MH v MAA (Family Appeal E003 of 2022) [2022] KEHC 11459 (KLR) (22 April 2022) (Ruling)

Neutral citation: [2022] KEHC 11459 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E003 OF 2022

JN ONYIEGO, J

APRIL 22, 2022

BETWEEN

MH ..... APPELLANT

AND

MAA ..... RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated 26th January, 2022 and filed on 28th January 2022. The application which is brought pursuant to Section 3A of the *Civil Procedure Act*, order 42 rule 6 of the *civil procedure rules*, Article 53 of *the Constitution*, Section 24 of the *children Act* and all enabling provisions of the law is seeking orders as follows;

    i. Spent

    ii. That at the interim, this honourable court be pleased to order stay of execution of the ruling and orders of the honourable L.k.Sindani issued on the 24th January 2022 pending the hearing and determination of this application interpartes.

    iii. That at the interim, this honourable court be pleased to order stay of execution of the ruling and orders of the honourable L.k.Sindani issued on the 24th January 2022 pending the hearing and determination of the appeal herein .

    iv. That pending hearing and determination of this application, the court be pleased to issue a temporary maintenance order of kshs 25,000 to be paid to the applicant on or before 5th of every month to cater for the basic needs of the minor as follows;

    1. Half rent Kshs9000

    2. Food & other necessities e.g diapers.....Kshs10,000

    3. Water & electricity.....Kshs2,500

v. That this honourable court be pleased to issue a temporary maintenance order of Kshs 21,500 per month against the respondent as itemised in (4) above pending hearing and determination of the appeal filed herein

vi. That costs of this application be provided for.

2. The application is hinged on grounds set out on the face of it and averments contained in the affidavit in support sworn on 26th January, 2011 by MH.

3. It is the applicant's case that she is a Pakistan national who legally got married to the respondent a Kenyan national on 28th December, 2017 while in Pakistan. That after their marriage, they moved to Kenya with her holding an independent pass/visa (see annexure "M1-2"). That out of the said marriage, they were blessed with the subject herein (See birth certificate marked "MH-3").

4. She averred that throughout the subsistence of their marriage, she experienced physical, mental and emotional abuse from the respondent, his mother and the rest of his family thus forcing her to leave their matrimonial home. That since she is yet to secure a good job due to lack of work permit, she has been surviving on the good will of well-wishers to provide for the minor.

5. She deposed that the respondent has since threatened to divorce her under Islamic law so as to occasion her deportation thus leaving the baby aged 2 years with him(respondent). That to arrest the possible deportation, she instituted Tononoka children's case No E341 of 2021 seeking orders of custody of the child and maintenance.

6. She further deposed that prior to her initiating the said suit, the applicant used to erratically send her kshs15,000 per month which money was not enough to meet initial expenses of kshs 18,000 rent per month, food, water, diapers and other necessary items.

7. It was stated that the application for interim orders was heard in her absence and that of her lawyer hence the impugned order's via a ruling delivered on 24th January, 2022 in which actual custody of the child was shared with the respondent herein to stay with the minor during weekdays and the applicant during weekends. That the court further ordered the respondent to pay Kshs10, 000 as maintenance expense per month.

8. The applicant averred that the child has been staying with her with the respondent having access over the weekends hence the sudden change will not be in the best interests of the child. She expressed herself that the amount of kshs 10,000 per month is not sufficient to pay for rent and maintain the baby hence the prayer for stay orders.

9. On 7th February, 2022, the respondent filed what is referred to as grounds of opposition and reply to the appellant's notice of motion dated 26th January, 2021. The respondent averred that the application does not disclose any new and important information or evidence to warrant an appeal and that the application is resjudicata as the issues in controversy have already been determined before Tononoka children's court being a competent court with jurisdiction.

10. He further averred that the application herein offends the principle of subjudice as the matter is pending before Tononoka children's court. He also deposed that he has since divorced with the applicant and divorce certificate issued before Kadhi's court on 23rd September, 2021 (see MA 1-2). He stated that the applicant is a foreigner who wants to travel out of the country to Pakistan without guaranteed safety measures.

11. It is the applicant's claim that he had come across a confidential whatsapp communication in which the applicant had promised to gift her son the subject herein to her in- laws (See annexure MA4). That

this being an act of human trafficking, he made a report to Mombasa central police station. He deposed that he has since enrolled the baby to a school where he drops and picks him daily.

12. It was further averred that the applicant has since enrolled at Methodist university on full time basis hence has no time to look after the baby.

13. Regarding the issue of divorce and likely suspension of the applicant's dependency visa, the respondent deponed that he has a right to divorce which he has already done. He stated that the question of work permit and dependency visa is an issue for the department of immigration to deal with and therefore none of his business.

14. On the question of issuance of exparte orders, he averred that the applicant did not turn up in court on 16th December 2021 when the application for interim orders was scheduled to be heard. He averred that the child has been under his care since 24th January, 2022 when the court made its order on shared custody hence there is nothing to stay.

15. Besides the said reply, the respondent filed a notice of preliminary objection dated 7th February 2022 thus stating that

    i. The applicant's appeal filed on 26th January 2022 offends order 43 rule 1 of the civil procedure rules and section 75 (1) of the *civil procedure Act* Cap 21 as the appeal does not lie as of right.

    ii. That the appellant's appeal offends Sections 75 (1) of the *civil procedure Act* wherein leave ought to be sought from the court making such orders

    iii. That the appellant has failed to attach a letter to prove that she had sought typed proceedings from the subordinate court.

16. When the application came up exparte under certificate of urgency, the court directed for service of the same and mention for directions on 8th February 2011. On 8th February, 2022 parties agreed to file submissions to dispose of the matter. On 14th March, 2011 parties' respective counsel opted to rely on their submissions and sought a ruling date.

Appellant's submissions

17. Through the law of firm of Muthee Kihiko Soni and Associates LLp, the applicant filed her submissions on 14th March, 2022 literally adopting the content contained in the affidavit in support of the application. Learned counsel submitted on two issues itemised as follows;

    a. Whether the orders sought herein are resjudicata and or subjudice.

    b. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the best interests of the child to grant the orders.

18. On the first issue, it is the applicant's submission that the application is not rejudicata nor does it amount to subjudice as the prayers sought are purely distinct from what transpired before the trial court.

19. Concerning the second issue, it was counsel's submission that the applicant has met the threshold for grant of stay orders under Order 42 rule 6 of the civil procedure rules hence the best interests of the child dictates that the orders should be granted. That it is in the interest of justice that the orders be granted to preserve the purpose of the application. In support of this proposition, the court was referred to the holding in the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 418 where the

court stated that the power to grant stay is a matter of discretion which should be exercised in such a way as not to defeat the purpose of an appeal.

20. Learned counsel further submitted that as a general rule, a child of tender age should be granted to the mother except where there are exceptional circumstances to warrant the award of the minor to the father. In this regard, reliance was placed in the case of *Githunguri vs Githunguri* (1979) eKLR and *J.O vs S.A.O* (2016) eKLR

Respondent's submissions

21. Through the firm of Ogendo and company advocates, the respondent filed his submissions on 11th March, 2022 basically reiterating the grounds of opposition and averments contained in the reply to the application.

22. It was counsel's submission that leave to appeal against the impugned orders was not sought from the trial court contrary to section 75 of the *civil procedure Act* and order 43 R 1 of the civil procedure rules. In support of this submission, the court was referred to the holding in the case of *Serephen Nyasani Menge vs Rispah Onsase* (2018) eKLR where the court held that; leave is pre- requisite before an appeal can be lodged and failure to seek and obtain leave is fatal and consequently no competent appeal can be lodged against such an order.

Determination

23. I have considered the application herein, response thereto and oral submissions by both counsel; Issues that crystalize for determination are;

    i. Whether the application herein amounts to resjudicata

    ii. Whether the application amounts to subjudice

    iii. Whether the intended application is bad in law and in breach of section 75 of the *civil procedure Act*.

    iv. Whether the applicant has met the criteria for grant of stay of execution orders.

24. It is the respondent's position that the application herein amounts to resjudicata in that it has already been determined by a court of competent jurisdiction before the Tononoka children's court.

25. Section 7 of the *civil procedure Act* is very clear on when hearing of a matter amounts to resjudicata. That provision provides that;

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally determined by such court."

26. The application before this court has not been heard by Tononoka children's court. Further, Tononoka children's court is not competent to hear such an application pending appeal. To that extent, the argument by counsel for the respondent that this matter amounts to resjudicata is misplaced hence section 7 of the civil procedure rules does not apply.

27. Regarding whether the matter before this court amounts to subjudice, I do not find any basis upon which this argument is anchored. The applicant has a right to prefer an appeal against any order or

issue arising from a lower court. It cannot be said to be subjudice in all respects. Why do we have court structures or hierarchy of courts? This argument is totally misplaced hence dismissed.

