



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISC. CAUSE NO. E048 OF 2020

PNM.....APPLICANT

V E R S U S

ECW.....RESPONDENT

RULING

1. Before this Court are two Applications for determination. The first is the Notice of Motion dated **30th October 2020** in which the Applicant **PNM** seeks the following orders:-

1. **SPENT**
2. **SPENT**
3. **THAT the Applicant be granted leave to appeal out of time.**
4. **THAT the costs of this application be provided for.**

2. The Application which was premised upon **Order 11 Rule 3, Order 22 Rule 22, Order 51** of the **Civil Procedure Rule (2010)** and **Sections 3A of the Civil Procedure Act, Section 7 of the Appellate Jurisdiction Act**, and was supported by the Affidavit of even date sworn by the Applicant.

3. The second Application for determination is the Notice of Motion dated **21st October 2020** in which the same Applicant prayed for the following orders:-

1. **SPENT**
2. **SPENT**
3. **THAT this Honourable Court be pleased to order a stay of execution of order 5 on payment of the minor's school fees given on 1st October 2019 in Milimani Children's Case No. 1165 of 2019 and in the interim an order be issued that the same shall be shared pending hearing and determination of the intended appeal.**
4. **THAT an order be issued that when the minor gets of school going age, the choice of school be agreed between both parents.**
5. **THAT the Honourable Court be pleased to order a stay of execution of order number 3 on access given on 1st October 2019 in Milimani Children's Case No. 1165 of 2019 and that in the interim, the Applicant be allowed to have the minor from Friday to Sunday evenings on alternate weekends pending the hearing and determination of this application and intended Appeal.**
6. **THAT the Honourable Court be pleased to order a stay of execution of order 6 and that in the interim, and in view the shared custody, each parent to provide for the minors and when and went they have her.**

7. THAT an order be issued restraining any manner of interference from the Respondent's parents with the growth, access, maintenance and wellbeing of the minor.

8. THAT the costs of this application be provided for.

4. This second application was premised upon **Article 53(2)** of the **Constitution of Kenya (2010)**, **Order 9 Rules 9 and 10**, **Order 42 Rule 6** of the **Civil Procedure Rules** and all enabling provisions of the law and was supported by the Affidavit dated **19th October 2020** sworn by the Applicant.

5. The two Applications were opposed by the Respondent **ECW** who filed the Replying Affidavit dated **8th December 2020**. Pursuant to directions given by this Court the two Applications were canvassed by way of written submissions. The Applicant filed the written submissions dated **4th May 2021**, whilst the Respondent relied upon the written submissions dated **5th May 2021**.

BACKGROUND

6. The Applicant who is the biological father of the subject minor herein filed in the **Nairobi Children's Court** suit Number **1165 of 2019** seeking the Court's determination on the questions of custody and maintenance of the minor child **ZMN**. Vide a Judgment delivered on **1st October 2020** the learned trial Magistrate made the following orders:-

- 1. THAT the parties are hereby granted joint legal custody of the minor.**
- 2. THAT the Defendant shall have actual custody, care and control of the minor.**
- 3. THAT the Plaintiff is granted access to the minor every alternate Saturday of the month from 10.00am to 5.00pm. For avoidance of doubt the minor may have sleepovers at the Plaintiff's house subject to prior arrangements with the Defendant.**
- 4. THAT the pickup and drop off point shall be agreed upon by the parties.**
- 5. THAT the Plaintiff shall cater for the minor's school fees and all related expenses.**
- 6. THAT the Plaintiff shall cater for the part of the minor's food at the rate of Kshs. 30,000/- per month.**
- 7. THAT both parties shall cater for the minor's medical expenses.**
- 8. THAT parties shall give appropriate parental guidance to the minor regarding religious education. For avoidance of doubt the Plaintiff is at liberty to have the minor baptized in the Catholic Church.**
- 9. THAT there are not orders as to costs.**
- 10. THAT parties are at liberty to apply.**

7. Being dissatisfied by the decision of the trial Court, the Applicant filed the Memorandum of Appeal dated **12th October 2020**. The Applicant now prays for leave to file his Appeal out of time. He also seeks a stay of execution of the orders made by the trial Court particularly orders (3) and (6) pending the hearing and determination of the Appeal. I have carefully considered the two Applications before this Court, the Replying Affidavit filed by the Respondent as well as the written submissions filed by both parties. I will now deal with each application individually.

1. Notice of Motion dated 21st October 2020

8. By this application the Applicant seeks a stay of the Decree issued by the Children's Court on **5th October 2020**. The Applicant submits that the learned trial Magistrate erred in limiting the hours of access which the Applicant will have with the minor child to alternative Saturdays only. That the effect of the trial Magistrate's decision is to deprive the Applicant of sufficient time to bond with his child.

9. On the question of maintenance the Applicant asserts that he is a responsible parent and insists that he has all along been providing for the needs of the minor. The Applicant contends that the learned trial Magistrate failed to take into account the evidence placed before her whilst apportioning the monthly maintenance of **Kshs. 30,000/-** to be paid by the Applicant towards the upkeep of the minor. That the trial Court failed to put into consideration **Article 53(1) (e)** of the **Constitution of Kenya 2010** which provides that both parents have an **equal** responsibility to provide for the care and protection of a child.

