HKM v NJK (Children's Appeal Case 58 of 2023)
[2023] KEHC 26887 (KLR) (15 December 2023) (Ruling)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CHILDREN'S APPEAL CASE 58 OF 2023

JRA WANANDA, J

DECEMBER 15, 2023

BETWEEN

HKM .... APPLICANT

AND

NJK .... RESPONDENT

RULING

1. This Appeal arises from the Judgment delivered on 23/06/2021 in Eldoret Magistrate's Court Civil Children's Cause No. 42 of 2021.

2. The Application now before this Court is the Notice of Motion dated 28/04/2023 filed by the Appellant acting in person. The same seeks the following orders:

   i. .... [spent]

   ii. That pending the hearing and determination of the Appeal, being High Court at Eldoret Appeal No. 58 of 2023, the Court be pleased to issue an order for stay of execution of the Judgment and orders issued by the Children's Court at Eldoret in Children's Case No. 42 of 2021 delivered virtually on 23rd June 2021.

   iii. That pending the hearing and determination of the Appeal, the Court be pleased to grant the Appellant joint custody of the minors with the Respondent.

   iv. That pending the hearing and determination of the Appeal, the Court be pleased to grant the Appellant unlimited access to the minors during school holidays and on weekends when schools are in session.

   v. That costs of this Application be provided for.

3. The Application is expressed to be brought pursuant to Order 42 Rule 6(2), Order 12 Rule 7 of the Civil Procedure Rules "and all other enabling provisions of the law". The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Appellant.

4. In the Affidavit, the Appellant deponed that following the Ruling delivered on 23/06/2021 by the Magistrates Court, he made two Applications for Review thereof but were unsuccessful, on 5/04/2023 during the hearing of the second Application, the Magistrate advised him to appeal against the Ruling of 23/06/2021 instead of pursuing Applications for Review, the Appellant lives in Nakuru where he is in the process of looking for a job, he has not secured one, since he is unemployed, he decided to carry out menial jobs which earn him Kshs 300/- on a good day, he does not have a business or property to generate income, the Respondent is employed by the Teachers Service Commission as a High School teacher, and that he is willing to support the minors to the best of his ability once he secures a stable job.

Response

5. The Respondent, through Messrs Isiaho Sawe & Co. Advocates opposed the Application by relying on the Replying Affidavit filed on 3/07/2023. She deponed that there has been an inordinate delay in bringing the Application, the impugned Ruling having been delivered on 23/06/2021, a period of more than 2 years, the orders sought are not in the best interest of the children who have been greatly prejudiced by the Appellant's non-compliance, the Appellant has approached this Court with unclean hands as he has never complied with the orders in force and is hence undeserving of the orders he seeks, the Application is an afterthought having been brought only after the Appellant was issued with a Notice to Show Cause, the Appellant has filed several Applications before the trial Court seeking to stay the Ruling most of which were dismissed for non-prosecution, the Appellant is using the numerous Applications as a delaying tactic not to comply with the orders, the Respondent moved the trial Court seeking inter alia, custody orders with respect to the minors forming the subject of these proceedings after the Appellant abrogated his parental responsibility, and that after considering the Respondent's Application on merit, the trial Court apportioned parental responsibility.

6. She deponed further that the Appellant has never complied with the Ruling, instead of complying, he chose to file an Application seeking to review the same, the Application was dismissed for his failure to comply with directions given thereon, the orders of custody which the Appellant seeks are obtainable before the trial Court as a Court of first resort, the Appellant has never challenged the custody orders issued by the trial Court, the orders of unlimited access as sought by the Appellant are already in force hence that prayer amounts to multiplicity, to demonstrate bad faith on the part of the Appellant, he has not even proposed the amount he is willing to pay for the upkeep of the children whom he has never provided for since they parted ways, the Appellant is a large scale farmer and a businessman trading in cereals hence capable of raising the amount ordered by the trial Court, he is abusing the Court process by filing numerous Applications in order to avoid complying with the Court orders, he is underserving of the orders he seeks having failed to comply with the orders of the trial Court more than 2 years later, granting the prayers will only cause more suffering to the children whose needs the Respondent cannot cater for single-handedly, the Appellant has never sought to know the school the children are attending and has not demonstrated any efforts that he has made to have the fee structure furnished to him, the paternity of the children having not been disputed by the Appellant, the law places an obligation on him to shoulder parental responsibility, the Application does not have the best interest of the children, and that the welfare of the children is paramount and of first consideration.

