



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS APPLICATION E017 OF 2021

NG.....APPLICANT

VERSUS

SNMRESPONDENT

RULING

1. On 24th March 2021 the learned trial magistrate delivered a judgment in **Nakuru Chief Magistrate's Children Case Number 63 of 2020** in which the applicant had filed suit seeking orders;

(a) A court order do an order issue vesting the actual custody, care and control of JG. upon the plaintiff and an order setting out particulars of reasonable access of the said minor.

(b) Permanent injunction restraining the defendant by herself and/or cronies from harassing, interfering and/or breaking into the applicant's house, place of business and or any other act that would jeopardise the applicant's peaceful existence.

(c) Costs of the suit to be borne by the defendant.

(d) Any other orders the court may deem fit.

2. SNM filed a counter claim for;

a) Legal custody of the minor.

b) That the plaintiff do shoulder half the cost of clothing, shelter, education and health of the minor.

c) The plaintiff to pay Kshs. 25,000/= as monthly maintenance.

d) Costs of the suit.

3. The trial court determined that it was in the best interest of the child to have the custody of the child, who was five (5) years old at the time, shared between the parents. The court also determined the maintenance for the child and each parent's contribution, including the Kshs. 5,000/= the applicant was required to contribute to the child's maintenance.

4. The applicant was aggrieved and he filed the application before me, the Notice of Motion dated 17th May 2021 brought under **Order 42 rule (6) (1), Order 50 rule 5, Orders 51 rule 1 of the Civil Procedure Rules and Section 3A, 79G and 63(e) of the Civil Procedure Act.**

He seeks the orders:

1. Spent.

2. *THAT the Honourable Court be pleased to grant temporary order of stay of execution of the judgment and decree in NAKURU CHILDREN'S CASE NO. 63 OF 2020 NG VS SNM pending the hearing and subsequent determination of this Application.*

3. *THAT the Honourable Court be pleased to grant leave and extend time to the Applicant to file his Appeal out of time in respect to NAKURU CHILDREN'S CASE NO. 63 OF 2020 NG VS SNM*

4. THAT the Honourable Court be pleased to grant stay of execution of the Decree in NAKURU CHILDREN'S CASE NO. 63 OF 2020 NG VS SNM and maintain status quo pending the hearing and subsequent determination of the intended Appeal herein.

5. THAT costs of the Application be in the cause.

5. The grounds for the application are set on its face. They are:

(a) THAT the applicant filed a plaint in NAKURU CHILDREN'S CASE NO. 63 OF 2020 NG VS SNM seeking custody and maintenance of the minor subject matter therein.

(b) THAT consequently, the respondent filed her defence contemporaneously with a counter claim equally seeking custody, upkeep and maintenance of the minor subject matter herein.

(c) THAT the matter proceeded to hearing on diverse dates and on the 23rd day of March 2021, the honourable court delivered its judgment.

(d) THAT after the judgment aforesaid was communicated to the applicant due to the unprecedented closure of the court premises on the 6th day of April 2021 up to 19th April 2021, the opportunity to appeal within the legally stipulated time frame had fundamentally lapsed.

(e) THAT the Applicant is dissatisfied with the lower court's decision and now wishes to appeal against the said decision but since the appeal is being filed out of time, it is mandatory that leave be sought and obtained first before filing the appeal out of time.

(f) THAT further, since no stay of execution orders were granted by the lower court, the Applicant is apprehensive that the Respondent will commence execution to the detriment of the best interest of the minor who has all along been in the custody of the applicant, whilst the intended appeal to this Honourable Court will still be pending hearing and determination.

(g) THAT the applicant's intended appeal, as can be seen from the draft Memorandum of Appeal, annexed to the Supporting Affidavit is an arguable one, has serious triable issues both in law and fact, and has prima facie high chances of success.

(h) THAT if the aforesaid appeal succeeds, it would be impossible to retrieve the Decretal monthly contribution from the Respondent who is not, in comparison with the Applicant, a person of means.

(i) THAT the applicant is aggrieved and dissatisfied by the lower court's judgment particularly since the Trial Court despite having acknowledged that the applicant solely took care of the minor for close to one year thus demonstrating that fathers are capable of taking care of their children's wellbeing, went ahead to hold that the minor subject matter be in custody of the respondent during school days, without considering the circumstances of the case and in total disregard of the recommendations of the children officer's report regarding the minor's best interests and wellbeing in the circumstances.

