



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 6 OF 2020

AWK.....APPELLANT/APPLICANT

VERSUS

PKM.....RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion **30th January 2020** by which **AWK** (the Applicant) seeks for orders as follows: -

“1. SPENT.

2. SPENT

3. A stay of execution of the judgment in terms of orders 3 (c) delivered on 20th December 2019 do issue pending the hearing and determination of the Appeal.

4. The Honourable court may grant any other orders necessary in the best interest of the minor.

5. Costs of this application be in the cause.

2. The Application was premised upon **section 3, 3A, & 80** of the **Civil Procedure Act, order 42 Rule 6 Order 51** of the **Civil procedure Rules 2010, section 4, 23, 24, 76, 97, 98** and **99** of the **Children Act 2001** and all enabling provisions of the law. The application was supported by the Affidavit of even date and the Further Affidavit dated **25th June 2021** sworn by the Applicant.

3. The Respondent **PKM** opposed the Application through his Replying Affidavit dated **14th December 2020** and the supplementary Affidavit dated **6th August 2021**. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated **28th June 2021** whilst the Respondent relied upon his written submissions dated **6th August 2021**.

BACKGROUND

4. The Applicant and the Respondent are the biological parents of the subject minor. The couple got married on **25th August 2012** and commenced cohabited as man and wife. However, the relationship began to experience problems and was beset with allegations of infidelity. In **2015** the Applicant left the matrimonial home and moved with the minor to live with her mother in **[Particulars Withheld] Estate**. The Respondent filed a petition for divorce which divorce was granted by the High Court on **18th March 2018**.

5. Following the divorce the couple were able to co-parent but the Respondent later alleged that the Applicant was denying him regular access to the minor. The High Court having made pronouncement on the question of the custody care and control of the minor, it was left to the **Children’s Court** to determine questions of access and maintenance.

6. Vide a judgment, which was delivered on **20th December 2019**, the learned trial magistrate made the following orders: -

“1. The legal custody of the minor shall jointly vest in the Plaintiff and the Defendant;

2. The actual custody shall vest in the defendant as previously ordered by the High Court;

3. The defendant is granted access as follows;

a. In the 1st instance for the first three (3) months on alternate weekends on Saturdays and Sundays from 10.00 am to 4.00 pm. The pickup and drop off points to be at Makalara Children's office or any other place as may be mutually agreed by the parties;

b. That the access in (a) above to be supervised by RK, the defendant's brother.

c. That after the above three (3) months, the plaintiff will have access to the minor as follows;

i. During school holidays at the ration 50:50;

and

ii. During special Holidays like Easter, Christmas and New Year on alternating basis;

d. At school subject to school rules and regulations;

e. The minor's school is directed to recognize the **plaintiff as the biological father of the minor forthwith**;

f. For avoidance of doubt, access at the school to take effect immediately;

g. That the defendant is directed to co-operate with the plaintiff to ensure seamless implementation of the above orders. This entail adequate preparation of the minor to acknowledge the plaintiff as her biological father.

4. Apportionment of Parental Responsibility **Plaintiff**

a. Monthly maintenance towards school fees and food – Kshs 7,000;

b. Clothing on need basis;

c. Entertainment whenever he has access.

Defendant

d. Shelter

e. Partly food;

f. Medical

g. Partly school fees

h. Rest

5. Each to bear own costs.

7. Being aggrieved by said judgment the Applicant filed the Memorandum of Appeal dated **20th January 2020**. Contemporaneously with the Appeal the Applicant filed the present application seeking a stay of execution specifically of **Order 3 (c)** of the judgment.

8. The Respondent stated earlier vehemently opposed the application for stay and complained the Applicant has gone to great lengths to deny him access to his biological child. That such denial is limiting the capacity of the child to bond with her biological father, which is detrimental to the child.

Analysis and Determination

9. I have carefully considered the application before me, the Replying Affidavit filed by the Respondent as well as the written submissions filed by both parties. The only question for determination is whether the prayer for stay is merited.

10. From a reading of the record it becomes clear that it has not yet been revealed to the minor who is now aged about **8 years** that the

Respondent is her biological father. The minor thinks that the Respondent is her 'Uncle'. The Applicant submits that it would be traumatic to have this information revealed to the minor without adequate counselling to enable the child absorb the new information. The Applicant argues that unless the stay is granted the Respondent is likely to enforce the judgment of the lower court regarding access to the child to the detriment of the minor.

11. The Applicant further alleges that the Respondent is a person of violent disposition. That the Respondent assaulted the Applicant in the year **2018** in the presence of the minor and that as a result the minor is afraid of him.

12. The Respondent submitted that the Applicant has consistently denied him access to his child despite numerous court orders. He complains that the Applicant has never introduced him to the minor as her father. The Respondent alleges that he has made proposals for counselling to prepare the child to accept him as her father, but the Applicant has been reluctant to take the child for said counselling. He urges the court not to grant any stay of orders made by the lower court.

13. **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**, provides for the circumstances under which the court may exercise its discretion to grant a stay pending appeal as follows: -

“(2) No order for stay of execution shall be made under subsection (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”.

14. Regarding the first condition I note that the judgment in question was delivered on **20th December 2019**. This application for stay was dated **30th January 2020** roughly **one (1) month** after the ruling was delivered. Given the intervening Christmas and New Year holidays I am satisfied that the application was filed in timeous manner.

15. It has been said that evidence of substantial loss is the key that unlocks the courts discretion to grant a stay. In the case of **DANIEL CHEBUTUK ROTICH & 2 OTHERS VS EMIRATES AIRLINES [2001]eKLR**, **Hon Justice Musinga** (as he then was) explained 'substantial loss' in the following terms –

“... Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

16. In the **Case of Adah Nyabok – vs – Uganda Holding Properties Limited (2021)**, Mwera J, (as he then was) stated that:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal.”

17. On the question of substantial loss the Applicant has not demonstrated what prejudice or loss she as the child's mother stands to suffer if the child is allowed to interact with her biological father.

18. The court cannot lose sight of the fact that this matter concerns the welfare of a child. **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”**.

19. Likewise **section 4 (3)** of the **Children Act 2001** provides 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 interest of the child shall be a primary consideration”. (own emphasis)

20. The Applicant has claimed that the Respondent is a man of violent disposition and that the child is afraid of him. There is no evidence to support the allegations. I have carefully perused report dated **25th November 2016** filed by the **Department of Children's Services**. There is no indication that the child feared the Respondent. Instead, the report recommended that access be allowed. Likewise, a second report by the same department dated **25th September 2019** recommended as follows:-

“The plaintiff needs to fully bond with the child to make up for the lost time. I therefore recommend that he be allowed access that includes sleep over on weekends and during the holidays.

I also recommend that the child to undergo counselling as the revelation on who the father is may have deep effects on her, these recommendations is subject to the court's honorable ruling.”

21. The Applicant submits that given that the minor to date is unaware that the Respondent is her father, it would only traumatize the child to her detriment if this information is revealed to her without the benefit of adequate counselling. On his part, the Respondent asserts that the child is entitled to know who her father is and that he as the child's biological father has the right to have access and interact with his child.

22. I have keenly perused the record of the proceedings in the lower court. It is evident that the Applicant has done all that she can to keep the minor away from the Respondent. She has even been committed to civil jail for disobeying court orders on access. It is extremely unfortunate that the minor is caught up in the battle between her parents. The fact that the Respondent is the child's father cannot be hidden from her forever. Paternity is a fact that cannot be denied.

23. The minor herein has the right to know who her father is and to interact with him freely. In my view, it is more detrimental to the child's welfare to deny her knowledge of her father and to deny her access to a father's love and care. Indeed, I do commend the Respondent for his tenacity in seeking to care and provide for his child despite great frustration and obstacles placed in his path by the Respondent.

24. The claim that the child needs counselling before being introduced to her father is nothing but a convenient excuse being put forward by the Applicant as a continuation of her efforts to keep the child away from her father. The denial of fatherly love and affection is a greater disservice to the child.

25. The Applicant has had more than ample time to arrange for counselling for the child. The court orders recommending counselling for the child were made in **December 2019**. More than a year has elapsed since then. The Applicant has not told the court what efforts if any she has made to avail this recommended counselling for the child. I have perused the report dated **25th September 2019**. The report recommends as follows –

“The Plaintiff (the Respondent) herein needs to fully bond with the child to make up for lost time...”

26. The same report which I repeat was made in **September 2019** recommended counselling for the child. More than **one year later**, the Applicant who has physical custody of the minor has made no arrangement for counselling. The child cannot be kept away from her biological father indefinitely while the Applicant dithers on the issue of counselling. In my view, it is imperative that the child get to know and interact with her father as directed by the lower court. By this application, the Applicant is only pursuing her agenda of keeping the Respondent away from his child. In my view, the counselling may proceed hand in hand with the access as ordered by the trial court.

27. I find that the best interest of the child are best served by introducing her to her biological father and by allowing the Applicant access to enable him interact with the minor and get to bond with her as her biological father.

28. In the premise I am not inclined to grant any stay of the judgment and orders delivered by the lower court. I find no merit in this application. The same is dismissed in its entirety. Each party to bear its own costs.

DATED IN NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

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MAUREEN A. ODERO

JUDGE