REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. E. 036 OF 2020

IN THE MATTER OF EK (MINOR)

IN THE MATTER OF MW (MINOR)

MMM.....1ST APPELLANT

ENM.....2ND APPELLANT

V E R S U S

SMK..... RESPONDENT

RULING

(1) Before this Court is the Notice of Motion application dated **18th December 2020** in which the Respondent/Applicant **SMK** seeks the following orders:-

1. SPENT

2. SPENT

3. SPENT

4. THAT pending the hearing and determination of the Appeal, this Honourable Court be pleased to order the Appellants herein to produce the minors, EK and MW before this Honourable Court to ascertain the well-being of the minors.

5. THAT pending the hearing and determination of the Appeal and upon production of the minors to this Honourable Court, this Honourable Court be pleased to order the Appellants not to remove the minors, EK and MW from the jurisdiction of this Honourable Court.

6. THAT this Honourable Court be pleased to set aside t he ex-parte Ruling and Orders made on 28th October 2020 by Hon. Justice Onyiego pending the hearing and determination of this appeal.

7. THAT pending the hearing and determination of this Appeal, this Honourable court be pleased to order that the minors, EK and MW be placed under the custody of the Respondent SMK.

8. THAT the costs of this application be borne by the Applicants.

(2) The Application was premised upon **Article 50** and **Article 159 (2) (d)** of the **Constitution of Kenya 2010, Section 4** of the **Children Act, Sections 1A, 1B, 3A & 63(e)** of the **Civil Procedure Act, Cap 21, Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010** and all other enabling provisions of the law.

(3) The 1st Respondent **MMM** and the 2nd Respondent **ENM** opposed the application through their Replying Affidavit dated **26th February 2020.** The Applicant thereafter filed a Supplementary Affidavit dated **4th March 2020.** The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated **25th May 2021** whilst the Respondents relied upon their written submissions dated **7th April 2021.**

BACKGROUND

(4) The present application arises out of a Ruling delivered on **28th October** by **Hon. Justice John Onyiego** staying the execution of a Judgment delivered on **25th August 2020** by **Hon. M. W. Kibe Resident Magistrate,** granting actual custody of the **two (2)** minor children to the Applicant who is their biological father. The children's mother who was the daughter of the Respondent had been murdered in **Kinoo** area in the **year 2018.**

(5) Being aggrieved by the decision of the Children's Court the Respondents herein filed a Memorandum of Appeal dated **15th September 2020.** Contemporaneously with the said Memorandum of Appeal, the Respondents seeking a stay of execution of the Decree from the lower Court pending the hearing and determination of the Appeal. This application as heard by **Hon. Justice Onyiego** who in his judgment dated **28th October 2020** granted a stay pending the hearing and determination of the Appeal. By this application the Applicant seeks to have that Ruling set aside.

ANALYSIS AND DETERMINATION

(6) I have carefully considered the present application, the Replying Affidavit filed by the Respondents as well as the written submissions filed by both parties. The Applicants case is that he is the biological father of the two minors and that the Children's Court in its Judgment dated **25th August 2020** granted him actual custody of the children. That he has made several attempts to execute the said Judgment but states his attempts to take over custody of the minors from the Respondents proved futile. The Applicant states that he had instructed the firm of **BEGI & COMPANY LAW OFFICES** to act on his behalf and defend the application seeking a stay, but that the said firm of Advocates failed to enter appearance on his behalf and failed to file a response in opposition to the application as per his instructions. That as a result that the application was heard Ex-parte and allowed by the Judge.

(7) The Applicant states that he subsequently engaged a new firm of Advocates **MATHEKA OKETCH & CO. ADVOCATES** to represent him. That his said Advocates upon perusing the Court file realized that the Ruling had been reserved for **28th October 2020.** That efforts by his new Advocate to arrest the Ruling were unsuccessful as the file was inside the Judge's chambers. The **Hon. Judge** then delivered the Ruling staying execution of the Judgment granting the Applicant of his children.

(8) The Applicant pleads that the mistakes of his previous Advocate ought not be visited on the Client. He alleges that the Respondents have removed the minors from the jurisdiction of the Court and that as a result he has no access to the children.