28. Concerning whether the appeal is properly before this court for lack of leave to appeal to this court pursuant to section Section 75 of the *civil procedure Act* and rule 43 (1) of the civil procedure rules, one will have to look into the two provisions in context and in the best interest of a child. Under section 75, orders from which an appeal can lie as of right are enumerated. Among such orders where an appeal is of right are orders specified at sub-section 1 para (h) which refers to an order made under rules from which an appeal is expressly allowed by rules. Order 43 lists such orders and rules relevant.

29. However, this court was not supplied with lower court proceedings to ascertain whether leave was sought or not. In the premises, this court cannot determine the validity of the appeal herein before a record of appeal is filed and at the appropriate stage. I think this issue has prematurely been raised.

30. I will now turn to the crux of the matter. The applicant is seeking stay of execution of the court order which shared out actual custody of the baby in the ratio of weekdays to the father and weekends to the mother. The applicant also complained that the amount of kshs10,000 as monthly maintenance expenses is too little considering the cost of living where she has to pay rent at 18,000 per month, buy food, clothing, and other related items for the general welfare of the child. She argued that custody of a child of a tender age should as a matter of general principle be awarded to the mother.

31. The application has been brought under order 42 rule 6 (2) of the civil procedure rules which sets out conditions upon which an order for stay can issue as follows; the applicant must prove that he is likely to suffer substantial loss should the orders sought be denied; the application has been filed within reasonable time and that security for due performance of the decree has been furnished or for any other sufficient cause.

32. The above principles were clearly emphasized in the case of *Kenya Shell Limited vs Kibiru* (1986) KLR 44 where the court held that;

> " 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 where 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 this evidence, it is difficult to see why the respondents should be kept out to their money."

33. However, it is worth noting that the power to issue or not to issue an order of stay of execution is purely discretionary subject to observance of the tenets of substantive justice after taking into account the delicate act of balancing parties' interests and in this case the best interests of the child. See *Absolom Dora vs Tarbo Transporters* (2013) eKLR where the court stated that;

> " The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court as such order does not introduce any disadvantage but administers the justice that the case deserves. This is in recognition that both parties have rights..."

34. In the instant case, the applicant is basically relying on the general principle that a mother has the right on priority basis to have actual custody of the minor who in this case is a child of tender age. There is no dispute that as a matter of general principle, custody of a child of tender age is normally awarded to the mother unless there are exceptional circumstances. This position was elaborated clearly in the case of Githunguri Vs Githunguri (supra).

35. Unfortunately, this court has not had the advantage of the pleadings relied on by the trial court when making the orders she did in her impugned ruling. Equally, the ruling of the trial court was not attached for this court to assess whether the court applied proper principles on the law to award shared custody in the manner she did. With that limited information, I am not able to authoritatively vary the impugned shared actual custody orders.

36. Considering the court's predicament alluded to under paragraph 35 above, I will rely on the averments by both parties in this application. Firstly, no one has been given exclusive or absolute actual custody of the child. The main complaint is that the father should not be given actual custody except for access rights. The respondent has also expressed fear that the applicant who is a Pakistan national with whom they have divorced is planning to secretly leave the country and give out the baby to the in laws.

37. The allegation of giving out the baby was supported by some WhatsApp conversation made by the applicant to some relatives which allegation was not controverted by way of a further affidavit. In such a scenario, this court would definitely exercise restraint when called upon to issue a discretionary order of stay in the best interests of the child. In the circumstances, I do not find any substantial loss that the applicant is likely to suffer at least in the interim pending hearing of the main appeal.

38. Equally, I do not find any prejudice in maintaining the status quo until the appeal is heard and determined. Regarding the amount of maintenance, again my hands are tied. No affidavit of means was tendered before this court nor does this court have the ruling of the trial court to ascertain factors which the court took consideration before ordering maintenance at a sum of kshs10,000 per month. The means of income of each party was not disclosed so as to determine the reasonable amount payable. Perhaps this will come out clearly on appeal when the record of appeal is filed.

39. Concerning whether the application herein was filed without inordinate delay, it is clear that the impugned orders were made on 24th January 2022 and this application filed on 3rd February, 2022 translating to 14 days . The application was therefore filed within reasonable time.

40. As to whether this is an ideal case for depositing security, I do not think so. Depositing security does not benefit the baby in anyway as such money will remain unspent in some account pending determination of the appeal.

41. In a nutshell, I do not find merit in the application and the same is dismissed with no order as to costs. Parties to expedite hearing of the appeal.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL, 2022

J N ONYIEGO

JUDGE