



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CHILDREN APPEAL NO. E2 OF 2020**

**AVG.....APPLICANT/APPELLANT**

**VERSUS**

**JMK (suing in her capacity as the best friend**

**of FC a minor aged 7 years old.....RESPONDENT**

**RULING**

1. This is a ruling on application dated **2<sup>nd</sup> day of November 2020**. It seeks the following orders: -

**i. Spent**

**ii. Spent**

**iii. That this Honorable court be pleased to stay execution of the order of the children's court made in Nakuru Chief Magistrates Court Children's Case No. xx of 2020 on the 15<sup>th</sup> October 2020 pending the hearing and determination of this appeal.**

2. Grounds on the face of the application are that the Children's Court made a ruling in the absence of both parties in **Nakuru Chief Magistrates Court Children's Case No. xx of 2020** ordering the appellant to pay kshs 25,000 per month as his contribution in the maintenance of the minor FC and ordered that the matter be mentioned on 4<sup>th</sup> October 2020 to confirm compliance and to take a hearing date of the main suit on priority basis.

3. Further that the appellant/applicant has another family with 8 other issues who depend on him for upkeep and execution of the order will jeopardize the appellant's duty to provide for his other family and his ability to service the loan and debts arising out of the construction of the matrimonial home; and appeal which has high chances of success will be rendered nugatory.

4. The affidavit is supported by affidavit sworn by **AVGM**. He averred that he is aggrieved by the ruling delivered on 15<sup>th</sup> October 2020. He averred that he is married to **AIT** and they have 8 children together and that he is also married to **JK** and they have one issue together.

5. He averred that he is servicing a loan of kshs 2,500,000 which he took for construction of a house in Miti Mingi/Mbaruk Block [XXXX] (Kianjoya A) and that he is still owe various suppliers and vendors of the parcel of land.

6. He averred that sometimes in February 2020 he was forced to leave the matrimonial home due to acts of adultery by the respondent and after leaving, he has continued to provide for the child and the respondent. He added that the **Matrimonial Cause No. x of 2020** was compromised by a consent dated 29<sup>th</sup> July 2020 and recorded on 30<sup>th</sup> July 2020. He attached the consent.

7. The applicant averred that he offered to pay kshs 7,500 for maintenance and the respondent scaled down her request to kshs 10,000. He averred that he has filed **Divorce Cause No. xx of 2020** which is pending for hearing.

8. The applicant averred that he has been responsible for the education of the minor who is in grade one; that he has been paying fees and related expenses amounting to about kshs 100,000 per year; that he has also been responsible for other education related expenses which include but not limited to school books, school uniforms and transports which is up to date. He annexed copies of cheque and deposit slips; that he also caters for medical expenses.

9. In paragraph 22 of his affidavit, he listed his other kids and their educational expenses and attached fee structure.

10. He averred that his monthly net salary ranges between kshs 90,000 and kshs 125,000 and that he has no other income to supplement salary whereas the plaintiff is permanent employed by Teachers' Service Commission at [Particulars Withheld] Secondary School in Nakuru.

11. He averred that he has been taking care of the minor herein and his other children and he believes the order of 15<sup>th</sup> October 2020 is not in the best interest of his other children.

12. In response, the respondent filed replying affidavit dated 17<sup>th</sup> December 2020. She denied averments by the applicant. She averred that the minor has not gone to school since 16<sup>th</sup> March 2020 when the government shut down all school.

13. She further averred that she has the means and ability to meet maintenance costs of kshs 25,000 per month and that she is reluctant to be genuine and open to court by availing her proof of earnings.

14. The respondent averred that averments in paragraph 9 and 10 of the affidavit were dealt with in **Matrimonial Cause No. x of 2020** and they are not relevant in this case.

#### **SUBMISSIONS BY THE APPLICANT**

15. The applicant restated grounds in support of the application and averments in the supporting affidavit. He submitted that he is currently servicing a loan of kshs 2,500,000; that they are both employed and are earning income; the respondent being permanent employed as a teacher by TSC and the applicant as a manager at [Particulars Withheld] Bank Limited at Nakuru with a monthly salary of between 90,000 to 125,000 per month and has no other source of income.

16. He submitted that he has been responsible for upkeep of the minor; that he has been paying school fees and other related expenses; that the respondent and the minor reside in the matrimonial home which the appellant considerably contributed towards purchase and construction and further, he caters for medical expenses.

17. The appellant further averred that since he left the matrimonial home in February 2020, the respondent has denied him access to the child.

18. He further averred that in the meantime, the appellant filed **Divorce Cause No. xx of 2020** which has been heard and marriage between him and the respondent dissolved.

19. He further submitted that the issue of school fees should be shared equally between parties and that he has not neglected his duty as a parent and father.

