SAM v SOA (Family Appeal 12 of 2022) [2022] KEHC 3019 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KEHC 3019 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL 12 OF 2022

JO NYARANGI, J

MAY 20, 2022

BETWEEN

SAM ..... APPLICANT

AND

SOA ..... RESPONDENT

RULING

1. The applicant/appellant herein is the biological father of the minor subject of these proceedings whose actual custody is contested between the father and the respondent a sister to the minor's late mother. From the pleadings, the minor's mother died on 11th July, 2021 leaving behind the minor as the only surviving child.

2. Subsequently, Shufaa Omar Ahmed (respondent) a sister to the minor's mother moved toTononoka children's court vide children case No MCCHMISC/E078/2021 seeking temporary orders restraining the applicant herein from withdrawing any funds left by the minor's mother now deceased and that actual physical custody, care and control of the child herein to vest in her with unlimited access to the applicant/appellant.

3. Upon canvassing the application, the court delivered its ruling thus dismissing the 1st prayer regarding the order restraining the appellant /applicant from accessing the account of the deceased. The court advised parties to file a petition for a grant of letters of administration.

4. On the second prayer, the court found that the appellant /applicant did not have a fixed place of abode and that he was unsuitable a fact which was reflected in the appellant/applicant's act in releasing the baby to the paternal aunt and later to the respondent after the death of the minor's mother. The court gave the child to the respondent after finding that the child was used to staying with her and had even been enrolled in school. The court however granted the appellant/applicant unlimited access.

5. Aggrieved by the said orders, the applicant moved to this court vide a Memorandum of Appeal dated 28th March, 2021 citing 5 grounds of appeal. Contemporaneously filed with the appeal is the

application subject of this ruling seeking an order of stay of execution of the said ruling and orders made on 16th March, 2022 pending hearing and determination of the application and subsequently pending hearing and determination of the appeal.

6. The application is anchored on the grounds stated on the face of it and an affidavit sworn by the applicant on 28th March, 2022.

7. Basically, the applicant's case is to the effect that being the biological father to the subject herein he takes priority in assuming actual physical custody of the minor in the absence of the mother. That prior to the death of the minor's mother they were staying with the minor until after the death of his wife when the respondent took advantage of the situation and decided to take the baby.

8. He stated that he has an arguable appeal with high chances of success and that the same will be rendered nugatory should stay orders be denied. He averred that prior to the impugned orders, he was staying with the minor who was schooling but got interrupted by the said orders leading to her transfer to another school.

9. In reply, the respondent filed a replying affidavit sworn on 11th April 2022 by the respondent stating that the minor herein has all along during the lifetime of her mother stayed at her mother's parent's home together with the appellant/applicant while the minor's mother worked in Nairobi.That after her sister died, the appellant/applicant was chased away from the in-law's house.

10. According to the respondent, the applicant took away the minor to fulfil an ulterior motive in pursuing the wife's estate. It was averred that; the appellant has no known source of income nor fixed place of abode as he resides with his sister within Mariakani where he was staying with the minor; the child is of the opposite sex to the applicant; children officer's report stated that the environment at the respondent's home was unsuitable for the baby and that the standard of education of the minor has dropped for the period the child was staying with the father.

11. When the matter came up for hearing, Mr Ganzala appearing for the appellant literally adopted averments contained in the affidavit in support of the application. Equally, Mr. Mutisya appearing for the respondent adopted the content of the affidavit in reply. Learned counsel contended that the prayers sought have been overtaken by events (moot) as the respondent has since assumed custody of the child who is already back to her previous place of residence before the applicant took her away.

12. I have considered the application herein and the response thereto. I have also considered counsel's oral submissions. The only issue for determination is; whether the applicant has met the threshold for stay of execution orders. The application herein has been brought pursuant to Article 53 of *the Constitution*, Section 1A, B 3 and 3A of the CPA and Order 40 rule 6 of the *Civil Procedure rules.*

13. Although not quoted, the application is premised upon orders ordinarily applicable under Order 42 rule 6 (2) of the Civil Procedure Rules which provides that; No order of stay of execution shall be made under sub-rule 1 unless the court is satisfied that substantial loss may result to the applicant if the order is not made and that the application has been made without unreasonable delay and finally, security for due performance of the decree or order has been deposited by the applicant.

