



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 137 OF 2020

PMM.....APPELLANT

VS.

ANG.....RESPONDENT

Appeal from the judgment of the Principal Magistrate's Court at Ruiru children's court case No. 20 of 2019 delivered on 28th October, 2020

RULING

1. Ruiru Principal Magistrate Court delivered its judgment on 28th October, 2020 in Children's Case No. 20 of 2019. By that judgment, that court ordered that: -

“(a) Both parties have joint legal custody of the children herein and the plaintiff (ANG) is granted actual and physical custody of the children of the union.

(b) The defendant (PMN) shall have reasonable right of access every alternate weekend from Saturday 10.00 am to Sunday 5.00 pm and half of the school holidays picking and dropping point will be on a neutral place to be decided by the counsel for parties herein.

(c) The defendant will pay school fees and school (sic) and related expenses of the children herein and provide comprehensive medical cover for the children herein to be agreed by the parties herein with the assistance of their counsel on record.

(d) The plaintiff to cater for shelter, food, electricity, water, good grooming, entertainment and other miscellaneous expenses.

(e) The defendant shall remit children monthly maintenance of Kshs.40,000/= every month payable to the plaintiff on or before the 5th day of every month starting November, 2020.

(f) This being a matter brought on behalf of the child each party shall bear their own costs and shall be at liberty to apply.”

2. PMN has filed this appeal against that judgment. The grounds of this appeal are directed at the trial court's order of PMN's maintenance of the children of the marriage. PMN has filed notice of motion application dated 3rd November, 2020. By that application he seeks stay of execution of the trial court judgment. Essentially, PMN seeks stay of the order of his provision of maintenance for the children. In his affidavit in support of the application he deposed that he had supported the children before the trial court's order on maintenance and further that the orders for him to provide maintenance of Kshs.40, 000 is excessive.

ANALYSIS

3. This Court, when considering an application for stay of execution pending appeal, should be guided by the provisions of **Order 42 Rule 6(2)** of the Civil Procedure Rules. That Rule provides thus: -

“(2) No order for stay of execution shall be made under sub-rule (1) unless: -

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

and

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

4. PMN seeks stay of execution on the basis he has supported the children prior to the trial court’s order and on the basis the amount ordered as maintenance was excessive. PMN failed to state how the order for execution would cause him substantial loss if any. It was not enough for him to state that if execution proceeds against him it would damage his relationship with his employer. PMN needs to know that the process of execution, by itself would not amount to substantial loss. PMN needed to show how paying the maintenance as ordered by the trial court will lead to him suffering substantial loss. I am persuaded by the holding in the case ***H.E. VS. S.M. (2020) eKLR***, where the court considered what substantial loss entails. The court in that case stated thus:-

“As to what substantial loss is, it was observed in JAMES WANGALWA & ANOTHER VS. AGNES NALIAKA CHESETO [2012] eKLR, that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

5. PMN in approaching this Court failed to show how the granting of the order for stay of execution would impact the children and their welfare. He failed to consider what was stated in the case ***Z.M.O. VS. E.I.M. (2013) eKLR*** thus:-

“As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”

6. On the whole I find that the order of stay sought by PMW is not in the best interest of the children and may very well be contrary to the provisions of **Article 53** of the Constitution, which Article encapsulates the rights of a child. The application is without merit.

DISPOSITION

7. The notice of motion dated 3rd November, 2020 is without merit and is dismissed with costs

RULING DATED AND DELIVERED AT KIAMBUTHIS 29TH DAY OF APRIL, 2021.

MARY KASANGO

JUDGE

Coram:

Court AssistantKevin

For the appellant.....Mr. Chegecha

For the Respondent.....Mr. Mulinge

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE