REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 29 OF 2020

PNN.....APPELLANT/APPLICANT

VERSUS

BMK..... RESPONDENT/RESPNDENT

RULING

A. Introduction

1. Before me is an application dated 14/09/2020 filed under certificate of urgency. However, a perusal of the said application and a strict construction of the same reveals that all the prayers sought are spent safe for the prayer for the costs of the application. I shall address myself on this issue in due course as the respondent has raised the same in opposition of the application.

2. The application is premised on the grounds that the applicant has appealed against the orders of the trial magistrate which has the effect of granting respondent custody of the minors especially since the order is unclear and that the respondent is planning to take the minors with them and wherein he may not return them until the schools reopen since he feels that the applicant has already stayed with them for over half of the holiday as directed by the court. That the children are of tender age and need their mother's care and the respondent had been a violent man with no interests in his children but only using the issue of custody to punish the applicant. Further that if the orders sought are not granted the appeal herein shall be rendered nugatory as the respondent will take away the minor for the indefinite period of school holiday.

3. The application is opposed by way of the replying affidavit sworn by the respondent herein in which he deposed that as the father to the minors herein, he is entitled to joint custody with the appellant and further the minors are also entitled to fatherly love. That as a father, he was entitled to his right to have access to the minors notwithstanding the indefinite nature of the holidays at the time of filing the application and that since the applicant has already admitted to having stayed with the minors for long, he ought to be allowed to visit and/or be with the children as he has equal rights with the applicant in that respect. Further that the minors will not suffer in any way as he sought joint custody which is in the best interest of the minors and that the applicant had not proved the loss she would suffer if the orders of stay are not granted and neither will the appeal be rendered nugatory if the orders of stay are not granted.

4. He deposed that the applicant had denied him access to the minors for over one year thus causing emotional suffering to the minors and as such the applicant is punishing him by denying him access to the minors and depriving the minors right to fatherly love and that the instant application is an abuse of the court process and would not serve any purpose since it seeks interim orders of stay pending the hearing of the application.

5. The application was canvassed by way of written submissions. The applicant submitted that the best interests of the child being the overriding consideration on all matters touching on children and now that the minors herein are children of 8, 5 and 3 years, the court ought to arrive at a just determination that the minors' custody be with their mother pending the hearing and determination of the appeal. Reliance was made on **section 4(2)(3) and (4) of the Children Act, article 53(2) of the Constitution of Kenya, JAM –vs- FOK (2019) eKLR, DK –vs- JKN (2011) eKLR** and **EAO –vs- SON Civil Application No. 170 of 2013** to support her submissions.

6. The respondent on his part reiterated his depositions in the replying affidavit to the effect that the applicant has had custody of the minors for a long time and thus the applicant should allow him to have custody of the minors as they have equal rights as parents. Reliance was made on S**ection 24 and 6 of the Children Act** and **MNN –vs- MOK and Another (2017) eKLR.** Further that it was the best interests of the children herein to have fatherly love and presence and contribution as well as applicant's (motherly) love and presence. Reliance was made on **Atwal –vs- Amrit (2011) E.A 20.** It was further submitted that the application herein is an abuse of the court process as it only seeks interim orders whereas parties are bound by their pleadings. Reliance was made on the case of **Independent Electoral and Boundaries Commission –vs- Stephen Mutinda Mule & Others Civil Appeal 219 of 2013**. Further that if the orders of the trial court were not clear as the applicant had alleged, then the recourse was to seek the interpretation from the court as opposed to filing an appeal.

7. I have considered the application herein, the replying affidavit and the rival submissions by the parties. As I have already noted, from the strict reading of the application, it is clear that all the orders sought are spent save for costs of the application. In fact, the respondent deposed that the instant application is an abuse of the court as it only seeks interim orders pending the hearing of the application interparties. Where a

pleading is an abuse of the court process, the court has no jurisdiction to proceed with any further hearing and as a matter of law, such pleading ought to be struck out.

8. I have indeed perused the instant application and I note that all the three prayers are in the interim (pending inter-parties hearing of the application) save for the costs. There is no prayer for stay of execution **pending appea**l. It is however clear that from the grounds in support of the application, the supporting affidavit and the submissions by the applicant, the application herein seeks stay of execution pending the hearing and determination of the appeal herein. Section 3(1)(c) of the Judicature Act Cap 8 Laws of Kenya provides that this court ought to exercise its jurisdiction in conformity with amongst others, the doctrines of equity. Amongst the said doctrines is that equity looks at intention and not the form.