10. On her part the Respondent opposes any stay of the orders made by the Children's Court and retorts that the life of the child cannot be stayed pending the hearing and determination of the Appeal. The Respondent states that whilst she has complied fully with the orders made by the trial Court, the Applicant despite being a main of means has defied the orders by failing to remit **Kshs. 30,000/-** monthly as directed by the Court. That a stay of execution would not be in the best interests of the minor and that the Applicant is at liberty to fully canvass the issues raised in this application during the Appeal.

11. Order 42 Rule (6) (2) of the **Civil Procedure Rules 2010** provides that in exercising its jurisdiction to grant a stay of execution, the Court is required to satisfy itself of the following:-

- i. That the Applicant will suffer substantial loss if the stay being sought is not granted.
- ii. That the application for stay has been brought with undue delay.
- iii. That the Applicant has provided security for the due performance of the decree or order appealed against.

12. The Ruling in question was delivered on **1st October 2020** and the current application for stay was filed on **21st October 2020**, I find that the same was brought in a timeous manner.

13. The Applicant is aggrieved by the order requiring him to make a monthly contribution of **Kshs. 30,000/-** towards the maintenance of the minor. He submits that he stands to suffer substantial loss unless the order in question is not stayed. The Applicant has failed to demonstrate the nature of loss he is likely to suffer if the order on maintenance is not stayed. On the other hand there can be no doubt that the child being dependant on his parents for sustenance will suffer substantial loss if the said orders are stayed. The rights of the minor outweigh those of the Applicant.

14. Moreover the Respondent has stated that the Applicant has defied the orders of the Court to pay this **Kshs. 30,000/-** monthly. The Applicant did not file a Supplementary Affidavit to deny this allegation. I take this opportunity to warn the Applicant that he is under an obligation to obey Court orders, whether he agrees with said orders or not. It is duplicitous of the Applicant approach this court seeking orders in his favour yet he is himself in active contempt of valid Court orders.

15. In the case of **MN –VS- TAN & ANOTHER [2015]eKLR** the Court held as follows:-

“I note from the material placed before me that the Appellant did not make any single effort after 30th July 2013 to comply with the order by making even one single payment of the amounts the subject of the said order. He alleges unaffordability of the amounts, but I note that he has not disclosed his monthly income nor his monthly expenses. There is therefore nothing on record to demonstrate unaffordability. The only explanation he offers is that he is married and therefore there is another family to take care of. With respect, that is not good enough

A valid Court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of law. It is not a mere wish or proposition. Disobedience or non-compliance with it attracts severe consequences. It would appear to me that the Appellant believes that the orders of 30th July 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them.

The Appellant has applied to the Court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to Court with unclean hands. The Court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law. [own emphasis]

16. The above case is on all fours with the present case. Being himself in active contempt of Court orders the Applicant does not merit the exercise by this court of its discretion in his favour.

17. Finally this Court cannot lose sight of the fact that this case involves the welfare of a minor. **Article 53 (2) of the Constitution of Kenya 2010** provides that **‘a child's best interests are of paramount importance in every matter concerning the child.’** Likewise **Section 4(2) of the Childrens Act** directs Courts to give priority to the **best interests of the child** in all matters involving the welfare of minors. Therefore the rights of the minor supercede the wishes and interests of her parents.

18. In the case of **BHUTT –VS- BHUTT MOMBASA HCCC No. 8 OF 2014** the High Court in determining an application for stay of execution in cases involving children held that the general principles in **Order 42 Rule 6 of the Civil Procedure Rules 2010**, must be complemented by an overriding consideration of the best interest of the child.

19. The Applicant has an appeal whose merits are yet to be determined. To grant a stay of execution at this stage would only serve to deprive the minor of maintenance and upkeep which is certainly **not** in the best interests of the child. Questions around the amount of maintenance payable, the custody and access to the child, and the financial capacity of the child's parents are matter which are best left for consideration and determination during the hearing of the Appeal.

20. I am fortified in this finding by the decision of my learned brother **Hon. Justice William Musyoka** who in the case of **ZMO –VS- EIM [2013]eKLR** held as follows:-

“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 it. 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. [own emphasis]

21. Finally I find no merit in this application for stay of execution. The Notice of Motion dated **21st October 2020** is dismissed in its

entirety. Each party to bear its own costs.

2. Notice of Motion dated 30th October 2020

22. In this application the Applicant seeks the leave of Court to file the Appeal out of time. The application as opposed by the Respondent.

23. Having considered this application for leave to file appeal out of time. I am satisfied that the same has been filed in a timely manner. I have perused the Memorandum of Appeal dated **12th October 2020** and I am satisfied that there is an arguable appeal. I find that no prejudice will be visited upon the Respondent if leave is granted as she will have ample opportunity to oppose said Appeal.

24. I therefore allow prayer (3) of the Notice of Motion dated **30th October 2020**. The Appellant be and is hereby granted leave to file appeal out of time. The said Appeal to be filed and served within **30 days** of the date of this Ruling. The Applicant will bear the costs for this application.

DATED IN NAIROBI THIS 6TH DAY OF AUGUST, 2021

.....

MAUREEN A. ODERO

JUDGE