



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. E17 OF 2021
BOO.....APPLICANT
VERSUS
CRWRESPONDENT
RULING

1. In the application before me dated 22.2.21, the Applicant seeks the following an orders:

1. Spent.

2. THAT an order of stay of execution of the Ruling made on 4.2.21 by Hon. R. O. Mbogo in Nairobi Children's Case No. E364 of 2020 pending the hearing and determination of this application;

3. THAT an order of stay of execution of the Ruling made on 4.2.21 by Hon. R. O. Mbogo in Nairobi Children's Case No. E364 of 2020 pending the hearing and determination of this appeal;

4. THAT the court be pleased to order for stay of any further proceedings in Nairobi Children's Case No. E364 of 2020.

5. THAT costs be provided for.

2. The Applicant, BOO avers that he is aggrieved by the ruling of 4.2.21 in Nairobi Children's Case No. E364 of 2020 in which he was ordered to make a monthly contribution of Kshs. 30,000/= towards the maintenance of the parties' children, with effect from March 2021. The Applicant was also ordered to take care of the minor's school fees and related expenses as well as their medical cover. The trial Court further ordered that the children shall continue to reside in the Applicant's house in Utawala. The Applicant further averred that even prior to the ruling, he had been taking care of the children's needs that the Court directed. Apart from the shared responsibility of food and utilities, the only other responsibility assigned to the Respondent CRW is clothing. To the Applicant therefore the order that he makes the monthly contribution of Kshs. 30,000/= was made in total disregard of the constitutional provision of equal parental responsibility. The Applicant stated that he is unable to pay the amount ordered as he is a civil servant and has 2 other children who also solely depend upon him. The Applicant contends that he has raised triable issues in his appeal and that unless the orders sought are granted the Appeal shall be rendered nugatory.

3. The Respondent though granted an opportunity by the Court did not file a response or submissions. The Application is thus not opposed.

4. The Application before me concerns children. Section 4(2) of the Children Act enjoins this Court to ensure, while considering the Application, that the best interests of the children are the primary consideration. Section 4(3) of the Act further requires this Court when exercising any powers conferred by the Act to treat the interests of the children herein as the first and paramount consideration. This paramountcy principle is further underpinned in the Constitution of Kenya, 2010 which provides at Article 53(2) that a child's best interests are of paramount importance in every matter concerning the child. Duly cautioned, my determination in this matter shall be founded on the best interests of the children herein.

5. The Applicant seeks stay of execution and stay of proceedings pending the hearing and determination of the Applicant's appeal. Stay of execution is discretionary. For this Court to exercise its discretion in favour of the Applicant, to stay the orders of the trial Court which affect the children herein, the Applicant must satisfy this Court that the orders sought are in the best interests of the children. This is the overriding principle

6. Because the Respondent neither filed a response nor submissions, the Applicant told the Court that there was no need for him to file submissions. The failure by the Respondent to respond to the Application does not give a free pass to the Applicant. The Court must still interrogate the material placed before it by the Applicant to enable it arrive at an informed decision. My finding is fortified by the holding in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR where Mulwa, J. stated:

I am of the considered view that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

7. The Applicant was obligated to place before the Court sufficient material to persuade the Court to exercise its discretion in his favour, which he did not. As it is, the Applicant did not exhibit the ruling or order in respect of which he seeks stay. The Court has also not had the benefit of seeing the lower Court record to make a considered determination on the issue. It is not enough for the Applicant to come to Court seeking stay of execution of an order, which order he does not deem necessary to place before the Court. Accordingly, the Court finds that the available material is insufficient to make an informed determination in the matter. In any event the Applicant has not demonstrated to the Court that grant of stay of execution of the unseen order, would be in the best interests of the children, the consideration of which is paramount.

8. In the premises, I make a finding that the Application dated 22.2.21 is devoid of merit and the same is hereby dismissed. This being a matter concerning children and given that no response was filed, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

.....

Court

Assistant