20. On whether stay should be granted, he cited **provisions of order 42 rule 6(2) of the civil procedure Rules and Article 53 (2) of the constitution** and submitted that grant of stay of execution are subject to the best interest of the minor and the case of **Bhutt vs Bhutt Mombasa HCCC No.8 of 2014 (OS)** where the court held as follows: -

**“In determining an application for stay of execution involving children, the general principle for the grant of stay of execution, order 42 Rule 6 of the civil procedure Rules, must be complemented by the overriding consideration of the best interest of the child in accordance with Article 53(2) of the constitution which provides: -**

**“In exercising its jurisdiction to grant stay of execution, the High court is required by order 42 Rule 6 (2) of the civil procedure Rules to be satisfied that: -**

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

**2. The application for stay has been brought without delay**

**3. The applicant has provided security for the due performance of the decree which may ultimately be binding on it.”**

21. And in **JMM V PM [2018] eKLR** the court held as follows: -

**“The principles upon which the court may stay execution of orders appealed from are settled. The applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for performance of the decree in the event the appeal does not succeed. These are the requirements stipulated in order 42 Rule 6 (2) of the civil procedure Rules.”**

#### **RESPONDENTS SUBMISSIONS**

22. In submissions the respondent started by giving brief facts leading to filing of the lower court suit giving rise to this appeal. She submitted that the only issue is whether the court can issue unconditional stay of execution. She submitted that the minor is school going and his needs in regard to maintenance and upkeep cover such requirements as food, water and other expected demands for children of his age.

23. The respondent further submitted that the applicant/appellant is a bank branch manager in a bank in Nakuru town while the respondent is

a secondary school teacher in Nakuru. He submitted that before marital issues, the minor was catered for from kshs 100,000 he used to give the respondent for the general management, maintenance and upkeep of the household.

24. She submitted that in the application seeking maintenance in the lower court, she sought kshs 50,000 per month for the maintenance and upkeep of the minor pending hearing and determination of the suit; and the court orders payment of kshs 25,000 per month; which is a quarter of what the applicant used to give the respondents during existence of the marriage.

#### **ANALYSIS AND DETERMINATION**

25. The applicant herein is aggrieved by the order to make monthly payments of kshs 25,000 for upkeep of the minor herein. He is not opposed to paying for upkeep; he states that he has been maintaining the minor but argues that the amount of kshs 25,000 is high in view of the fact that he has obligation to maintain 8 children from his first family. He stated that he earns between kshs 90,000 and kshs 125,000 per month and indicated the amount he spends on his other children.

26. It has not also been disputed that the respondent is employed by Teachers' Service Commission as a teacher and is earning a salary. **Article 53 of the constitution** gives both parents joint legal custody which mean they are both liable to provide for the child. **Section 24** goes further to apportion that responsibility as follows: -

**“Who has parental responsibility  
(1) Where a child’s father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.”**

27. From the foregoing, there is no doubt that parental responsibility is shared between both parents. **Section 23 of the Children’s Act** define parental responsibility as follows; -

**“(1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child.**

**(2) The duties referred to in subsection (1) include in particular—**

**(a) the duty to maintain the child and in particular to provide him with—**

**i. adequate diet;**

**ii. shelter;**

**iii. clothing;**

**iv. medical care including immunization; and**

**v. education and guidance”**

28. I have not seen list of expenses in respect to the child but there is no doubt that every child require provision for upkeep. The detailed expenses could have been provided to the lower court which I have not had opportunity to peruse. I however note from the averments herein that shelter is not an issue as they indicate that the minor and the mother are living in the matrimonial home which the appellant averred he contributed towards purchase of land and is still paying suppliers for construction materials. As seen listed in paragraph 27 above, shelter provision is one of the responsibilities of parents. The appellant has indicated that he is providing for medical expenses which is also included as a duty expected of a parent to a child.

29. Having noted that part of the expenses has already been taken care of, and view of the fact that parental responsibility is shared between both parents, I find an amount of kshs 10,000 as monthly contribution from the applicant reasonable pending hearing and determination of this appeal.

30. Averments herein also indicate that the child is school going and in view of the fact that both parents are working I will direct that they equally contribute to school fees and other school related expenses awaiting determination of this appeal.

#### **31. FINAL ORDERS**

**1. Stay of execution do issue pending appeal on condition that the appellant/Applicant make a contribution of kshs 10,000 for the child’s upkeep and also contribute half of school fees and other school related expenses.**

**2. Each party to bear own costs of this application.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 20<sup>TH</sup> DAY OF MAY, 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola/Jeniffer- Court Assistant

Mr. Konosi Counsel for Appellant

Ms. Omweyo Counsel for Respondent - absent