



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 98 OF 2019

CKM.....APPELLANT/APPLICANT

VERSUS

DNK.....RESPONDENT

(Being an appeal from the judgment and decree of the Honourable Senior Resident Magistrate G.M. Gitonga (Mr.) delivered on 9th August, 2019 in Children's Case No. 659 of 2016)

RULING

1. By an application filed on 20th September, 2019 by way of a Notice of Motion dated 20th September, 2019 brought under **section 1A, 1B, and 3A** of the **Civil Procedure Act CAP 21, Order 42 rule 6** of the **Civil Procedure Rules, 2010** the Appellant/Applicant sought for orders that:

1. The application be certified urgent and the same be heard exparte in the first instance on account of the urgency involved.
2. This honourable court be pleased to stay execution of the part of the judgment delivered by the court in Milimani Children Case Number 659 of 2016 directing the Appellant to pay a sum of Kshs. 150,000/= per month on the 5th of every month in addition to the school fees and school related expenses for the minors namely LL and AI together with school fees, school related expenses and upkeep of AK pending hearing and determination of this application and pending appeal.
3. The costs of this application be in the cause.

2. The application is predicated on the grounds set out on the face of it and supported by an affidavit sworn by the Appellant on 20th September, 2019 and a further affidavit sworn on 16th December, 2019 and filed on 16th January, 2020. The Appellant deposes that the trial court did not demonstrate what it had considered to come up with the stated sum of Kshs. 150,000/= per month which it directed the Appellant to pay in addition to catering for the school fees and school related expenses of the minors the subject of this suit.

3. The Appellant argues that in arriving at its decision, the trial court did not take into account the colossal sum of money that the Appellant has been paying in terms of school fees for the minors LL and AI in addition to school fees and school related expenses for AK at [Particulars Withheld] University. He asserts that the trial court did not take into account the pleadings of the Respondent which indicated that the Respondent was entitled to medical care which includes the minors, entertainment and admission to a private members' club on account of her employment. That the decision demonstrates bias against him hence the need to prefer this appeal.

4. The Appellant states that unlike the Respondent, he does not earn a salary and is only entitled to allowances pegged on the business performance of his employer and the applicable accounting rules with the highest monthly allowance being Kshs. 300,000/= which he utilizes as specified in his affidavit of means filed before the trial court.

5. The Appellant asserts that he has been paying school fees and school related expenses for the subject minors during the pendency of the proceedings in the trial court and that he intends to continue doing so. That the allegations that he has not borne parental responsibility over the subject minors or that he has overburdened the Respondent are without basis. He acknowledges that parental responsibility must be shared, but states that the allocation granted by the trial court is insensitive to his means and financial obligations.

6. It is the Appellant's case that the Respondent may execute the judgment of the trial court in relation to the provision of monthly upkeep of Kshs. 150,000/= thereby rendering the appeal nugatory hence the need to file the instant application for stay.

7. In opposition to the application, the Respondent swore an affidavit on 28th October, 2019 in which she states that the application is fatally and incurably defective, devoid of merit, an abuse of court process and fashioned only to deny the minors their basic right. She deposed that the grounds advanced on the Appellant's application are meant to be canvassed during the hearing of the appeal and not relevant to the

present application. That in any event, the orders sought by the Appellant are not in the best interest of the children the subject of this matter.

8. The Respondent asserted that the court put into consideration the expenses incurred by the minors in arriving at the judgment delivered on 9th August, 2019 in which it ordered the Applicant to take care of school fees and school related expenses for the minors LL and AI in addition to catering for food, upkeep and entertainment to the tune of Kshs. 150,000/= per month.

9. It was the Respondent's statement that the Appellant had previously sought stay of execution against orders of the Children's Court which were issued on 1st November, 2019 during the pendency of the Children Case. The High Court consequently granted orders in Civil Appeal No. 166 of 2016 in which it stayed the order requiring the Appellant to pay school fees and school related expenses for the subject minors terming it premature. The Respondent averred that since the grant of the orders for stay, the Appellant has not borne his parental responsibility to provide for the minors.

10. The Respondent accused the Appellant of abusing the court process in order to avoid bearing his parental responsibility over the subject minors. In the Respondent's view, the present application is akin to asking the court to revisit the issue of stay of execution which has already been heard previously. She terms it a disguised attempt by the Appellant to have a second bite of the cherry.