9. It is my view that this being a court of equity, it is bound to look at intentions of the parties before it and not the form. The omission to have a prayer for stay of execution pending the hearing of the appeal is an omission curable by invoking the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya** as well as the provisions of **Sections 1A** and **1B** of the **Civil Procedure Act** which mandates the courts, while enforcing rules of procedure, not to lose sight of the bigger picture which is to render substantive justice. (See **Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR*).*** The intentions can be inferred from the grounds in support of the application and the supporting affidavit (that the applicant intended to apply for stay of execution pending appeal).

10. Further this court under section 4 of the Children's Act nO. 8 OF 2001 Laws of Kenya has a duty to consider the best interest of the child while making an order where children interests are at stake. It is my view that the best interests of the minors herein favour sustaining the instant application and determining it on merits.

11. Proceeding to the merits of the application, the main issue for determination is whether the applicant has made a case for the grant of the said orders.

12. The conditions for granting a stay of execution pending appeal are now settled. An order of stay of execution is a discretionary one but that discretion is fettered by the conditions set out in **Order 42, Rule 6(2)** of the **Civil Procedure Rules 2010. These conditions are: -**

i. *The applicant will suffer substantial loss if stay is not granted;*

ii. *The application for stay has been brought without undue delay; and*

iii. *The applicant has provided security for the due performance of the decree or order appealed against.*

13. The court in *Bhutt v. Bhutt* Mombasa HCCC NO. 8 of 2014 (O.S.) added another condition that when it held that 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 an overriding consideration of the best interest of the child in accordance with Article 53 (2) of the Constitution.

14. In the instant case, I note that the application was filed on 14/09/2020 and against the ruling delivered on 26/08/2020. It is my view that in the circumstances, the same was brought without undue delay.

15. The applicant's main ground in support of the application is that the trial court orders were indefinite in the sense that if they were to be executed, the respondent would have custody for indefinite time as the school holiday was not defined. She deposed that the order is unclear and that the respondent was planning to take the minors with him and may not return them until the schools reopen since he feels that the applicant has already stayed with them for over half of the holiday as directed by the court whereas the children are of tender age and need their mother's care.

16. However, I note that the schools have resumed and the government has issued the school calendar for the next two academic years. Further, the matter before the trial court is still pending and the orders were issued in the interim and whereas the respondent was granted orders for partial custody of the minors. Under Section 6(1) of the Children's Act Cap 141 Laws of Kenya, a child shall have a right to live with and to be cared for by his parents. Further **Article 53(1) (e)** of the **Constitution of Kenya** provides that a child has a right to **parental care and protection which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not.** As such, the respondent herein has a duty to ensure that the minors enjoy these rights. It is my view that the best way that the respondent and indeed both parties can fulfill these duties is by having shared custody now that they are not living together. The duties ought to be shared equally and no one has superior rights over the minors herein than the other. That being the case, I don't find any proof or reasons as to how the applicant shall suffer substantial loss if the orders of the trial court are not stayed.

17. The applicant seems to have been apprehensive as to the duration of the school holiday as the same was not certain due to the infinite school closure which was being experienced at the time of the application. However, the circumstances have changed and the school term dates are now clear. In my view, the applicant will not suffer any substantial loss by having the minors' father enjoy his rights in relation to his children.

18. Further it is trite that the paramount consideration in this type of case is the welfare of the children. To deprive a parent access to his children is to deprive such a child or children of an important contribution to his emotional and material growth in the long run. This court has a duty under section 4 to treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to amongst others safeguard and promote the rights and welfare of the child and to conserve and promote the welfare of the child. Despite the applicant having deposed that the respondent herein is a violent man with no interests in his children, there is no evidence which was tendered to prove the same. I am unable to find that the respondent is an unfit person who should not have the custody of the children the subject of these proceedings. In the circumstances of this case, the best interests of the minors herein do not favour the granting of the orders sought herein.

19. Since the issues involve and are for the benefit of children, the court makes no orders as to costs.

20. Further as I have already noted, there is still a pending matter in the lower court and also the appeal herein is yet to be heard. It is in the best interest of the minors herein that the appeal be disposed off expeditiously so that the matter before the trial court can be heard.

21. As such, and in exercise of the powers of this court under section 4 of the Act, this court do order that the record of appeal be filed expeditiously (within 21 days from the date hereof) failure to which the memorandum of appeal shall be struck out.

22. It is so ordered.

Delivered, dated and **signed** at **Embu** this **24th** day of **February, 2021.**

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent