



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. E026 OF 2021

PR HOO.....APPLICANT

VERSUS

MGO.....RESPONDENT

RULING

1. The parties herein are the parents of a 5 year old child known as ZKO. In a judgment delivered by Hon. R. Mbogo on 4.2.21 in Children's Case No. xxxx of 2018 *H.O.O vs M.G.O.*, actual custody of the child was granted to the Respondent while the Applicant was granted access every Saturday from 10.00 hours to 16.00 hours. Being aggrieved by the judgment, the Applicant preferred the appeal herein. The Applicant also filed a Notice of Motion dated 5.5.21 seeking stay of execution of the impugned judgment and order, pending the *inter parte* hearing of the appeal.

2. The Applicant claims that the Respondent has not complied with the Court orders; that on 3.4.21, the Respondent took the child to the Applicant and picked him up on 6.4.21. On Saturday 17.4.21, she dropped him but picked him up Tuesday 20.4.21. Again on Saturday 1.5.21, she dropped the child with the Applicant and said she would pick him up on 7.5.21 but to date has not done so and the child remains with the Respondent. The Applicant further alleged that the Respondent was heavily pregnant and was living with a man named J. He further claimed that the child had lost weight and that his welfare was in danger. To the Applicant therefore, the Respondent is incapable of staying with the child and further that it is not in the child's best interests to live with a stranger who is not his biological father and grow up with another child who is not his biological relative.

3. In her replying affidavit sworn on 24.5.21 the Respondent denied the allegations of the Applicant. She accused him of failing to comply with the trial Court orders. She has been giving the Applicant access to the child on Saturdays and has on his request, allowed the child to sleepover at the Applicant's house on a few occasions. She has done this to facilitate smooth co-parenting, in the best interests of the child. The Respondent's case is that on 22.5.21, she handed over the child to the Applicant for access purposes, but the Applicant refused to return the minor at the end of the day, blocked her calls and switched off the child's phone. He moved houses and she had no way of getting access to him and the child as she does not know where the Applicant lives.

4. The Respondent contends that the Applicant has disobeyed the court orders, by retaining the child at his house and should be compelled by the Court to return the child to her forthwith. She confirms that she is married to JAO who the Applicant refers to as J, a fact well known to the Applicant. The child has developed a strong bond with her husband and is excited at the prospect of having a sibling. The fact of her pregnancy does not in any way make her unfit to have actual custody of the child. In the Respondent's view, the Applicant is incapable of taking care of the child. The trial Court made a finding in this regard due to the Applicant's drunkenness, bringing home different women, driving a vehicle with the child while drunk and refusing the child to go to Church. The Respondent urged the Court to dismiss the Application for being devoid of merit.

5. The jurisdiction of the Court to grant stay of execution is set out in Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 2 provides:

(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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

6. The matter herein concerns a child. The Court is mindful of the provisions of the Constitution of Kenya, 2010 and of the Children Act which require the Court to give paramount importance to the best interest of the child. Article 53(2) of the Constitution provides:

“A child’s best interests are of paramount importance in every matter concerning the child.

The Children Act on the other hand provides at Section 4(3) that:

“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.”

7. As the Court considers the matter and makes its decision that will impact the child herein all circumstances affecting the child must be taken into account. The overriding focus must be a solution that will be in the child’s best interests.

8. The law requires that an application for stay of execution be filed without unreasonable delay. The decision of the lower Court by which the Applicant is aggrieved was made on 4.2.21 while the Application is dated 5.5.21. I am therefore satisfied that this Application for stay has been brought without inordinate delay.

9. On the issue of loss, the Court must look beyond the possible substantial loss to be suffered by the Applicant and consider the substantial loss to be suffered by the child. The interests of the child supersede those of the parties and must at all times be upheld.

10. The Applicant argues that it is not in the best interest for the minor to live with a stranger who is not his biological father and further to live with another child who is not his biological relative. The Respondent on the other hand has demonstrated through a marriage certificate that J is actually her husband who she married on 6.2.2020. Accordingly, J is not a stranger as the Applicant would have this Court believe, but a step father to the child. The Respondent also confirmed that she is with child. The Applicant has not demonstrated how his mother’s marriage to J and cohabiting with him adversely affects the child. Indeed, having a father figure in his life, and one who loves and cares for his mother, should be of immense benefit to the child. Further, the expected baby will be a half-sibling to the child. The contention by the Applicant that the expected baby is not a biological relative to the child herein is unfounded. Even if such baby were not a relative of the child herein, the Applicant has not demonstrated how having a half sibling or another child in the home will not be in the best interests of the child. I am therefore of the considered view that the Applicant has not placed any material before me to persuade me to grant the orders sought. My view is that the child herein being of the tender age of 5 years stands to suffer substantial loss if he continues to be away from his mother for the duration of the appeal.

11. In view of the foregoing, I consider that a stay of execution would militate against the best interests of the child herein. Accordingly, I find and hold that the Application dated 5.5.21 lacks merit and the same is hereby dismissed. This being a matter concerning the parties’ child, 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**