11. The Respondent asserted that if the orders sought are granted, they would be prejudicial to herself who would be left to solely shoulder the responsibility of providing for the minors against the best interest of the subject minors. She contended that where the duty to maintain a child is imposed on a parent by statute, it would not be in the best interest of the child to suspend a maintenance order particularly where parentage is not disputed. She urged that where there is a challenge on quantum of maintenance as in the present case, the court should order an expedited hearing of the main appeal rather than stay the orders of the trial court pending the hearing of the appeal.

12. At the hearing of 16th January, 2020 learned Counsel Mr. Saluny submitted on behalf of the Appellant that the maintenance sum of Kshs. 150,000/= per month is unwarranted. Counsel asserted that the Respondent had asked for maintenance of Kshs. 121,000/= to cater for four (4) children but that the court after finding that the Appellant had parental responsibility over only two (2) children went ahead to direct that the Appellant pay a monthly sum of Kshs. 150,000/= towards maintenance. That the trial court however failed to indicate how it arrived at a figure of Kshs. 150,000/= instead of 60,000/= as had been tabulated by the Respondent.

13. Mr. Saluny contended that it is undisputed that the school fees and school related expenses for the two minors costs over Kshs. 800,000/= annually. That it would therefore be unfair to call upon the Appellant to pay the additional sum towards maintenance. He stated that the Respondent had taken out a Notice to Show Cause dated 25th November, 2019 for why the Appellant has not paid maintenance and school fees and the Appellant therefore faces a real risk of being committed to civil jail. That if committed to civil jail for a period of six (6) months, the Appellant will be unable to pay the minor's school fees.

14. Mr. Saluny's submission is that the Appellant has an arguable appeal to warrant the grant of stay orders against the imminent execution pending the hearing and determination of the appeal. This he says will allow the parties to revert to the position prevailing before the order. Counsel contended that there is no evidence that the Respondent is unable to discharge the duties she did before the orders were made, and as such no prejudice will be suffered.

15. In rebuttal, learned Counsel Mr. Olewe for the Respondent opposed the application stating that the Appellant has not proved his case reasons for which the application should be dismissed.

16. Mr. Olewe contended that while the Appellant is seeking equity, he has not done equity. Counsel asserted that since August 2019 when judgment was delivered, the Appellant has never made any payment in satisfaction of the judgment, nor has he come up with a counter proposal of what he can pay. That while the court has been told that annual school fees of the two (2) minors is a sum of Kshs. 800,000/= this does not compare to the sum of Kshs. 1,620,000/= which the Respondent pays towards rent annually.

17. Mr. Olewe pointed out that whereas the Appellant had appealed against an earlier order which directed him to pay school fees for the subject minors and two other minors in Civil Appeal 116 of 2016, all Onger J did was stay parental responsibility and not payment of school fees for the subject minors pending the determination of the suit. That the interim orders were thus obviated when the trial magistrate gave judgment in the matter.

18. Mr. Olewe admitted that there is a Notice to Show Cause taken out against the Appellant but stated that it was unopposed. That the Appellant had not filed a replying affidavit to it instead opting to move the high court for stay orders. Counsel contended that the trial court had cross-examined both the Appellant and the Respondent on their affidavits of means and took into consideration the amount of money the Respondent had sought before making a determination.

19. It was Mr. Olewe's submission that of paramount importance is the best interest of the child. Counsel asserted that in the circumstances, what the court should consider is not what prejudice the children will suffer if the Appellant does not pay maintenance, but rather what prejudice he will suffer if he pays. He urged that the lifestyle of the Respondent of being a member of a private club does not obviate the responsibility of the Appellant as a father.

20. In his rejoinder, Mr. Saluny stated that the allegations that the Appellant has not bothered to find out how the subject minors have lived since 2016 is without basis since there is a court order which demarcated how the parents were to cater for the minors. He asserted that the fact that the Respondent is a member of a club shows that she has a healthy financial status. That the status of the Appellant cannot however be elevated to that of the Respondent merely by an order of court.

21. Counsel asserted that the fact that the Respondent lives with two other children who are now adults does not mean that the Appellant should bear parental responsibility over them. He urged that the question of how much rent a parent can pay and what lifestyle a child should be exposed to should mirror the ability of the concerned parents. That the best interest of a child in any manner should rank *pari passu* with

the ability of the parent to provide depending on the circumstances of the case.

