SIA v MH (Family Appeal E027 of 2021) [2021] KEHC 9822 (KLR) (26 November 2021) (Ruling)

Neutral citation: [2021] KEHC 9822 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E027 OF 2021

JN ONYIEGO, J

NOVEMBER 26, 2021

BETWEEN

SIA ..... APPLICANT

AND

MH ..... RESPONDENT

RULING

1. Through Tononoka Children case No 12/2020, the Hon. L.K Sindani delivered her judgment on April 12, 2021thus granting physical custody of the subjects (minors) to the suit (NMH and AMH) to the applicant (plaintiff). However, through a Notice of Motion dated June 8, 2021, the respondent (defendant) moved the court thereby seeking review and variation of the said judgment by vesting actual custody of the two minors to him with access to the applicant (plaintiff).

2. The said application was anchored on the ground that circumstances had since changed as the applicant had remarried and therefore abandoned the children to 3rd parties.

3. Upon considering the application, the learned magistrate delivered her ruling on September 1, 2021holding that the applicant /plaintiff having remarried and abandoned the children with her mother, she was not fit to take actual custody of the children. That it was not in the best interests of the children to keep jostling between their grandmother and their mother's house. That the house at the applicant's mother and that of her new husband is not fit for the children' occupation. The honorable magistrate further found that the moral character of the applicant's new husband is questionable taking into account the tender age of the children at 4 and 7 years.

4. Consequently, the court removed actual custody of the children from their mother the applicant and vested the same to the father (respondent) with access rights to the mother.

5. Aggrieved by the said ruling, the applicant filed a memorandum of appeal dated September 2, 2021and filed on September 6, 2021 challenging the entire ruling .Contemporaneously filed with the memorandum of appeal is a notice of motion dated September 2, 2021Pursuant to sections 1A, 1B,

3A 63 (e) of the *Civil Procedure Act* , order 9 rule 9(a), order 42 rule 6 (1) and (2) and order 51 rule 1 of the *Civil Procedure Rules* seeking orders that;

a. Spent;

b. That this honorable court be pleased to grant stay of execution of the ruling and decree dated September 1, 2021delivered by Honourable L.K Sindani pending hearing and determination of this application.

c. That the Honourable court be pleased to grant stay of execution of the ruling and decree dated September 1, 2021delivered by Honourable L.K.Sindani pending hearing and determination of this appeal.

d. The costs be provided for.

6. The application is based on grounds set out on the face of it and an affidavit in support sworn on September 2, 2020by SIA stating that, the review orders necessitating the removal of the children from the physical custody of their mother was contrary to the established principles of the law that as a general rule, children of tender age should be given to the mother.

7. She averred that she is likely to suffer substantial loss if the children are taken away from her. That it is in the best interests of the children that the orders be granted as the appeal is arguable and therefore likely to be rendered nugatory if the orders are not granted.

8. Upon considering the application under certificate of urgency on September 7, 2020, Ongi'jo J granted a temporary stay of execution pending hearing and determination of the same on September 16, 2021.

9. Upon being served, the respondent filed a replying affidavit on September 15, 2021stating that he had already taken custody of the children with effect from September 3, 2021and that there is nothing to stay. That the impugned ruling was based on proper assessment of facts using the children officer's report and verbal testimony from the children themselves.

10. He further averred that the applicant will not suffer any prejudice by the court declining the orders and that what matters is the best interests of the children and not personal convenience.

11. He further stated that the appeal herein will not be rendered nugatory as he will hand over the children should the appeal succeed. He urged the court to find that the applicant had transferred her parental responsibility to the mother thus abandoning the children.

12. In her rejoinder, the applicant filed a supplementary affidavit sworn on October 4, 2021claiming that she had disclosed all material information. She claimed that the children officer's report was biased as it indicted that her new husband chews Khati yet the respondent chews the same substance. She averred that the children were not interviewed by the court as claimed by the respondent.

13. She further stated that she has been staying with the children except when away thus necessitating temporary stay with the grandmother. Lastly, she contended that she has since moved with her husband to a much bigger house with enough space for the children's accommodation.

14. Parties agreed to dispose the application by written submissions. Mr Obonyo for the applicant filed his on October 6, 2021while the respondent did not. Learned counsel basically reiterated the averments contained in the affidavit in support plus the supplementary affidavit.

15. Mr. Obonyo urged the court to exercise its discretionary power to grant the order in the best interests of the children. In buttressing the discretionary power of the court, counsel made reference to the holding in the case of Bhutt vs Bhutt Mombasa HCCC No 8/2014 (O.S)where the court held that

stay of execution under Order 42 of the civil rules is purely a discretionary power exercised by the court presiding over the matter.