14. It is incumbent upon the applicant to establish proof that he likely to suffer substantial loss, the appeal is arguable with high chances of success and that if not granted the appeal maybe rendered nugatory. See *Kenya Shell Limited v Kiburu* (1986) KLR 44 where the court stated 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 for substantial loss to the applicant, it would be a rare case where an appeal would be rendered nugatory by some 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 of their money".

15. However, the court is bestowed with wide discretionary powers to grant or not to grant stay orders. In the case of *Absolom vs Tarbo Transporters* (2013) e KLR the court had this to say;

> " The discretionary relief of stay of execution pending appeal is defined on the basis that no one would be worse by virtue of an order of the court as such order does no introduce any disadvantage but administers the justice that the case deserves. This is in recognition that both parties have rights..."

16. In the instant case, the appellant is submitting that as the biological father, he has every right to have actual custody of the baby. It is trite that unless under exceptional circumstances, a biological parent has superior rights to assume actual custody of a child of tender age as against any other person. See *DMM vs PMN & another* (2020) e KLR.

17. Article 19 of the African Chapter on the rights and welfare of a child further provides;

> " Every child is entitled to parental care and protection and shall whenever possible reside with his or her parents.

18. Section 6 (1) of the *children Act* goes further to provide that a child shall have a right to live with and to be cared for by his parents.

19. Under Section 83(1) of the *Children Act*, the principles for consideration before awarding custody to any person is as follows;

(1) In determining whether or not a custody order should be made in favour of the applicant the court shall have regard to -

(a) The conduct and wishes of the parent or guardian of the child;

(b) The ascertainable wishes of the relatives of the child;

(c) The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years proceedings the application;

(d) The ascertainable wishes of the child;

(e) Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) The customs of the community to which the child belongs;

(g) The religious persuasion of the child;

(h) Whether a care order, or a supervision order, or a personal protection order or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

(i) The circumstances of any sibling of the child concerned, and of any other children of the home, if any

(J) The best interest of the child.

20. Among the conditions set out above is the best interest of a child as stipulated under Article 53 (2) of *the Constitution* and Section 4 (2) and (3) of the *Children Act* which also underscores the paramouncy of the best interests of a child principle. Further, the ascertainable wishes of the child's relatives is a key consideration.

21. According to the appellant/applicant, he is able to look after his baby while the aunt (respondent) insisted that the father has no place of affixed abode as he used to stay with his in laws in their home (his wife's home) instead of his home. That the child has not known any other home through-out her life time hence unnecessary interruption by the father relocating her to other relatives who are strangers to her.

22. From the ruling, the trial court took into consideration various factors inter alia; the children officer's report and the child's wish to stay with the respondent her aunt who all along has been staying with her even before the mother died. The children officer's report attached to the replying affidavit clearly indicates the inability of the appellant in looking after the baby as he keeps relocating her from relative to relative hence recommended the child to stay with the aunt.

23. Whereas it is a difficult balancing act for the court to arrive at a decision which meets the requirements of a parent's right to custody of his or her child, it must also take into account the child's rights and best interests.

24. Primafacie, the scales of justice appear to tilt towards the respondent's side subject to substantive arguments on appeal. Without delving into the merits of the appeal, I do not find any substantial loss the appellant is likely or will suffer if the baby were to stay with the aunt at a home which she has been staying even before the mother died up to now. The appellant will not suffer any prejudice if the orders remains in force pending the outcome of the appeal.

25. Regarding the filing of the application within reasonable time, the same was filed on 29th March 2022 while the impugned order was delivered on 16th March,2022. Obviously it was filed within reasonable time.

26. As Concerns agreeability of the appeal, yes there is a legal issue over custody by aparent vis a vis an aunt hence a legal question which is tied to proof of likelihood to suffer substantial loss. Mere proof that an appeal is arguable cannot on its own warrant issuance of a stay order. As to the appeal being rendered nugatory, I do not think so because the order has already been executed yet the appeal will survive and if proved the orders will be set aside.

27. However, in matters concerning children, it is always advisable for parties to pursue a substantive hearing of the main appeal to avoid wasting time on interlocutory appeals. It is during the appeal or substantial hearing before the trial court that the appellant/applicant will prove that he has not failed in his parental responsibility to the baby.

28. In a nutshell, I do not find sufficient ground to grant the orders sought. Application is dismissed with no order as to costs. Parties to expedite the hearing of the appeal or better still opt to prosecute the main suit before the lower court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF MAY, 2022.

J. N. ONYIEGO

JUDGE