



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E060 OF 2021

FSL.....APPELLANT

-VERSUS-

FNK.....RESPONDENT

RULING

1. The Appellant FSL and the Respondent FNK are parents of a minor child known as JS. The child is the subject of Nairobi Chief Magistrate's Court Children's Case No. 1495 of 2012 between the parties.

2. In a ruling of 17.6.21 Hon H. M. Gitonga, Resident Magistrate reiterated orders on custody and access issued on 26.3.18. It was further directed that the Respondent would have access of the child every weekend of the month. The Respondent was to pick the child on 24.7.21 at 10 am at Loitoktok Police Station in the presence of the children's Officer and return him at the same place on Sunday at 3 pm. The Court further directed that in the intervening period of 1 month, the Appellant was to prepare the child for the said access through parental counselling, including disclosing all facts about the existence of the child's biological mother. In default of compliance with the order of access, warrant of arrest would issue and custody of the child would revert to the Respondent.

3. Being aggrieved with the said ruling, the Appellant preferred the Appeal herein. The Appellant also filed his Application dated 23.7.21 seeking stay of execution of the orders of 17.6.21, pending the hearing and determination of his Appeal.

4. The grounds for application are that in compliance with the Court's orders, the Appellant had prepared the child and had reported to the police and the children's officer. However, on 19.7.21, his employer summoned and assigned to him duties outside his home area, for the period between the 19th to 26th July 2021. He stated that due to the Covid 19 pandemic, the Appellant who works in the tourism industry had been out of work for a long time. He was thus fortunate enough to be recalled and assigned duties. The assignment ran through the access date as ordered by the Court and put him in a hard situation.

5. The Appellant further stated that he immediately informed the Respondent of his predicament but she remained adamant thereby exposing him to arrest in the event the access date was not varied. He stated that the decision to take up the assignment is in good faith and in the best interest of the child as his earnings would enable him provide for the child. The Appellant further averred that the child will suffer aggravated prejudice in the event he is incarcerated as his livelihood will be disrupted and he will not be able to provide for the child. He urged the Court to vary the access date from 24.7.21 to another date and he was ready and willing to comply with the Court order.

6. The Application was opposed by the Respondent *vide* a replying affidavit dated 7.10.21. The Respondent stated that the Appellant has not provided evidence indicating that he prepared the minor and reported to the police and the children's officer. She denied that the Appellant had informed her of the predicament he was in and contended that this was a deliberate scheme to deprive her of access to the child. She further stated that the Appellant contravened the Court orders by engaging clergy to counsel the minor instead of conducting parental counselling himself. Additionally, the Respondent averred that the Appellant has not sufficiently demonstrated that his Appeal has good chances of success. She accused the Appellant of seeking to stave off the eventuality of the Respondent ever reuniting and bonding with the child whom the Appellant has prevented her from visiting. The Respondent has further contended that the Appellant has not provided security for the due performance of the decree as required by law. She urged the Court to dismiss the Application.

7. The law relating to grant stay of execution is set out in Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 2 provides:

(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 Appellant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court order for the due performance of such decree or order as may ultimately be binding on him has been given by the Appellant.

8. A party seeking stay of execution must move the Court without unreasonable delay. In the present case, the decision of the lower Court by which the Appellant is aggrieved, was made on 17.6.21 while the Application is dated 23.7.21. I am satisfied that this Application for stay has been brought without inordinate delay.

9. On the issue of substantial loss, the Appellant relied on the case of M.O v M.E.M [2015] eKLR where Mwita J. stated that it is the minor who will suffer and not the Appellant, thus the Court should consider how the minor will be affected. Counsel further submitted that the Respondent only sees the minor when needed in Court. It was further contended that the Respondent has not demonstrated her willingness to accommodate the minor in her new family, which is likely to affect the minor's growth and development.

10. For the Respondent, it was submitted that the grounds relied on by the Appellant are untenable because the order for access is continuing in nature. It was further submitted that execution date of 24.7.21 has lapsed but it did not preclude the Appellant from rescheduling access to other convenient dates. She stated that it had been 4 months since the order was due for execution and the Appellant has not complied with the same. Reliance was placed on the case of Kenya Power & Lighting Company Limited –v- Esther Wanjiku Wokabi, Civil Appeal No. 326 of 2013 which outlined the 3 guiding principles for grant of an order for stay. It was further submitted that any loss occasioned to the Appellant, would be of his own making in that he had the opportunity to redress the situation by demonstrating good faith and scheduling another access date.

11. When considering the issue of loss in this matter which concerns a child, the Court must look ***beyond*** the possible substantial loss to be suffered by the Appellant and consider the substantial loss to be suffered by the child. The Respondent contended that the best interests of the child are paramount and not that of the Appellant. Reliance was placed on the case EGW v GWT [2017] eKLR where the Court noted that the best interests of the child are superior to the rights and wishes of the parents.

12. In the present matter which relates to a child of the parties, the interests of the child supersede those of the parties and must at all times be upheld. In this regard, the Court is guided by the provisions of the Constitution of Kenya, 2010 and of the Children Act which require the Court to give paramount importance to the best interests of the child. Article 53(2) of the Constitution provides:

“A child’s best interests are of paramount importance in every matter concerning the child.

The Children Act on the other hand provides at Section 4(3) that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

13. The Court is required, as it makes a decision that will impact the child herein, to consider and take into account all circumstances affecting the child. The child was to be taken to the designated place on 24.7.21 so that his mother could have access to him. Parental involvement by both parents in a child's life is critical for that child's wholesome development. The reality of life is that it is not always possible for a child to grow up in the same home with both parents. This is because of breakdown in relationships between parents. When a relationship between the parents of a child breaks up and they are no longer able to live together or where unmarried persons have a child, it is necessary to ensure that both parents influence and support the child. This is done through facilitating access of both parents to the child. This is no doubt the reason why the trial Court made orders granting the Respondent access to the child.

14. The trial Court made very clear orders directing the Appellant to avail the child to the Respondent on a specific date at a specific place. The Court notes that the reason proffered by the Appellant for not being able to comply with the orders of availing the child on 24.7.21 at 10 am at Loitoktok Police Station, the designated place, is that he had been assigned duties outside his home area for the period between the 19th to 26th July 2021. The Court appreciates that the Covid-19 pandemic led to the loss of many job and business opportunities in the tourism sector as indeed in all other sectors of the Kenyan and global economy. Getting assigned duties was therefore a godsend for the Respondent and it is expected that he embraced the opportunity with enthusiasm. This notwithstanding, the Appellant has not demonstrated to the Court that he made any efforts to comply with the Court orders, by having someone else take the child to the designated place on his behalf. Notably the Appellant was able to travel to Nairobi on 23.7.21, the day before he was to avail the child to the Respondent, to give instructions to his advocate to file the present application and swear an affidavit. I therefore find that the Appellant has not come to this Court with clean hands. Further, staying the order of access by the Respondent to the child is not in the best interest of the child. In any event, the matter has been overtaken by events as 24.7.21, the date the child was to be availed to the Respondent is long past.

15. In view of the foregoing, I find and hold that the Application dated 23.7.21 lacks merit and the same is hereby dismissed. This being a matter concerning the parties' child, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in NAIROBI this 25th day of February 2022

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... for the Respondent

..... Court Assistant