(j) THAT unless the honourable court diligently intervenes and the orders sought herein are issued, the Applicant stands to suffer substantial loss and irreparable harm since the minor has all along been in the applicant's custody will be subject to untold misery and the abrupt change of environment will have dire psychological and mental consequences to the minor's best interest in the circumstances.

(k) THAT it is imperative that the execution proceedings be stayed pending hearing of this Application and further thereafter pending the hearing of the intended Appeal lest the intended Appeal will be rendered nugatory.

(l) THAT no prejudice whatsoever or at all shall have been occasioned to the Respondent upon the grant of leave and extension of time sought as well as the stay of execution pending the hearing and determination of the intended Appeal.

(m) THAT the period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent and the minor subject matter herein if the application is granted if any, the resources of the parties, all put into consideration works in favour of granting the instant application.

(n) THAT it is in the interest of orderly administration of justice and fairness that the orders sought herein be granted and the grant of the said orders will not prejudice the respondent to make her suffer any hardship.

(o) THAT the applicant subject to the court's orders and direction is willing to abide by any conditions that may be imposed by this Honourable Court for the ends of justice to be met.

6. The application is supported by the affidavit of NG sworn on 12th May, 2021 reiterating the grounds on the face of the application.

7. He annexed the judgment of the subordinate court in **Chief Magistrate's Nakuru Children's Case Number 63 of 2020** and the Memorandum of Appeal dated 12th May 2021 where the grounds for appeal are set out as hereunder;

1. THAT the learned trial Magistrate erred in law and fact in failing to take into consideration salient relevant considerations concerning and touching on the welfare of the minor before reaching her decision key among them the respondent's dwelling set up

vis-vis the minor's welfare and best interests.

2. *THAT the learned trial magistrate erred in law and in fact in overburdening the appellant with disproportionate parental responsibilities in complete disregard of constitutional, statutory, judicial principles and the recommendations by the children officer's report despite having granted the parties shared custody.*

3. *THAT the Learned trial Magistrate erred both in law and in fact by ordering the appellant to contribute Kshs. 5,000/= per month for food, which amount is excessive in the circumstances despite having noted that both the appellant and the respondent are engaged in businesses.*

4. *THAT the Learned trial Magistrate erred both in law and in fact by ignoring the recommendation in the children officer's report especially on the welfare and wellbeing of the minor during school going days.*

5. *THAT the Learned trial Magistrate also missed the whole point by arguing that the residence of the respondent was not a basis to deny either parent custody, while it is pellucid and crystal clear that the welfare, social security and protection of the minor is of paramount importance.*

6. *THAT the Learned trial Magistrate erred both in law and in fact not considering that the Respondent had neglected the subject minor for over a year while he was of fragile age, and it's the appellant and his mother who brought him up single handedly to the current status of responsible school going child.*

7. *THAT the Learned trial Magistrate erred both in law and in fact by holding that the respondent had received a scholarship from an institution situated in Nairobi when there was no evidence to that effect.*

8. *THAT the Learned trial Magistrate erred both in law and in fact by failing to consider the financial constrains occasioned by economic vicissitudes and the prevailing Covid 19 Pandemic which has affected the general carrying out of the businesses, thus asking it fundamentally hard for the appellant to raise the amount ordered as contribution for food.*

9. *THAT the Learned trial Magistrate erred both in law and in fact in not appropriating the uniqueness of this case.*

8. SNM filed a Replying Affidavit sworn on 31st May 2021. She deponed that the applicant had not laid any basis for the application to warrant any of the prayers sought. That even though court's closed on 6th April 2021 they re-opened on 19th April 2021, the time for appealing ended on 23rd April, 2021. He did not give any explanation for not appealing in time. In addition that the application was not in the best interests of the child.

9. Counsel, Ms Cheloti for the applicant and Mr. Wambeyi, for the respondent argued the application.

10. Ms Cheloti argued that the child had been in the custody of the applicant continuously for a period of one (1) year since March 2020 had been enrolled by the Applicant at Acacia Grassland Academy near his home and he had paid fees and if the orders of the lower court were not stayed, then the child's welfare and education would be interfered with contrary to **Article 53 of the Constitution**. That the respondent stayed far from the minor's school. That the judgment was delivered on 24th March 2021 and there had not been unreasonable delay in filing the application. That the applicant had an arguable appeal.