(9) On their part the Respondents submit that they are the grand-parents of the minors being the parents of the children's biological mother who is now Deceased. They claim that the children's mother was living with them together with the minors since **2017** when the Applicant chased her away. That the minor's mother was brutally murdered and that there is an ongoing **Inquest No. x of 2018** at **Kikuyu Law Courts.** According to the Respondents, the Applicant is a key suspect in the death of the children's mother.

(10) The Respondents states that the minors are comfortable in their current environment. That they have been providing for all the needs of the children including their school fees. The Respondents deny the allegation by the Applicant that they are deliberately delaying the prosecution of the Appeal. They state that the delay has been caused by failure to obtain the certified proceedings from the Court. They urge the Court not to set aside the ruling staying execution of the Ruling delivered on **28th October 2020.**

(11) It is not for the Court at this stage to delve into the merits or otherwise of the intended Appeal. The only issue for determination in this application is whether the stay orders issued in this matter should be set aside. **Order 42 Rule 6** of the **Civil Procedure Rules 2010** provides as follows:-

> ***"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.***
>
> ***(2) 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."***

(12) In the case of **KENYA POWER & LIGHTING COMPANY LIMITED –VS- ESTHER WANJIRU WOKABI, CIVI APPEAL No. 326 OF 2013** it was stated that:-

> **"To my mind, the Courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;**
>
> > **(a) Whether the Applicant has established that he/she has a prima facie arguable case;**

(b) Whether the application was filed expeditiously; and

(c) Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought."

(13) The Ruling in question as delivered on **28th October 2020** and the present application was filed on **18th December 2020** barely **two (2)** months after the Ruling in question as delivered. In my view the application was filed in a timeous manner and I do so find.

(14) The Applicant places the blames for his failure to oppose the application for stay of execution wholly at the feet of his Counsel on record at the time. He alleges that the said Advocates failed to comply with his instructions to enter appearance and to file a Reply opposing the application. It is trite that a suit belongs to the litigant and **not** to the Advocate. The Applicant cannot just issue instructions to his Advocates and then just sit back. The Applicant had a duty to follow up with his Advocate to ensure that the instructions he had issued had been complied with.

(15) In **SAVINGS AND LOANS LIMITED –VS- SUSAN WANJIRU MURITU NAIROBI (MILIMANI) HCSC NO. 397 OF 2002 Kimaru, J** held as follows:-

"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

(16) Further the claim by the Applicant that efforts made by his new Advocate to arrest the Ruling failed because the file was in the chambers of the Judge also not very persuasive. The Advocate could have proceeded to file an application under a skeleton file. Moreover I am certain that had the Judge been informed that the file was required for purposes of filing an application, the said file would have been released. These in my view are merely excuses for the failure of the Applicant to file a Reply to the application or stay.

(17) The Respondents have filed a Memorandum of Appeal which in my view raises triable issues. As stated earlier it is not for the Court at this stage to comment on the merits or otherwise of the Appeal. Suffice to say I find that the Respondents have an arguable Appeal.

(18) This Court cannot and will not ignore the fact that this is a matter which concerns the welfare of minors. **Article 53(2)** of the **Constitution of Kenya, 2010** provides that best are of paramount importance in every matter concerning the child. Similarly **Section 4(2)** of the **Children Act 2001** provides as follows:-

"In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." [own emphasis]

(19) In a matter concerning children it is the welfare of the children not the parents (adults) that is of paramount importance. It is not in dispute that the minors herein have lived with the Respondents since the **2017.** It would not be in their best interests to disrupt their lives at this stage when the Appeal is still awaiting determination.

(20) The Applicant has alleged that the children have been removed from the jurisdiction of the Court. The Court is not told where they have been moved to. I find no proof to support the allegation that the minors are out of reach of the jurisdiction of this Court.

(21) Children are not sacks of potatoes or merchandise to be shifted from one place to another based on the whims of the adults in their lives. Children require stability in order to grow and thrive. It is my considered opinion that the current status quo ought to be maintained until the Appeal is heard and determined. Accordingly I decline to set aside the stay made in the Ruling of **28th October 2020.** I find no merit in this present application. The same is dismissed in its entirety. Each party to pay its own costs.

DATED IN NAIROBI THIS 30TH DAY OF JULY, 2021.

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MAUREEN A. ODERO

JUDGE