



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 24 OF 2020**

**MMK.....APPELLANT/APPLICANT**

**VERSUS**

**SN.....RESPONDENT**

***(Being an appeal from the ruling and order of the Honourable Resident Magistrate R. O. Mbogo (Mr.)***

***delivered on 13<sup>th</sup> March, 2020 in Nairobi Children's Case No. 974 of 2019)***

**RULING**

1. What is for determination is an application filed by way of a Notice of Motion dated 4<sup>th</sup> May, 2020 under Certificate of Urgency. In it, the Appellant/Applicant is seeking for stay of execution of the orders made in Nairobi Children's Court Case No. 974 of 2019 pending the hearing and determination of the appeal filed herein.
2. The application is supported by an affidavit sworn by the Appellant on 4<sup>th</sup> May, 2020 and premised on the grounds that the trial court directed the Applicant to pay an amount that is not available as demonstrated by the Applicant's payslip, and did not take into account the fact that he has other children. Further that the trial court granted full relief when the Respondent had prayed for only Kshs. 100,000/= in her application dated 24<sup>th</sup> September, 2019.
3. The Appellant deposed that he earns only Kshs. 39,305/= monthly, hence cannot afford the monthly maintenance of Kshs. 80,000/= in addition to school fees and related expenses and comprehensive medical cover as directed by the court. That he has been greatly prejudiced by the trial court's failure to consider his payslip and the fact that he has other dependants. He urged that his appeal has a high chance of success and if the application for stay is not allowed, the appeal will be rendered nugatory.
4. On 2<sup>nd</sup> June, 2020 the Respondent filed a replying affidavit sworn by herself on 27<sup>th</sup> May, 2020 in which she asked the court to dismiss the application with costs stating that it is bad in law as it is brought in bad faith and offends the principles of morality.
5. The Respondent asserted that the Appellant has made no effort whatsoever to comply with the ruling of 13<sup>th</sup> March, 2020 since it was delivered nor has he provided any maintenance towards the needs of the child. This, she says, was despite the fact that the Appellant is a senior servant serving in the rank of a County Commissioner earning Kshs. 479,610/= monthly. A copy of the Appellant's payslip for December 2019 is annexed thereto and marked "SN4".
6. Whereas the Appellant earns a gross salary of Kshs. 479, 610/= monthly, from the copy of the payslip on record, it is evident that his net pay amounts to Kshs. 39,309.50/= following a number of deductions which amounted to Kshs. 440,300.50/= in the month of December 2019.
7. According to the Respondent, the deductions reflected in the Appellant's payslip are investments which he failed to disclose to the court. She asserted that having benefitted from the investments, the Appellant cannot be said to be earning Kshs. 39,309.50/= as averred in his affidavit. Further that if this was indeed the Appellant's monthly income, he would not be able to meet the school fees obligations of his other children; Kshs. 145,000/= at Kenya School of Law and Kshs. 127,252/= at Jomo Kenyatta University of Agriculture and Technology. That the court should therefore reject the Appellant's argument as it defeats logic and common sense and amounts to perjury.
8. She urged that since all of the Appellant's children are entitled to parental care and protection and having demonstrated that the Appellant has the means, he ought to pay the maintenance sum of Kshs. 80,000/= in addition to half school fees for the minor. This she says will be in the best interest of the child to mitigate his suffering since he is a child of special needs and who is in need of care and protection.

9. It was the Respondent's contention that since the Appellant is a senior civil servant he should be able to obtain a medical cover for the subject child and it is no excuse that he has other children. She invited the court to take judicial notice that the Government of Kenya provides medical cover for its employees and their dependants.

10. The Respondent accused the Appellant of turning a blind eye to the plight of his child, the subject of these proceedings, which act she says offends the provisions of the Constitution, the Children Act No. 8 of 2001 and the Persons with Disabilities Act 14 of 2003. She urged the court to reject the application which she termed an invitation to perpetuate impunity and outright disobedience of court orders and the law.

11. The application was disposed of by way of written submissions. Learned Counsel Mr. Ombachi filed written submissions dated 2<sup>nd</sup> June, 2020 on behalf of the Appellant/Applicant in which he stated that the Appellant has made out a case to warrant the grant of the orders of stay of execution as sought.

12. Mr. Ombachi submitted that the trial court failed to consider the Appellant's means despite him having filed an affidavit of means and his pay slips. That the apportionment of the sum of Kshs. 80,000/= monthly was therefore not realistic.