11. Opposing the appeal Mr. Wambeyi argued that the application was not founded in law. The respondent relied on **George Oraro & Another vs Juma Oyiende Jabel [2021] eKLR** where the judge citing the Supreme Court **Nick Salat** case quoted the principles upon which the court can extend time.

"... It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant."

" We derive the following as the underlying principles that Court should consider in exercising such discretion:

1. *Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court;*
2. *A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
3. *Whether the court should exercise discretion to extend time, is a consideration to be made on a case-to-case basis.*
4. *Where there is a reasonable (cause) for the delay, [the same should be expressed] to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents, if extension is granted;*
6. *Whether the application has been brought without undue delay; and*

7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*”

12. It was the Respondent’s potion that the application had not met the threshold set out herein above to warrant the orders sought.
13. That in any event the applicant had conceded that he knew that the judgment was delivered on 23rd March 2021 and the appellant knew of his own knowledge that the judgment was to be delivered on 24th March 2021.
14. Having the foregoing in mind, I have considered the rival submissions and the authorities cited. The issues for determination are whether the application meets the threshold required for extension of time, for leave to file appeal out of time and for stay of execution.
15. The grounds upon which this court’s discretion is to be exercised in favour of an applicant in an application such as this are settled.
16. On extension of time, the applicant has conceded in his affidavit that he was aware of the date the judgment was to be delivered. That Judgment was rendered about two weeks before the closure of the courts. And courts opened before the expiry of the period for appeal. The applicant has not placed a reasonable explanation before court to show why he delayed in filing his appeal.
17. On the prayer for stay of execution of the decree, no decree was attached to the application. Be that as it my, the judgment of the trial court sets out the issue of custody and maintenance for the child. The question is whether the applicant has demonstrated what loss/prejudice he will suffer when custody of the child is shared. He has indicated that the welfare of the child will be prejudiced but that prejudice has not been demonstrated. According to the Children Court the child was in the custody of the mother until he decided to keep the child contrary to the arrangement the two had made. The issue as to who is more well-resourced than the other cannot be a determining factor when it comes to the right of a child of tender years to access both parents and to be cared for and loved by each parent. When parents are not living together it is upon them to ensure that each performs their parental duties in the best interest of the child.
18. With regard to the contribution of Kshs. 5,000/= for the upkeep of his own child. Should the court stay this order? The applicant’s position is that should his appeal succeed, then he would not be able to recover what he will have contributed as maintenance. However the court did find that both parents were business persons with the financial capacity of providing for their child. So perhaps instead of stay, the applicant would have been asking for a review of the sum pending the hearing and determination of the appeal. He was providing food for the child while the child was in his custody. He ought not to find it a problem to do the same when the child is in the respondent’s custody. I doubt it would be in the best interests of the child to stay this monthly contribution.

19. **Order 42 rule 6(2)** states

No order for stay of execution shall be made under subrule (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.

20. The applicant has not offered any security as is required.
21. Hence it is my view that the applicant has not demonstrated that he will suffer irreparable loss or damage that cannot be compensated by way of costs.
22. In any event the orders issued by the children court are reviewable by the same court under **Section 99 of the Act**.

The **Children Act** recognises that the circumstances under which an order for custody or maintenance may vary and require the same to be reviewed. That is why under **Section 99 of the Act**, the court, which made the order may review or vary, modify or even discharge the same. The child is growing and his needs could change, the circumstances of the parents could change, hence, the applicant still had that avenue if he was dissatisfied with the orders of the court.

23. That be as it may, I find no good reasons to stay shared custody order or the maintenance order.

24. In the end the following orders issue:

- a. The prayer for stay of the shared custody order is denied.
- b. The prayer for stay of the contribution of Maintenance Kshs. 5,000/= per month for the child is denied.
- c. The prayer for extension of time to file appeal out of time is not merited.

25. The application is dismissed.

26. Each party to bear own costs.

DATED, SIGNED and DELIVERED via ZOOM this 30TH Day of JUNE 2021.

MUMBUA T. MATHEKA,

JUDGE.

In the presence of:-

CA: Edna

Ms. Cheloti for Applicant

Mr. Wambeyi for Respodent