REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. E103 OF 2021

EAO..APPLICANT

VERSUS

M M O AND S K O (Minors suing through

their guardian ad litem PWO)............................RESPONDENT

RULING

[1] The Notice of Motion dated **1 September 2021** was filed by the appellant, **EAO**, under Order **42 Rule 6** of the **Civil Procedure Rules, 2010,** for orders that:

[a] Spent

[b] There be stay of execution of the order made on **18 August 2021** in **Eldoret Chief Magistrate's Children Case No. 93 of 2021: M M O and S K O (suing through PWO) vs. EAO** pending the hearing and determination of the application and thereafter pending the hearing and determination of the appeal;

[c] The costs of the application be provided for.

[2] The Application is premised on the grounds that substantial loss would result; that sufficient cause exists to warrant the grant of stay; and that the application has been made without undue delay. It is supported by the applicant's affidavit, sworn on **1 September 2021,** in which he averred that he is the defendant in the lower court matter; and that he is dissatisfied with the ruling and the interlocutory orders made in the matter by the lower court to the effect that:

[a] legal custody of the minors was given to the guardian ad litem;

[b] he was to pay fees as per the fee structure, in addition to a monthly maintenance of **Kshs. 10,000/=;**

[c] a comprehensive report be filed by the children officer on or before **8 September 2021;**

[d] the matter be mentioned on **8 September 2021** to confirm compliance; and,

[e] each party to bear own costs of the application.

[3] The appellant averred that since his appeal raises serious issues of law and fact as to the manner in which the trial magistrate made the impugned decision, he stands to suffer irreparable harm should he be required to comply with the order before the hearing and determination of this appeal. According to him, the order on custody is not in the best interests of the minors, granted that their guardian *ad litem* now stays with a different man as husband and wife; along with a son from a different union, yet the subject minors are female children. He also complained that the lower court did not take into account that the respondent is also in gainful employment, earning a higher income than his, as a Tutorial Fellow at the University of [Particulars Withheld].

[4] The appellant relied on several documents which he annexed to his affidavit, which were however not cross-referenced with the averments in the affidavit or specifically marked for identification purposes. Nevertheless, the documents augment the averments in the

supporting affidavit.

[5] The application was resisted by the respondent. She relied on her Replying Affidavit sworn on **10 September 2021**. She averred that the appellant is the biological father of the two minors and is therefore obligated to honour the terms of the ruling delivered by the trial court in **Eldoret Children's Case No. 93 of 2021.** She stressed that she is best placed to have custody of the minors pending the hearing of the dispute before the lower court, considering their gender and tender ages of 10 and 5 years, respectively. She pointed out that, for now, the appellant is required to only pay **Kshs. 10,000/=** maintenance per month and school fees, which is within his means as a Senior Lecturer at the **University of [Particulars Withheld].** She accordingly prayed for the dismissal of the application.

[6] The appellant filed a Further Affidavit on **16 September 2021** to draw the attention of the Court to the fact that the respondent had taken steps to enforce the lower court order; and that a Notice to Show Cause had already been issued and fixed for hearing on **22 September 2021**. He was apprehensive that if the matter before the lower court proceeds as planned then his appeal would be rendered an academic exercise.

[7] The application was canvassed by way of written submissions. **Mr. Kigamwa** for the appellant relied on his written submissions filed herein on **16 September 2021**. He relied on **Jones vs. National Coal Board** [1957] 2 QB 55; **M K S vs. P J K** [2017] eKLR to support his argument that the decision of the lower court was flawed in every aspect. In his view, the orders for custody, school fees and maintenance were made without an informed basis; and did not take into account the respondent's income. The case of **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another** [2006] eKLR was also relied on to support the submission that it was incumbent upon the respondent to disclose and furnish evidence of her own income.

[8] On behalf of the respondent, **Mr. Omboto** proposed the following issues for determination, vide his written submissions dated **16 September 2021:**

> **[a]** Whether the appellant has satisfied the threshold for grant of stay of execution against the orders issued in favour of the minors;
>
> **[b]** Whether the court acted *ultra vires* by granting an order that fees be paid as per the fees structure;
>
> **[c]** Who should bear the costs of the application?

[9] Counsel made reference to **Order 42 Rule 6** of the **Civil Procedure Rules** in addition to **Article 53(2)** of the Constitution and **Section 4(3)** of the **Children Act** and urged the Court to find that the impugned orders were made in the best interest of the minors who are female children of tender years. According to **Mr. Omboto**, it is not sufficient for the appellant to state that he stands to suffer substantial loss; and that the was under obligation to demonstrate how so. In his view, it is not in dispute that the appellant is the biological father of the children; or that they are in school, and therefore liable to pay school fees. He pointed out that there are numerous other expenses that the respondent is currently bearing, such as shelter, medical care, food, house help, for which no order has been made. The Court was accordingly urged to dismiss the application with costs.

[10] I have given due consideration to the application and the submissions made herein by learned counsel. **Order 42 Rule 6** of the **Civil Procedure Rules**, pursuant to which the application has been brought, provides that:

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

[11] Thus, the conditions an applicant for stay of execution of decree or order needs to satisfy, as set out in **Rule 6(2)** of **Order 42** aforementioned, are:

> **[a]** that substantial loss may result to the applicant unless the order is made;
>
> **[b]** that the application has been made without unreasonable delay.
>
> **[c]** that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[12] The rationale for the conditions aforementioned was aptly given in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63,** thus:

> **"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

[13] In addition, it is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the children in question be given utmost consideration. In **Bhutt vs. Bhutt,**

Mombasa HCCC NO. 8 of 2014 (O.S.), this principle was expressed thus:

> **"In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 rule 6 of the Civil Procedure Rules, must be complemented by an overriding consideration of the best interest of the child in accordance with the injunction of Article 53(2) of the Constitution..."**

[14] Hence, with regard to the best interest of the minors, there is no dispute that the subject children are minors aged 10 and 5 years respectively. They are already in the custody of the respondent and it would neither be in their interest nor in the interest of justice to reverse that order before hearing the parties on the appeal; particularly in the absence of concrete evidence that the respondent is unsuitable to look after the welfare of the girls in the interim. Conversely, it has not been demonstrated that the appellant is unable to meet the interim maintenance payment of **Kshs. 10,000/=** per month or the minors' school fees.

[15] Additionally, the ruling of the lower court is yet to be availed along with the record of the lower court. Thus, it would be premature to conclude that the lower court's decision is flawed. It is noteworthy too that, while seeking stay of the orders made by the lower court, the appellant has not made any payment proposal pending the hearing and determination of the appeal.

[16] Accordingly, although, the application was filed without undue delay, I am far from convinced that substantial loss will be visited on the applicant unless the orders sought are given. Indeed, the welfare of his daughters dictates that the lower court order be complied with in every aspect thereof by the appellant, pending further orders of the Court upon the hearing of the appeal.

[17] In the result, I find no merit in the application dated **1 September 2021.** The same is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF

SEPTEMBER 2021

OLGA SEWE

JUDGE