the affidavit of the appellant sworn on September 1, 2022 and filed on September 2, 2022.The application seeks the following orders;

    a. Spent

    b. Spent

    c. That this honourable court be pleased to partially grant stay of execution of the ruling and/or orders issued on the 17th day of August, 2022 by Hon Viola Yator in Children Case Number E418 of 2021 Nadim Nadim Saleh Yakub versus Saabia Amir Khan to an extent that "the respondent do have access to the minor subject matter of the proceedings at the appellant/ applicant premises every Saturday and Sunday from 3pm to 6pm pending the hearing and determination of the appeal filed herein.

    d. That the costs of this application be in the cause.

2. The crux of the matter is that the children's court in its ruling of August 17, 2022 proceeded to review its orders of November 8, 2021 exparte thereby directing that; the respondent does access the child subject of this matter away from her place of residence for 3 hours with an allowance of 30 minutes; the applicant to pack a snack for the respondent to feed the child during the respondent's time of access. That in issuing the said orders the court did not accord her an opportunity to be heard on issues relating to the best interest of the minor which amounted to an ambush. She further deponed that when the

said ruling was being issued, the minor was only 2 months old. That being dissatisfied with the ruling, she filed an appeal by way of a Memorandum of Appeal.

3. The applicant further averred that she fears for the safety of the child if the minor is to be given to the respondent without her presence for reasons that; the respondent has a history of physical violence; the respondent can easily harm the minor in retaliation; if the orders sought are not granted, she stands to suffer irreparable harm and the appeal shall be rendered nugatory.

4. In response, the respondent filed a replying affidavit sworn on September 16, 2022.He opposed the application thus stating that he has always supported and taken care of his child. That it is not in the interest of the child for the applicant to expect him to provide maintenance and at the same time allege that he is a risk to the child.

5. The application was canvassed by way of written submissions.

6. The applicant through her advocate H A Mwadzogo Advocates filed her submissions dated November 21, 2022 and filed on November 23, 2022. Counsel reiterated the applicant's position in her supporting affidavit. He relied on Order 42 Rule 6(1) (2) of the *CPR*s thus submitting that the applicant was not heard before the orders referred to herein were made and/or reviewed. That there can be no more substantial loss than harm to a minor who is the subject of the court proceedings. Regarding time factor, counsel submitted that the application has been brought timely without delay.

7. The respondent through his advocate Ambwere TS & Associates Advocates filed his written submissions dated November 10, 2022 and filed on November 11, 2022.Counsel reiterated the respondent's averments in his replying affidavit and submitted that the allegation that the respondent is a violent man is false and malicious as the criminal case referred to was withdrawn and no other case is pending. That the appellant failed to disclose this information and obtained orders based on false, malicious and misleading information.

8. Counsel further submitted that the applicant has not proved the allegation on the respondent having a history of violence. That the applicant and the respondent stayed together for two years without any complaint of violence

9. Counsel submitted that the respondent has been performing his duties of maintaining and being a father to the child and thus should not be denied his right to see and stay with the child. In conclusion, counsel urged the court to dismiss the application with costs.

10. I have considered the application herein, response thereof and rival submissions by both counsel. The only issue that emerges for determination is whether an order of stay of execution should issue.

11. The law governing stay of execution is provided for under Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* 2010 which provides;

    1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

    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.

12. It is incumbent upon the applicant to establish the conditions set out under order 42 rule 6(2). It is settled law that proof of likelihood to suffer substantial loss is the cornerstone for granting stay of execution orders. In the case of *Kenya Shell Limited vs Benjamin Karuga Kabiru & another* (1986) eKLR Platt J had this to say:

> "... it is usually a good rule to see if order XLI rule 4 of the Civil Procedure rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case unless an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without evidence it is difficult to see why the respondents should be kept out of their money.".

13. The subject matter herein is a child of tender age. The applicant's claim is that the children's court reviewed its orders of November 8, 2021 without according her an opportunity to be heard. That she fears for the safety of the minor if given to the respondent without her presence on grounds that she has had a history of physical violence with the respondent including the time she was expectant and the respondent is badly hurt hence abusive to her and can easily harm the minor in retaliation. To support her claim the applicant annexed a P3 Form, Treatment Note and a Charge Sheet for Criminal Case No E2154 of 2021.

14. On the other hand, the respondent disputed the allegations/claims by the applicant and termed them as false and malicious. He annexed the proceedings of Criminal Case No E2154 of 2021, *Republic v Nadim Saleh* showing that the alleged charge was withdrawn under section 87(a) of the *Criminal Procedure Code* and the accused discharged.

15. The learned magistrate in reviewing her orders of November 8, 2021 in her ruling of August 17, 2022 stated;

> "At the time court gave the orders on November 8, 2021 the child was barely 2 months old therefore it was reasonable not to allow the minor leave. The child is now about 11 months old. I have also seen the text messages exchanged by the parties and there is a bad relationship between the parties as well as the family members.it is better if the applicant accesses the child outside the home of the defendant considering the child is a bit grown.
>
> Since there is proof that there has been access although limited, moving forward I review the earlier orders to the effect that the applicant accesses the child away from the defendant's place for 3 hours with an allowance of 30 minutes.
>
> The applicant shall forth be picking the child outside the defendant's gate on Saturdays and Sundays from 3pm and return between 6 pm and 6.30 pm.
>
> The defendant to pack milk or snacks for the applicant to feed the child during his time of access."

16. It is trite law that in every decision made concerning a baby, the best interest of the child shall be taken into account. See the case of *AM v MAM* [2012] eKLR where the court stated that;

> "In deciding children's matters it is incumbent upon the courts to bear in mind that children are vulnerable members of society and are therefore susceptible to physical, psychological and other types of abuses. The courts remain the upper guardians of children's rights and interests, and where necessary, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of sensitive interests that relate to family status and touch on private lives of individuals."

17. Similar position was held in the case of *LDT v PAO* [2021] eKLR where the court stated;

> "While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted…
>
> The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense."

18. The applicant did not provide any proof on the substantial loss she or the minor will suffer. Therefore, it's my finding that the applicant has not established substantial loss which is the main principle for consideration in issuance of stay of execution order. Regarding filing of the application within reasonable time, the record is clear that it was filed within 14 days from the date the impugned decision was delivered. Accordingly, it is my finding that the application was filed within reasonable time.

19. I must note that this court has not had the benefit of the lower court file nor the ruling of November 8, 2021.The only document available is the ruling of August 17, 2022 which is being challenged hence it will not be prudent to delve on the merits of the appeal prematurely.

20. In conclusion, it's my finding that the application herein lacks merit and it's hereby dismissed with no order as to costs. Appeal to be heard on priority basis.

Dated, signed and delivered in Mombasa this 24th day of February 2023

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J.N. ONYIEGO

JUDGE

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