



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. E016 OF 2021

DRA.....APPELLANT

VERSUS

EM.....RESPONDENT

RULING

1. Before this court is the Chamber Summons dated **15th February 2021** by which **DRA** (hereinafter '**the Applicant**') seeks the following orders: -

“1. SPENT.

2. Leave be granted to the applicant to appeal against the interim orders issued by Hon R.O. Mbogo (Mr) Resident Magistrate on 19th January 2021.

3. The Memorandum of Appeal filed herein be deemed as properly on record.

4. Pending hearing and determination of the appeal, proceedings in Children’s court at Nairobi Children’s Case Number E061 of 2021. EM v DRA be stayed.

5. Pending the hearing and determination of appeal, the orders issued by Hon. R. Mbogo on 19th January be set aside, reviewed, varied or modified.

6. Cost of this application be borne by the respondent.”

2. The application was premised upon **section 167 of the Children Act 2001, Rule 21 (Practice and Procedure Parental Responsibility) Regulations, 2002, sections 1A, 1B, 3A and 75 (i) of the Civil Procedure Act, Order 42 (b), 43 and 45 (i) of the Civil Procedure Rules, 2010** and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **EM** opposed the Application through her Replying Affidavit dated **28th June 2021**. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated **29th July 2021** whilst the Defendant relied upon the written submission dated **27th July 2021**.

BACKGROUND

4. The Respondent herein filed in the **Nairobi Children Court Suit No. E061 of 2020** seeking various orders. On **19th January 2021**, the learned trial magistrate **Hon R.O. MBOGO** made *inter alia* the following interim orders *ex parte*: -

“1. THAT in the interim, pending hearing and determination if this application, the Defendant do pay school fees for the minor at her current school, [Particulars Withheld].

2. THAT pending hearing and determination of the application, the Director Immigration Services, Kenya is hereby ordered to restrain the Defendant who is an American citizen and holder of Kenyan Passport Number xxxx from leaving the Jurisdiction of this court.

3. THAT both parties to file their Affidavit of means”.

5. Being aggrieved by the orders granted by the trial court, the Applicant filed a Memorandum of Appeal dated **15th February 2021**, which Memorandum raised **five (5)** Grounds of Appeal. Contemporaneously with that Memorandum of Appeal the Applicant filed the present application.

6. As stated earlier the Respondent opposed the application on the grounds that any stay and/or review of the interim orders made by the **Children Court** would mitigate against the best interest of the child.

ANALYSIS AND DETERMINATION

7. I have considered the present application, the reply filed by the Respondent as well as the written submissions filed by both parties. The questions for determination are –

(i) Whether leave to appeal ought to be granted.

(ii) Whether the proceedings in the lower court should be stayed.

(iii) Whether the interim orders made by the trial court on **19th January 2021** should be reviewed and/or set aside.

LEAVE TO APPEAL

8. **Order 41 Rule 6** which sets out the principles for stay of execution 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 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.

(c)”

9. Therefore in order to merit the orders being sought the applicants must satisfy the court.

(i) That the application for stay was made without unreasonable delay.

(ii) That the Applicant stands to suffer substantial loss unless the stay order is granted.

(iii) That security for the performance of the decree or order has been given by the Applicants.

10. The applicant has sought leave to appeal against the Ruling by the trial court dated **19th January 2021**. It is trite that any litigant who is aggrieved or dissatisfied by an order of the court has the right to appeal against said Ruling. The Ruling in question was delivered on **19th January 2021** whilst the application was filed on **15th February 2021**, barely one month after the Ruling. Therefore, I am satisfied that this application was brought in a timeous manner. In the circumstances, this court grants to the Applicant leave to appeal against said Ruling and further directs that the Memorandum of Appeal dated **15th February 2021** be deemed as property filed.

11. Vide prayers **(4)** and **(5)** of the present application the Applicant has asked this court to stay the proceedings in the **Children Court**, and has prayed that the court review and/or set aside the orders made in the **Children Court** pending the hearing and determination of the appeal.

12. It is not for the court at this point to determine the merits or otherwise of the intended appeal. The only question the court has to determine is whether the prayers sought in this application are merited.

13. The applicant states that he is not the biological father of the minor. That he met and entered into a romantic relationship with the Respondent who is the biological mother of the minor. He denies the Respondent's allegation that he ‘**adopted**’ the child and undertook to provide for all her needs. The Applicant submits that the interim orders were obtained *Ex parte*, that the same are draconian and curtail his freedom of movement. He states that he has already transferred to the Respondent a sum of **Kshs 9,000,000/-** which can be used to provide

for the minor in the interim.

14. On her part the Respondent insists that the Applicant voluntarily undertook to care and provide for her minor child.

15. The Respondent stated that the minor stands to be ejected from her school if the interim orders are stayed. Whilst the Respondent concedes that she received **Kshs 9,000,000/-** from the Applicant, she states that said funds were meant for renovating her parents home and for her own personal use. She submits that the Applicant is a man of means who is merely trying to evade his responsibility to the minor. The Respondent urged the court to dismiss the application.

STAY OF PROCEEDINGS

16. An order of stay pending appeal is primarily intended to obviate situation where the Appeal by the Applicant may be rendered nugatory and to avoid a situation where the Applicant would be subjected to irreparable harm.

17. The power to grant a stay is a discretionary power which the court will exercise upon evaluating of each individual case. In **RE GLOBAL TOURS AND TRAVELS Civil Application No 3229 of 2006** (unreported), the court states as follows: -

“Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay at proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the *prima facie* merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been timeously brought.”

18. Likewise in **Niazons (Kenya) Ltd v China Road and Bridge Corporation Kenya Ltd NRB HCC No. 126 of 1999** it was held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render orders made nugatory and render the exercise futile.... stay should be granted”.

19. The question of whether or not an appeal will be rendered nugatory in the absence of a stay, depends upon the peculiar circumstances of each individual case. In **RELIANCE BANK LIMITED – VS – NORLAKE INVESTMENTS LTD [2007]E.A 227**, the **Court of Appeal** held as follows:-

“...what may render the success of an appeal nugatory... must be considered within the circumstances of each particular case. The term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid, it also means trifling.” (own emphasis)

20. It is my view that the proceedings in the lower court being proceedings which touch on the welfare of a minor ought not to be stayed. The question of whether or not the Applicant has acquired parental responsibility over the minor is one which can only be determined by the trial court. It is not in the best interests of the child to stay those proceedings in the lower court and accordingly I decline to do so.

REVIEW OF ORDERS

21. The lower court made interim orders regarding the payment of school fees for the minor and also made orders prohibiting the Applicant from travelling out of jurisdiction.

22. **Article 53 (2)** of the **Constitution of Kenya, 2010** provides thus-

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

23. The orders made by the trial court specifically the order for payment of school fees were made in the best interests of the child. It would mitigate against the best interests of the child to review and/or set aside those orders. I decline to review the orders on school fees.

24. Regarding the order restraining the Applicant from leaving the country, I find the said order to be rather draconian. The Applicant like every citizen has the freedom of movement. He cannot be held hostage in this country merely because he is facing a suit in the **Children Court**. By her own admission the Respondent has received a sum of **KShs. 9,000,000/-** from the Applicant a very generous amount which can in the meantime be utilized to provide for the needs of the child. In the circumstances, I hereby review and **set aside** the order made by the trial court restraining the Applicant who is an American Citizen and holder of Kenyan Passport No. **xxxx** from travelling out of Jurisdiction.

Each party to meet its own costs.

DATED IN NAIROBI THIS 29TH DAY OF OCTOBER, 2021.

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MAUREEN A. ODERO

JUDGE