16. Counsel contended that the applicant will suffer substantial loss from the context that the children will be affected in the absence of their mother. That children of tender age should generally be with the mother unless there are exceptional circumstances. To support this proposition, the court was referred to several authorities among them; *KK P M vs SWW* (2019) e KRL, *M,A.A vs ABS* (2018) *HGG Y vs YP* (2017) e KRL and *KMM V JIL* (2016) e KLR

17. On the existence of special circumstances to warrant variation of the orders, counsel submitted that there was none. As to depositing security, it was submitted that the applicant was ready to furnish the same. As to who is staying with the children currently, counsel submitted that the children are with the mother/applicant.

Analysis and Determination.

18. I have considered the application herein, response thereto and submissions by the applicant. The only issue that renders itself for determination is; whether the applicant has met the threshold for grant of stay orders pending appeal. Basically, the application has been brought under order 42 rule 6 of the *Civil Procedure Rules* which outlines conditions precedent that a party seeking stay orders must fulfill. order 42 rule 6 (2) places the onus upon the applicant to prove that;

    (i) He is likely to suffer substantial loss should the court decline to grant the orders sought.

    (ii) That the application has been filed without undue delay; and

    (iii) That security for due performance of the decree has been furnished.

19. The above principles were succinctly echoed in the case of Kenya Power and Lighting Company Ltd vs EWW (2014) e KLR where the court emphasized that a party seeking stay of execution orders must prove likelihood of suffering substantial loss if the orders are not granted and timely filing of the application. Indeed, the power to grant stay orders is a discretionary one which is exercisable judicially. See *A B vs HRJDP* (2020) e KLR.

20. In this case, the impugned ruling was delivered on September 1, 2021and the instant application and intended appeal filed on September 6, 2021. Therefore, the application was filed timeously. Regarding proof of loss of substantial loss, the court ought not to be strictly guided by the direct suffering of the parents to the minor but rather the cumulative effect of issuance or non-issuance of such order against the best interests of a child. The best interests of a child principle espoused in article 53 (2) of *the Constitution* and section 4 (2) and (3) of the *Children Act* is the primary consideration for any court, body or administrative institution to take into account before undertaking any decision concerning a child.

21. In this regard, I am guided by the holding by Achode J in *AB v HRJDP* (Supra) where the learned Judge stated that;

> " The case before me involves the custody of minors rather than money decree. Reference to substantial loss must be quantified from the point of view of the affected children, as they are the subject of the orders applied for and are the ones likely to suffer the most herein. There is no dispute that since 2018 the minor has been in the custody of the applicant who is residing in India. The applicant and the respondent are divorced living in difference countries.

22. The question that begs for an answer is; what prejudice will the respondent suffer if the order of stay is granted to maintain the status quo? The children have all along been staying with their mother. The court itself granted physical custody to the applicant in its judgment of April 12, 2021. The position only changed when the review application was heard.

23. In my view, the prayer for stay will serve the purpose of forestalling unnecessary interruption and movement of the children from one parent to the other every time afresh order is given or made. To remove the children from the applicant to the respondent and thereafter if the appeal succeeds from the respondent to the applicant will cause more confusion to the children especially on their studies by changing schools time and again hence substantial loss to the children.

24. The only solution here is to maintain the status quo obtaining before the review orders were made vide the impugned ruling. The remedy therefore commending itself to me is to expedite the hearing of the appeal for the court to make a final decision once and for all. While handling similar application, Musyoka J in the case of *ZM v ELM* (20213) e KLR had this to say;

> " The solution ideally lies in expediting the disposal of the appeal and staying the matter before the children's court to wait the outcome of the appeal. Tinkering with quantum at this stage would amount to determining the appeal before arguments are heard from both sides.

25. I do not find it prudent to determine on the issue as to who between the father and mother is entitled to actual custody of the children at this stage. That will amount to premature determination of the appeal hence interfering with the substratum of the appeal itself.

26. As regards depositing security, this is a family issue where there is no contestation on maintenance or likelihood of the applicant not being able to pay costs in case the appeal fails. I do not find it prudent to make such orders in the circumstances of this case.

27. Besides the conventional proof the three requirements under order 42 rule 6 (2) of the *Civil Procedure Rules* before grant of stay orders, on appeal, the court may consider additional grounds or conditions among them; proof that the appeal may be rendered nugatory should the orders be denied and that the appeal is arguable. See *Halai and another vs Thornton and Turphin (1963) Ltd* (1990) KLR 365.

28. In this case, the applicant is arguing that the appeal is arguable considering that as the mother, she has first preference in taking custody of the children of tender age. I find this to be acritical issue for determination hence an arguable appeal.

29. In a nut shell, I am satisfied that the application herein is merited and the same is allowed pending hearing and determination of the appeal. The applicant to expedite the process by filing a record of appeal as soon as possible. Mention on January 27, 2022to confirm compliance. The interim orders herein are hereby confirmed.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF NOVEMBER, 2021.

J. N. ONYIEGO

JUDGE