



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 11 OF 2021**

**DOB.....APPELLANT**

**VERSUS**

**DMA.....RESPONDENT**

**(Being an appeal from the judgment of Hon. G.N. Barasah R.M.**

**in Ogembo Children’s Court Case No. 18 of 2019 dated 12<sup>th</sup> January, 2021)**

**RULING**

1. The suit before the trial court was instituted by the respondent against the appellant for legal and actual custody of two minors namely, LJ and ZO. She also sought provision of maintenance for the minors and payment of their school fees. Upon considering the parties’ pleadings, the Children’s Court ordered that legal and actual custody of both minors be given to the respondent with limited access to the appellant . It also ordered the appellant to pay Kshs. 20,000/= by 5<sup>th</sup> of every month towards the upkeep of the minors and further ordered the appellant to take care of school fees and shelter of the minors.

2. Being aggrieved by that decision, the appellant filed this appeal in which he primarily challenges the court’s order that he pay Kshs. 20,000/= monthly for the upkeep of the minors. After filing his appeal, the appellant moved this court through an application dated 15<sup>th</sup> February 2021, for stay of execution of the decree of the Children’s Court pending the hearing and determination of the appeal. In his affidavit sworn in support of the application, the appellant deposed that if execution was levied against him, he would suffer a lot of loss which would prejudice his position to meet the medical and educational obligations to the minor which he was not opposed to.

3. In opposition to the application, the respondent swore an affidavit in which she averred that the appellant was unfit to be granted audience of the court having persistently failed to obey the lawful orders of maintenance of the subject minors. She averred that the minors were living in squalor yet the respondent was a senior County Government Officer with a salary and assets in Nairobi and Kisii. She accused the appellant of concealment of material particulars relevant to the matter and claimed that he is a man of means with capacity to pay maintenance of more than Ksh. 40,000/ = per month considering that the minors did not now live in their house or get provisions as they used to while they were with the appellant in Nairobi. The respondent urged the court to have the appellant’s salary attached as accessing him had become difficult and he was not willing to obey the court’s orders. She averred that the application had been brought in bad faith and was only mean to trample the minors’ rights.

4. The appellant filed a further affidavit on 15<sup>th</sup> March 2021 disputing the allegations made by the respondent in her affidavit. He denied that the he was a senior Nairobi County Government officer with a salary and assets in Nairobi and Kisii or that he had big cars and came to court in big entourages as alleged by the respondent. He asserted that he had all along discharged his parental obligations to the best of his ability and had been remitting Kshs. 2,000/= to the respondent as he had undertaken in the Children’s Court before it issued the impugned decision. He averred that no lawful basis had been laid by the respondent to deny him an audience before the court and that he was deserving an audience before the court as any other litigant.

5. The application was canvassed by way of oral submissions before this court. The appellant’s learned counsel, Mr. Soire, relied on the appellant’s supporting affidavit and further affidavit and urged the court to issue stay of execution to enable the appellant to continue paying Kshs. 2,000/=.

6. The respondent’s learned counsel, Mr. Obure, refuted the allegation that the applicant had been providing Kshs. 2,000/= and taking care of the minor’s medical and educational expenses. Counsel submitted that the respondent had indicated that she would object to the appellant being given an audience before the court for failing to obey court orders. He submitted that since the replying affidavit had been filed, the appellant had failed to demonstrate that he was obeying court orders.

7. Counsel submitted that the appellant was earning a gross salary of Kshs. 49,000/= and had given his own schedule of assets in his affidavit of means in which he showed that he had property. The appellant was therefore a man of means but had been neglecting to perform his obligations. Counsel argued that the application was an affront to the best interest of the child and entertaining it would aggravate the misery of the children and also jeopardize their best interests.

8. In brief rejoinder, Mr. Soire argued that it was not a law that the applicant had to support what the respondent had said he had failed to provide proof of. He argued that the appellant had said that he was willing to support the children and was abiding by the order of the court by paying Kshs. 2,000/=. He also submitted that the appellant had not hidden material facts as alleged and sought that the application be granted.

### **ANALYSIS AND DETERMINATION**

9. The application before this court is brought under **Order 42** of the **Civil Procedure Rules. Rule 6 (2)** thereof provides the following conditions for grant of an application for stay of execution pending appeal;

*6(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.*

10. The decision appealed against was issued on 12<sup>th</sup> January 2019. The application for stay was filed on 16<sup>th</sup> February 2021, about a month after the impugned decision had been issued which is a reasonable time period.

11. In matters concerning children, the best interests of the child are of paramount importance. The accepted principle in applications for stay of execution of maintenance orders in children's cases is that the suspension of the maintenance order is not in the best interests of the child.

12. Musyoka J. in **RWW vs. EKW CIVIL APPEAL NO. 13 OF 2013 [2019] eKLR** held;

*“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.”*

13. Before the court issued the orders which the appellant seeks to challenge in this appeal, the parties had agreed that the appellant take care of the medical cover for the minors and pay school fees for the minors and also remit a sum of Kshs. 2,000/= by 28<sup>th</sup> of every month. The appellant is adamant that he adhered to the consent order and still continues to abide by it. On the other hand, the respondent refutes the appellant's claim that he has been paying maintenance. She maintains that the appellant is a man of means and is capable of paying the amount he was directed to pay by the lower court. She rightly argues that the appellant has failed to furnish proof of payment of maintenance as agreed in the consent order or as ordered by the Children's Court.

14. The appellant has conceded that he is the biological father of ZOB. He therefore has a legal obligation to maintain the minor. He has however challenged the paternity of LJ and contends that he is not lawfully obliged to pay for the minor's upkeep. This assertion by the appellant is not denied by the respondent. She avers in her plaint, that by the time she got married to the respondent, she had the issue, LJ. The question of whether appellant acquired parental responsibility is an issue that must await the hearing and determination of the substantive appeal.

15. Regarding security, the appellant has offered to pay a sum of Kshs. 2,000/= as per the consent entered into by the parties before the Children's Court issued the orders challenged in this appeal. However, the court's order directing the appellant to pay Kshs. 20,000/= per month as maintenance supersedes the consent which was entered into before the court made the impugned orders.

16. This court does not have the benefit of the lower court file. The record of appeal presented before this court contains an incomplete copy of the appellant's affidavit of means which is not helpful in determining whether to review the maintenance order downwards. Moreover, the reasonableness of the amount payable as maintenance is an issue that forms the substratum of the appeal and should await the hearing and determination of the appeal on merit. Since the appellant concedes paternity of one of the minors and challenges the paternity of the other, his application for stay of execution is allowed subject to him providing security.

17. In sum, the application for stay of execution pending the hearing and determination of this appeal is allowed on condition that the appellant pays maintenance of Kshs. 10,000/= monthly to the respondent by the 5<sup>th</sup> of every month.

18. I direct that the appeal be heard expeditiously on a date to be fixed on priority basis.

19. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF APRIL 2021.**

**R. E. OUGO**

**JUDGE**

In the presence of:

**For the Applicant/ Appellant**

**For the Respondent**

**Ms. Rael Court Assistant**