22. I have considered the application, the affidavits filed herein and the rival oral submissions. Although the parties have raised several issues in their arguments to advance their respective cases, I note that to venture into the demerits and or merits of the filed appeal at this stage would prejudice the appeal itself. At this stage, the court only needs to be satisfied that the Applicant has an arguable appeal and if stay orders are not granted, the appeal will be rendered nugatory.

23. An application for stay of execution pending appeal is necessitated by the fact that no appeal can be filed, served and determined in one day. If this court did not have power to grant interim relief in the intervening period, great injustice would be occasioned to litigants. (See – **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR**)

24. The conditions for granting a stay of execution pending Appeal are now settled. An order of stay of execution is a discretionary one but that discretion is fettered by the conditions set out in **Order 42, rule 6(2)** of the **Civil Procedure Rules 2010** which states thus:

“No order of 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.”

25. In granting or refusing stay of execution pending appeal, the court exercises discretion which must, however, be based on sound judicial principles, as espoused in **Sections 1A and 1B** of the **Civil Procedure Act** which espouse the overriding objectives of the law, thereby enlarging the conditions under **Order 42 rule 6(2)** of the **Civil Procedure Rules** for stay pending appeal.

26. The order of the trial court from which the Appellant is seeking stay of execution relates to payment of an additional sum of Kshs. 150,000/= monthly towards the food needs and general upkeep of the subject minors. The trial court had also directed the Appellant to pay school fees and related expenses to which the Appellant avers he is compliant even though the Respondent argued that he was non-compliant. This is however an issue that can only be put to rest by interrogating the evidence which was adduced in the lower court when the appeal comes up for hearing. In any case, it is not the basis of this application.

27. It is not in dispute that a Notice to Show Cause has been taken out against the Appellant with regard to payment of the maintenance sum of Kshs. 150,000/= and he therefore faces risk of being committed to civil jail hence this application for stay of execution of that part of the judgment and decree. At the time of the hearing of this application, the Notice to Show Cause had not been heard and this court cannot therefore pre-empt the outcome of that hearing.

28. While arguing this application, the Appellant merely mentioned the circumstances that led to the filing of this appeal and stated that the appeal is arguable. Further that he could not comply with the orders of maintenance owing to his financial status. The Appellant did not however bring evidence to show that he had complied with the order for payment of school fees and related expenses. At one point, the Appellant asserted that he had paid the school fees of the subject minors then went on to state that even if he had not, there is no dispute on it. This is a court of equity and it is trite law that he who comes to equity must do equity.

29. Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending appeal. ‘Substantial loss’ is a relative term and more often than not, it can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted (See - **Adah Nyabok vs. Uganda Holding Properties Limited [2012] eKLR** and **Daniel Chebutul Rotich & 2 Others vs. Emirates Airlines Civil Case No. 368 of 2001.**)

30. I note in passing that neither the father nor the mother of a child has a superior right or claim against the other in the exercise of parental responsibility, and that **Article 53** of the **Constitution 2010** and **section 24** of the **Children Act No. 8 of 2001** envision equal parental responsibility of parents over a child. It behoves the court to call for and analyse with circumspection the earnings of the parents on the one hand and the needs of the children on the other in apportioning maintenance.

31. Of importance in this matter is the best interest of the subject children which is paramount. It is therefore upon this Court to give directions which benefit the children and ensure the least disruption in their lives.

32. The Appellant raised concerns of the likelihood that he will be committed to civil jail. Whereas the Notice to Show Cause is yet to be heard, I note that to commit the Appellant to civil jail, when his income is pegged on commissions for work done, will not serve the best interest of the subject minors in any manner. In any event, the Appellant is required to pay the school fees, school related expenses and maintenance as apportioned by the trial court.

33. In the premise and in the interest of justice, the execution of the decree against the Appellant for the payment of an additional maintenance sum of Kshs. 150,000/= is hereby stayed on the condition that the appeal shall be heard within sixty (60) days since this is a matter concerning children. The Appellant shall bring evidence of payment of school fees and school related expenses at the hearing of the appeal. Costs shall be in the cause.

DATED SIGNED and DELIVERED in open court this 10th day of March, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Appellant/Applicant.

In the presence ofAdvocate for Respondent.