REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CIVIL APPEAL NO. 036 OF 2020

EN...APPELLANT/APPLICANT

-VERSUS-

IR (suing as next friend and mother of **JWN)...............................RESPONDENT**

RULING

[1] Before the Court for determination is the Notice of Motion dated **13 January 2021.** It was filed herein by the appellant/applicant, **EN**, pursuant to the provisions of **Sections 3, 3A, 75, 78, 79G** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya; Order 42 Rules 1, 2 and 6;** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

> **[a]** Spent
>
> **[b]** There be stay of execution of the judgment and decree in **Eldoret Children's Case No. 67 of 2019** pending the hearing and determination of the application and subsequently pending the hearing and determination of the intended appeal from the said judgment and decree delivered on **13 November 2020**.
>
> **[c]** That costs of the application be provided for.

[2] The application was premised on the grounds that the applicant is dissatisfied with the judgment and wishes to lodge an appeal; and that given the time it will take to hear the appeal and the nature of the orders issued by the lower court, the appeal will be rendered nugatory unless the orders sought are granted. It was further the assertion of the applicant that the respondent will not be prejudiced in any way if the instant application is allowed. In support of the application, the applicant relied on his own affidavit sworn on **13 January 2021** to which he annexed a copy of the impugned judgment, among other documents. He also pointed out, at paragraph 6 of his affidavit, that the job he was doing at **[Particulars Withheld] Limited** came to an end; and therefore that his financial position at the moment is that he does not have a regular income. He exhibited his termination letter as **Annexure EN-3** to the Supporting Affidavit in proof of this averment.

[3] The respondent opposed the application vide her Replying Affidavit sworn and filed herein on **18 January 2021**. Her posturing was that the application does not have the best interest of the minor at heart; and that the orders being sought run counter the provisions of the applicable law. She further pointed out that no effort at all had been made by the applicant to comply with the orders of the lower court; and therefore that he was in arrears to the tune of **Kshs. 50,000/=** as at **January 2021**. The respondent also pointed out that the minor was yet to be enrolled in school, in utter disregard of the court order. Regarding the applicant's source of income, it was the contention of the respondent that the he is an engineer by profession and is therefore in a position to pay the sums decreed by the lower court. She added that the issue of the applicant's loss of employment was taken into consideration by the lower court before arriving at the orders in issue. Thus, the respondent prayed for the dismissal of the application.

[4] Directions were made on **19 January 2021** that the application be canvassed by way of written submissions; and while **Mr. Kagunza**, learned counsel for the applicant duly complied, no submissions have, thus far, been filed on behalf of the respondent. In his written submissions, counsel for the applicant proposed only one issue for determination, namely: whether the applicant has met the threshold for grant of stay pending appeal for purposes of **Order 42 Rule 6** of the **Civil Procedure Rules.** Counsel then proceeded to submit that the judgment of the lower court was delivered electronically on **13 November 2020**, whereby the applicant was ordered to pay monthly maintenance of **Kshs. 15,000/=,** and to share in paying for the medical needs of the minor, as well as school fees and all related needs. Hence, it was the submission of counsel that, given the time it will take for the appeal to be heard and determined, it is only fair and just that stay of execution be granted; for otherwise the appeal would be rendered nugatory.

[5] It was further the submission of **Mr. Kagunza** that the intended appeal is arguable and has high chances of success due to the reasons captured in the Memorandum of Appeal dated **3 December 2020**. He added that the judgment of the trial court is prejudicial to the applicant

and negatively affects his financial obligations to his other minor children. Counsel relied on **SAK vs. SDNP** [2019] eKLR in which the maintenance sum was reduced from **Kshs. 50,000/=** to **Kshs. 20,000/=** upon the court ascertaining that the appellant's earning per month was **Kshs. 93,000/=** and not **Kshs. 1,000,000/=** as had been alleged by the respondent in that case. He urged the Court to take into consideration that the applicant has no regular income. He therefore proposed that the amount of maintenance payable be reduced, in the interim, to **Kshs. 5,000/=** per month pending the hearing and determination of the appeal. He relied on **JMM vs. PM** [2018] eKLR in support of this proposition.

[6] For purposes of stay pending appeal, **Order 42 Rule 6 of the Civil Procedure Rules** provides that:

> **"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside..."**

[7] In the premises, an applicant for stay of execution of decree or order pending appeal is under obligation to satisfy the conditions set out in **Rule 6(2) of Order 42** aforementioned, namely:

> **[a] that substantial loss may result to the applicant unless the order is made;**
>
> **[b] that the application has been made without unreasonable delay.**
>
> **[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.**

[8] It cannot be gainsaid that a successful litigant is entitled to the fruits of his judgment. Thus the exposition in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)** [2002] KLR 63, is apt, namely, that:

> **"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

[9] I have consequently perused the proceedings of the lower court and confirmed that indeed the applicant acknowledges his parental obligation towards the subject minor. It is also manifest that, on that account, he had prayed for the sole custody of the minor in his pleadings before the lower court. I note too that the applicant filed his appeal in time on **7 December 2020**; and whereas he did not file the instant application until **13 January 2021,** I would not say the application was filed after an inordinate delay. Thus, the key issue for determination is the question whether the applicant has demonstrated that he stands to suffer substantial loss to warrant stay of execution.

[10] Secondly, and most importantly, it is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the child in question be given utmost consideration. In **Mombasa HCCC No. 8 of 2014: Bhutt vs. Bhutt,** for instance, the Court took the view, which I entirely agree with, 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 the injunction of Article 53(2) of the Constitution..."**

[11] Bearing the foregoing principle in mind, I have carefully considered the application for stay. I note that, although the applicant offered to pay **Kshs. 5,000/=** per month pending the hearing and determination of the appeal, he did not demonstrate good will by making any such payments. To the contrary, the respondent has presented cogent evidence to prove arrears, on the applicant's part, to the tune of **Kshs 50,000/=** as at **January 2021**. The applicant did not avail proof of the efforts made by him to have the minor enrolled to any school of choice, if, as he averred, he was disagreeable with the choice made by the applicant. In sum, there is no indication that the applicant is concerned at all about the welfare of his son whose life must of necessity move on in spite of the appeal. And, it can hardly be said that the applicant stands to suffer substantial loss by providing maintenance for the well-being of his own offspring.

[12] Hence, I entirely agree with the position taken by **Hon. Muriithi, J.** in **K.W.M. vs. R.N**. [2015] eKLR that:

> **"…it is in very rare cases that courts grant stay of maintenance orders in cases involving minor children, where the duty to maintain a child is imposed on a parent by statute, as it is not in the best interests of the child to suspend a maintenance order particularly where parentage is not in dispute and that an expedited hearing of the main appeal might be a solution where there is a challenge on quantum of maintenance rather than staying the orders of the trial court pending appeal…"**

[13] In the result, I find no merit in the application dated **13 January 2021** and hereby dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF MARCH 2021

OLGA SEWE

JUDGE