Appellant's Supplementary Affidavit

7. The Appellant then filed a Further Supplementary Affidavit on 12/07/2023. He deponed that there has been no inordinate delay in bringing the Application, he filed his first Application 10 days after the trial Court Ruling and requested the Court to review the Ruling, the same was dismissed on a technicality, not on merit, the second Application seeking to reinstate the first Application was not heard since the Magistrate advised him to appeal, the orders sought herein are in the best interest of the children, granting him joint custody will enable him as a father to share the rights and responsibilities for making important decisions about the children, although the trial Court granted him unlimited access to the minors, he is at the mercy of the of the Respondent who has unilaterally denied him access to the children, the Respondent has never allowed him to access the 1st born since their marriage broke down in mid-2020, the last time he saw the 2nd born was in early 2021 when she was a toddler, the Respondent is being dishonest by claiming that the Appellant is a large scale farmer and a businessman, the Respondent knows very well that the Appellant is not carrying on any business, in the lower Court, without any evidence, the Respondent had argued that the Appellant is a journalist with a well-paying job, the Respondent misled the Court into giving a Ruling that has caused anguish and pain to him leading him to a near depression state, he has been unable to comply with the orders in force since he cannot raise Kshs 15,000/- per month, as shown in the Mpesa evidence in his Application, he did send financial support to the children through the Respondent who however reversed the money back, and that he stands to suffer irreparably and risk being committed to civil jail as he cannot raise the amount as ruled in the lower Court.

Hearing of the Application

8. The Application was canvassed by way of written submissions. Pursuant to directions given, the Applicant filed his Submissions on 12/07/2023 while the Respondent filed on 28/09/2023.

Appellant's Submissions

9. The Appellant submitted that the trial Court not only denied him joint custody of the children but also passed all parental obligations to him including paying school fees, medical and monthly maintenance of Kshs 15,000/-, although the Respondent is a High School teacher in Elgeyo Marakwet County, the Court failed to consider that she is a person of means, that she lives in teachers' quarters and does not pay rent and that the school is also located in a rural setting implying that the cost of living is low there, under Section 76(3) of the Children's Act, the trial Court was to consider the financial abilities of both parents, the trial Court erred by failing to ask both parents to swear Affidavits of means, and that the trial Court ordered him to pay school fees without allowing him to make important decisions such as the schools the children are supposed to join.

Respondent's Submissions

10. On her part, the Respondent's Counsel submitted that prayers 3 and 4 of the Application were already granted by the trial Court. She then contended that the Appellant is asking this Court to stop any provision for his children until the Appeal is concluded then posed the question: would this serve the best interest of the children as enshrined under Section 8 of the Children's Act? Counsel submitted that the answer is in the negative.

11. She submitted further that there has been an inordinate delay in bringing the Application and which has not been explained, that the Appellant has also approached the Court with unclean hands having filed to comply with the orders in force in the absence of any stay orders, the Appellant is legally

obligated to maintain the children, Sections 11, 32, 110, 113 and 118 of the Children's Act empower the trial Court to make orders necessary towards maintenance of children, Section 8 of the Act and Article 53(2) of *the Constitution* uphold the welfare of the children as being paramount and of first consideration in all matters concerning children, the granting of the orders sought will fly in the face of the said provision, and that this will amount to denying the children their basic needs.

12. In regard to the prayer for stay of execution, Counsel submitted that the Appellant has not satisfied the conditions envisaged by Order 42 Rule 6(2) of the Civil Procedure Rules, he has not demonstrated the substantial loss that he stands to suffer should stay be denied, he has not explained the inordinate delay, and that he has not stated his readiness and/or willingness to furnish security for due performance of the decree. She cited the cases of Mathu vs Gichimu [2004] eKLR, Siegfren Busch vs MCSK [2013] eKLR and Vishram Ravji Halai vs. Thornton & Turpin, Civil Application No. Nai. 15 of 1990 [1990] KLR 365 and submitted that the Application is an afterthought.

13. She also cited the case of Bungoma High Court Misc. Application No. 42 of 2011 – James Wangalwa & Another vs. Agnes Naliaka Cheseto and stated that it is not sufficient for the Applicant to simply state that the monthly upkeep of Kshs 15,000/- is on the higher side, he has to demonstrate the same as required under Section 107 of the *Evidence Act*.

14. On the provision of security, Counsel cited the cases of Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR and Gianfranco Manethi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR.

15. In conclusion, Counsel submitted that the Court should not only consider the interest of the Appellant but also the interest of the Respondent who has been denied the fruits of the Judgment. She cited the case of RWW v EKW [2019] eKLR.

Analysis and Determination

16. Upon considering the record, including the Affidavits presented, I find the issue that arises for determination herein to be "whether an order of stay of execution pending appeal should issue against the Judgment of the Childrens Court".

17. In determining matters involving children, including an Application for stay of execution as herein, the best interest of the child is what is paramount. This is expressly provided under Article 53(2) of *the Constitution* and also in Section 8(1)(a) of the *Children Act* as follows:

Article 53(2) of *the Constitution*	A child's best interests are of paramount importance in every matter concerning the child.
Section 8(1)(a) of the *Children Act*	8(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies— a. the best interests of the child shall be the primary consideration;

18. The principles applicable in handling Applications for grant of stay of execution in children's matters was well set out in the case of Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.) where the Court stated as follows:

> "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 overriding consideration of the best interest of the child in accordance with Article 53 (2) of *the Constitution*."

19. Generally, the principles guiding grant of stay of execution pending Appeal are well settled. In this respect, Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:

> "No order for stay of execution shall be made under sub rule (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."

20. From the foregoing, it is clear that an applicant for stay of execution pending appeal must satisfy the above conditions, namely, (a) that he will suffer substantial loss unless the order is granted, (b) the Application has been made without unreasonable delay, and (c) such security as the Court orders for the due performance of such decree

21. As to what encompasses "substantial loss", Hon. Justice F. Gikonyo, in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, stated as follows:

> "No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

22. In children's matters, the "substantial loss" that prevails over and above that of the Applicant-parent is that of the children. In regard thereto, in the case of LDT v PAO [2021] eKLR, Hon. Lady Justice R. Ngetich stated as follows:

> "18. 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. I however note that the applicant averred that he will suffer great prejudice as he will be condemned to pay school fees twice if an order of stay is not granted.
>
> ....

20. 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. The respondent submitted that she has the actual custody of the minors and the minors are attending [Particulars withheld] and if the orders of stay are granted, it will not be in the best interest of the minors since it will mean the custody reverts to the applicant and the minors attend [Particulars withheld] Academy thereby interfering with education of the children."

23. The first condition that I wish to consider is whether the application has been made without unreasonable delay. In determining this limb, I note that the Ruling appealed against herein was delivered by the Children's Court on 23/06/2021. From what I gather from the Affidavits filed herein, the Applicant in late June or early July 2021 filed an Application before the same Court seeking review of the said Ruling but the same was dismissed in November 2021. In January 2022, he filed another Application before the same Court seeking the setting aside of the dismissal of his Application for Review. This second Application was not however prosecuted and was abandoned because the Appellant alleges that in May 2022, the Magistrate advised him to appeal instead of pursuing the Applications for Review. He then filed the Appeal herein on 13/04/2023 and on 28/04/2023, he followed it up with the present Application.

24. From the above chronology, I note that the period between the date that the Magistrate allegedly advised the Appellant to drop the Applications for Review and file an Appeal instead (May 2022) and the date when he eventually filed the present Application (April 2023) is almost 1 year apart. No explanation having been offered by the Appellant for this delay, I find the same to be grossly inordinate. The Appellant therefore fails at the first condition since he has failed to demonstrate that the Application has been made without unreasonable delay

25. The second condition is on whether the application would suffer substantial loss should the order not be made. This matter revolves around parental responsibility. The appellant does not deny his paternity of the children. He in fact concedes that he has automatic and mandatory statutory parental responsibility over the children. It is also not contested that the payment ordered by the Court is meant for the children's upkeep which is a duty and obligation he does not deny is bestowed upon him by law. As was held by Hon. Lady Justice R. Ngetich in the case of LDT v PAO [2021] eKLR (supra), I too find that, in the circumstances of this case, the issue of substantial loss so far as parental duty is concerned does not arise. The issue raised by the Appellant relates to the question whether the amount he was ordered to provide for upkeep of the children is fair or reasonable. I agree that these are issues that cannot conveniently be addressed at this stage as they form the substratum of the Appeal. I also agree that in any event, the Appellant has not even proposed what he considers reasonable. Further, the orders were made in June 2021, more than 2 years ago, yet the Appellant has made no effort to pay any monthly maintenance at a rate that he considers, in his view, to be reasonable or sustainable. He has therefore come to Court with unclean hands and is undeserving of the orders sought.