13. Counsel referred to the decisions in **Re of RAS & RDS, Civil Appeal No. 48 of 2018 [2019] eKLR** and **HWN vs. GKC, Children Appeal No. 3 of 2018** and submitted that in apportioning parental responsibility, the court ought to conduct a proper inquiry into the financial ability of each party and the orders must pass the test of practical enforcement.

14. In response to the application, learned Counsel M/s Makori filed written submissions dated 29<sup>th</sup> May, 2020 on behalf of the Respondent in which she asked the court to dismiss the application with costs for lack of merit.

15. M/s Makori contended that the trial court was well guided by the provisions of the Constitution and the Children Act in arriving at its decision. Particularly the income and earning capacity of the parties and the physical and mental disability, illness or medical conditions of the child. Further that the order was only for an interim period of six (6) months before the Appellant is heard by the Children Court.

16. According to M/s Makori, the orders of the trial court were given in the interest of justice and in the best interest of the child, and to interfere with the orders would amount to condemning the subject child to suffering. She urged that by admitting that he has other children for whom he pays school fees, the Appellant had demonstrated earning capacity and the court should therefore so find.

17. M/s Makori contrasted the authorities cited in support of the Appellant's case stating that in those cases the court failed to consider the earning capacity of the parties which circumstances do not lend themselves to the instant case.

18. I have considered the application, the affidavits filed herein and the written submissions filed in support and in opposition thereto. 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.

19. 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.”**

20. The order of the trial court from which the Appellant is seeking stay of execution relates to payment of a sum of Kshs. 80,000/= monthly towards the maintenance of the subject minor. The trial court had also directed the Appellant to take out a comprehensive medical cover to supplement the Respondent's cover. I note that the orders, which were granted on 13<sup>th</sup> March, 2020 were for an interim period of six (6) months during which time the Respondent was to set down the matter for hearing.

21. Whereas the Appellant argues that he cannot meet the financial obligations imposed by the trial court, an argument the Respondent vehemently denies, I note that this is 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. To do so at this stage would prejudice the appeal itself. In any event, the orders are interim pending the hearing of the application before the Children's Court.

22. Neither the father nor the mother of a child has a superior right or claim against the other in the exercise of parental responsibility, as stipulated under **Article 53 of the Constitution 2010** and **section 24 of the Children Act No. 8 of 2001** which envision equal parental responsibility of parents over a child. As such, the Appellant, as the biological father of the child, has an equal responsibility to provide for the subject child as does the Respondent.

23. In apportioning maintenance, 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.

24. In granting the interim orders, the learned trial magistrate stated that the monthly sum of Kshs. 10,000/= proposed by the Appellant towards the maintenance of the child was not sufficient owing to the health condition of the child. He noted that while the Appellant had argued that his net monthly pay was Kshs. 39,305.50/= his payslip showed that his gross monthly pay was Kshs. 479,610/= and that much of the deductions made thereto, were on loans and savings of which no evidence had been adduced to show that the subject child was a beneficiary. He noted further that the Appellant has other children for whom he provides financial support, and that the Respondent, as the child's primary custodian put in more resources towards his care giving.

25. 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.**)

26. From the record, the court gathers that the subject child was diagnosed with Autism Spectrum Disorder after birth and is under constant medication, therapy and care. It is therefore upon this court to give directions which will benefit the child. Of importance in this matter is the best interest of the subject child which is paramount.

27. In the instant case, the Appellant has not stated what substantial loss will be occasioned to him if he pays the sum of Kshs. 80,000/= monthly towards the maintenance of the child. In any event, the orders are for an interim period of six (6) months. This is bearing in mind that the subject minor requires constant care and is in the sole physical custody of the Respondent.

28. Additionally, the Appellant has failed to demonstrate that he has complied with the orders of the trial court prior to preferring the appeal or filing this application. This is a court of equity and it is trite law that he who comes to equity must come with clean hands.

29. In the end, I find that the Appellant has failed to make out a case to warrant the grant of the stay of execution orders sought. Reasons wherefore the application dated 4<sup>th</sup> May, 2020 is hereby dismissed with costs. It is so ordered.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 29<sup>TH</sup> DAY OF JULY, 2020.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the Appellant/Applicant.**

**In the presence of.....Advocate for the Respondent.**