



REPUBLIC OF KENYA



HA v LB (Civil Appeal 188 of 2021) [2023] KEHC 18432 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL 188 OF 2021

FR OLEL, J

MAY 31, 2023

BETWEEN

HA APPELLANT

AND

LB RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated November 9, 2021 brought pursuant to provisions of Section 3A of the *Civil Procedure Act*, Order 42 Rule 6 and 7 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is prayer 3 that there be a stay of execution of the judgment/decree of Honourable B. Kasavuli Principal Magistrate given on November 4, 2021 and May 27, 2021 herein pending the hearing and determination of the appeal filed herein and that costs be provided for. The application is supported by a supporting affidavit of the appellant Hilary Asamba dated November 17, 2021. The applicant also filed submission in support of their application dated April 13, 2023.
2. This application is opposed by the Respondent who filed Replying Affidavit's dated February 20, 2023 sworn by the respondent Lilian Bett. Further the respondent had previously filed a preliminary objection dated November 26, 2021 challenging the validity of the application dated November 9, 2021. The said objection was heard and vide a ruling dated January 24, 2022 it was held that the appellant was barred from challenging the ruling dated May 27, 2021, but the appellant could proceed with his appeal as against the ruling dated November 4, 2021. The Respondent also filed written submission dated March 31, 2023 opposing the said application.

Background

3. The respondent filed an application dated November 29, 2019, seeking amongst other prayers that the appellant be compelled to pay monthly maintenance of Kshs 80,000/=. Vide a ruling dated May



27, 2021, the appellant was ordered to pay monthly child support maintenances of Kshs 50,000/=. The appellant was dissatisfied with the same and filed an application to review the said ruling vide his application dated June 3, 2021. This application for review was dismissed on November 4, 2021, hence this appeal.

4. The appellant stated that, the trial court failed to consider pertinent facts placed before the court and unfortunately dismissed his application without considering the same. The appellant further submitted that he had been taking care of all the minors school fee's, medical expenses, food, clothing and other expenses and that the respondent was not contributing her share as is expected in law. The appellant also stated that he had an arguable appeal with high chances of success and unless stay is granted the appeal would be rendered nugatory.
5. The Respondent did oppose this application by her Replying Affidavit dated 20th February 2023. The respondent stated that this appeal arises from a ruling of the court refusing to review its ruling dated May 27, 2023 and the order issued was a negative order, which was incapable of being executed and thus there could not be stay of execution of the said order.
6. The respondent also averred that, it was not open to the appellant to apply for review under Section 80 of the *civil procedure Act* and Order 45 rules 1 and 2 of the *Civil Procedure Rules* and at the same time appeal from the said order and litigation could not be conducted in a manner of trial and error. The application filed was thus otiose, vexatious and constituted an abuse of the process of court and ought to be dismissed suo moto.

Appellants Submissions

7. The appellant filed his submissions dated April 13, 2023 and stated that, he would rely on the supporting affidavit filed in support of the application for stay of execution, the response to the preliminary objection dated December 2, 2021, submissions filed in response to the preliminary objection dated December 14, 2021 and ruling delivered by the honorable judge dated January 24, 2022. The appellant also submitted that the replying affidavit filed by the respondent did not raise any new facts, but raised similar legal issues that were determined in the preliminary objection filed by the said respondent. The issues having been determined it was just and fair to grant stay of execution pending hearing and determination of the appeal so as not to render the appeal to be nugatory.

Respondents Submissions

8. The respondent submitted that the applicant had to prove mainly that h will suffer from substantial loss if the orders sought are not granted and since this matter involved children, Article 53(2) of *the constitution of Kenya 2010* as well as section 8 of the *Children's Act* No 29 of 2022 too ought to be considered. It was the respondent's contention that the appellant had failed to show how he will suffer from substantial loss if the impugned orders are not stayed. The respondent relied on *PNC v NMC* (2021) Eklr where it was held by Justice Achode (As she was then) that substantial loss must be quantified from the point of view of the affected child, who is subject of the order being appealed against and is the one likely to suffer.
9. The respondent also submitted that, the fact that execution has been put in place or is likely to be put in motion by itself does not amount to substantial loss. Reliance was placed in *James Wangalwa & Another v Agnes Nalika Cheseto* in Misc Appl No 42 of 2011 (2002) eKLR. The respondent urged the court to find that this application is not merited to warrant an order of stay of execution and thus should be dismissed with costs.