26. On the third condition, I note that the Appellant has not offered any security for due performance of the Decree. Further, as aforesaid, he has made no efforts to comply with the Ruling of the Children's Court requiring him to pay upkeep and which Ruling was delivered more than 2 years ago. I do not believe that the Appellant expects this Court, at this stage, to excuse him from the responsibility of paying upkeep for his own children. To show his good faith, he ought to have offered security. He therefore also fails at this last hurdle.

27. In the case of ZM v EIM [2013] eKLR , Musyoka J, held as follow:-

> "As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same".

28. Similarly, in JMR v RNM [2022] eKLR Hon. Lady Justice M. Odero held as follows:

> "18. The Applicant claims that he stands to suffer great prejudice if the orders are not stayed as the amount awarded as maintenance were in his view excessive and that he is not able to afford to make said payments.
>
> 19. The question of whether or not the maintenance awarded is excessive is one which cannot be determined at this interim stage. That is a matter, which can only be determined upon a full hearing of the Appeal.
>
> 20. The orders which the Applicant seeks to stay relate to the maintenance of the minors. It cannot be in the best interests of the minors to stay said orders. The Applicant has not denied paternity and as such, he together with the Childrens mother has an obligation to provide for the needs of their children.
>
> 21. It has been revealed that the Applicant has not complied with the orders of maintenance made by the Children Court. The Applicant has not denied this allegation. The Applicant is reminded that courts do not make orders in vain. Parties are obliged to obey court orders even when they do not agree with said orders.
>
> 22. It is trite that he who comes to equity must come with clean hands. It is duplicitous of the Applicant to approach this court seeking to stay orders, which he has in any event disobeyed.
>
> ....
>
> The appellant has applied to the court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law".
>
> 24. The Applicant cannot approach this court seeking to stay orders which he has never obeyed. That amounts to an abuse of court process.
>
> 25. I find no valid grounds to stay the orders made on 2nd September 2021. The welfare of the children is paramount consideration and cannot be stayed, as this would be detrimental to the welfare of the said children."

29. Further, in the case of MN – VS – TAN & another [2015] eKLR again, Musyoka J, in a holding that I fully associate myself, stated as follows:

    20. On the question of the appeal, it is quite evident from his affidavits that the appellant has chosen to disregard the orders of 30th July 2013. He brazenly states on oath that he cannot comply with the said orders because he has filed an appeal against the orders.

    21. It is trite law that the filing of an appeal does not operate as stay of the order appealed against. The appellant has to move the court to have the order stayed. The grant of stay is at the discretion of the court. No doubt the appellant is aware of this legal position hence the filing of the application dated 27th July 2014. The orders of 30th July 2013 are still in force for they have not be stayed. They are available for obedience or compliance by the appellant.

    22. A valid court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of law. It is not a mere wish or proposition. Disobedience or non-compliance with it attracts severe consequences. It would appear to me that the appellant believes that the orders of 30th July 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them.

30. For the foregoing reasons, I believe that I have said enough to indicate that the present Application has no merit and must be dismissed.

31. Before I pen off, I observe that, as aforesaid, the Judgment challenged in this Application and by extension, the Appeal, was delivered on 23/06/2021 and this Appeal was filed on 13/04/2023, after a period of almost 2 years. Section 75G of the *Civil Procedure Act* provides as follows:

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order."

32. Although no party has raised this issue nor was the issue canvassed before me, it appears on the face of it that the Appeal was filed grossly out of time. Since I have not come across any evidence from the record suggesting that leave to file the Appeal out of time was granted, it may, as a result, be the case that the Appeal is incompetent. However, since as aforesaid, this issue was not canvassed, I will say nothing more about it.

Final Orders

33. The upshot of my findings above is that the Application fails. Consequently, I rule as follows:

    i. The Notice of Motion dated 28/04/2023 is hereby dismissed

    ii. This being a family matter, I make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF DECEMBER 2023

....

WANANDA J.R. ANURO

JUDGE