Analysis & Determination

10. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and the submissions filed and discern that the only issue which arise for determination is whether this court should grant stay of execution of the ruling/order dated November 4, 2021.
11. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. (see Butt v Rent Restriction Tribunal (1982) KLR 417 and James Wangalwa & Another v Agnes Nalika Chereto (2012) eKLR)
12. In the case of Masis Mwita vrs Damris Wanjiku Njeri (2016) eKLR provided the guiding principles which the court should consider while determining an application of this nature. These were;
 - (a) The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - (b) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not to be rendered nugatory should that appeal court reverse the judge's discretion.
 - (c) A judge should not refuse stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - (d) The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements.
13. The judgment appealed against was delivered on November 4, 2021. The Appeal herein was filed on November 18, 2021 and this application was also filed on March 18, 2021. Thus, it can be said that this appeal and application for stay of execution have been file timeously.
14. On the likelihood of suffering substantial loss, it is evident that, this suit involves maintenance of minor children and as stated in PNC v NMC (2021) eKLR in such cases substantial loss must be quantified from the point of view of the affected child, who is subject of the orders being appealed against. The court also has to bear in mind that, paramount interest of the child must also be considered in line with Article 53(2) of the constitution of Kenya 2010 and section 8 the Children's Act No 29 of 2022.
15. On May 27, 2021, the trial magistrate made a ruling directing the appellant to be paying Ksh.50,000/= as monthly maintenance for his children. The court also further ordered that he also continues to pay school fees and also gave him unlimited access to his children. Being aggrieved by the said decision, the appellant filed an application to review the said order through his application dated June 3, 2021. The same was heard and determined on November 4, 2021. The appellant applied for stay of execution of both the order dated May 27, 2021 and November 4, 2021. The respondent filed a preliminary objection which was partially upheld by the ruling of this court dated January 24, 2022, where it was held that it was not open for the appellant to apply for review and then appeal as against the ruling dated May 27, 2021. He was therefore barred from appealing as against the said ruling.



16. The order dated November 4, 2021, is a negative order. It was simply dismissing the application dated June 3, 2021. As pointed out by the respondent in their replying affidavit, one cannot stay a negative order. In *Kaushtik Panchamatia & 3 others v Prime Bank Limited & Ano* (2020) eKLR, the court of appeal stated that;

“that a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we have no mandate to grant stay order in the manner prayed for by the applicants”

17. Similarly, in the case of *Western college Arts and Applied sciences v Oranga & others* [1976] KLR 63 the court while considering, whether an order of stay can be granted in respect of a negative order stated *inter alia* that;

“But what is there to be executed under the judgment, the subject of the intended appeal the high court has merely dismissed the suit with costs. An execution can only be in respect of costs.....

The high court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the high court judgment for this court in an application for stay to enforce or restrain by injunction.”

18. The order of November 4, 2021 simply dismissed the application of review dated June 3, 2021. There is nothing which can be executed on the strength of this order other than costs. It is obviously a negative order which cannot be stayed.

19. The final issue which is to be considered is the issue of security. But having found that, there is no order capable of being stayed, it would be superfluous to consider the merits of the same.

Disposition

20. Taking all relevant factors into consideration find that the application dated November 9, 2021 lacks merit and the same is dismissed with costs.

21. It is so ordered

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF MAY 2023.

RAYOLA FRANCIS OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 31ST DAY OF MAY 2023

In the presence of;

.....For Applicant

.....For Respondent

.....**Court Assistant**

