REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CHILDREN CIVIL APPEAL NO.3 OF 2019

(Appeal Originating from Nyahururu CM's Court Children No.38 of 2018 by: Hon. J. Wanjala – C.M.)

MNW.....APPELLANT/APPLICANT

- V E R S U S -

LNN.....RESPONDENT

R U L I N G

By the Notice of Motion dated 22/11/2019, the appellant/applicant, MNW seeks an order of stay of execution of the decree in Nyahururu Children Case No.38 of 2018 pending the hearing and determination of Nyahururu Children's Appeal No.3/2018.

The respondent, LN, who was the plaintiff in the trial court, by a plaint dated 17/10/2018, sought judgment against the applicant who was the defendant, for orders of access to the minor GWN and paternity test on the minor FWN and reimbursement of costs for DNA done on FWN and a sharing out of parental responsibility on the said subjects. The applicant filed a defence to the effect that the respondent was not the biological father of the subjects. The subjects were subjected to a DNA test which established that in fact, the respondent was not their biological father of GWN, upon whom he had laid claim and that confirmed the applicant's defence.

Parties were invited to submit on the issue of costs. The costs were assessed at Kshs.59,115/= and the respondent was ordered to pay same. The respondent has intimated his intention to institute execution proceedings to recover the costs. That prompted the applicant to file the instant appeal.

MN, the applicant swore an affidavit in support of the application in which she depones that she fears that execution proceedings may be lodged at any time which will be to her prejudice.

The applicant also filed a supplementary affidavit on 20/2/2020. She deponed that they got married in 2001 but could not get a child because the respondent was found to have a medical condition. Later in 2006, they agreed to get a child through his friend which they did in 2008, GWN, and a second child in 2011 (FWN) and the issue was kept as a secret. She denied having got the children out of wedlock; that it was unnecessary for the respondent to seek a paternity test which he knew the truth and the applicant pleaded in her defence that the children were not the respondent's biological children but the respondent insisted on a DNA test; that the results then confirmed what she had pleaded in her defence, that was therefore the successful party and costs should have been awarded to her. She claims that her appeal has high chances of success.

The respondent filed a lengthy affidavit whereby he believed the first child was his but the second one, FWN was born after the applicant had left the matrimonial home; that when the applicant insisted that both children were his, then he insisted on a DNA test; that it is when the applicant filed a defence that she indicated for the first time that the respondent was not the father of both children; that it is the applicant who misled the children's officer over the children's paternity but the DNA confirmed it and it is then they were asked to file submissions on costs. According to the respondent, had the applicant not insisted that the respondent was the father of the subjects, the issue of DNA would not have arisen and she was properly condemned to bear the costs.

Both counsel filed written submissions. Mr. Nderitu, the applicant's counsel, submitted that the costs awarded to the respondent are challenged because the applicant had filed a defence denying the respondent's claim in the plaint, that he was the biological father of the two subjects but he insisted on proceeding with the suit which ended with a DNA test that confirmed that he was not the biological father and hence she was the successful party and was entitled to the costs. The applicant's submission is that the appeal has high chances of success and if execution is allowed to proceed, the substratum of the appeal will be lost.

Counsel further submitted that the applicant is the sole bread winner of the family and has to maintain the two subjects and the respondent will suffer no prejudice if execution is stayed.

Ndegwa Wahome Advocates, the respondent's counsel, filed their submissions. The submissions addressed provisions Order 46 Rule 6(2)

Civil Procedure Rules which must be satisfied by the applicant for an order of stay pending appeal can be granted; that the applicant will suffer substantial loss if the order is not granted; that the applicant has to provide security for the due performance of the decree and thirdly, that the application was filed without unreasonable delay.

On substantial loss, it was submitted that the applicant has not demonstrated that the respondent is a man of straw and not able to refund Kshs.59,115/= in the event the appeal succeeds; that the respondent exhibited a bank statement showing what he earns per month and is a person of means.

As for security, counsel submitted that no security was offered by the applicant.

On the issue of delay, it was urged that the ruling was delivered on 12/8/2019 and the application was filed on 25/9/2019, four months after delivery of the ruling and it was only filed after a demand for payment was made. It is the respondent's submission that the application is an afterthought and there was unreasonable delay in filing the same and no explanation has been given for the same.

I have considered the application, the affidavits filed and submissions by counsel. This application is brought under Order 42 Rule 6 Civil Procedure Rules which 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 be 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.*
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> *(2) No order for stay of execution shall be made under subrule*
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> *(1) Unless:-*
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> *(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*
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> *(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."*

The grant of an order of stay is discretional and the court has to act judiciously within the principles set out in Order 42 Rule 6 that is; that the applicant must demonstrate that she will suffer substantial loss if the order of stay is not granted; that the application was brought without unreasonable delay and that the applicant must provide security for the due performance of the decree.

Generally, an order of stay is not given as a matter of right just because execution is about to commence or has commenced. One must demonstrate that they will suffer substantial loss. In *James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR* the court held:

> *"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*
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> *The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:*
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> *"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."*
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> *With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above."*

Again in *Kenya Shell Ltd v Kibiru (1986) eKLR* Platt J.A. stated that substantial loss is the corner stone of the jurisdiction to grant or not to grant an order of stay when he said:

> *""It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules (now Order 42 Rule 6) can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without evidence, it is difficult to see why the respondents should be kept out of their money."*

Apart from the applicant stating that she now has the burden of caring for the two children alone, she has not said what loss she will suffer if stay is not granted. Neither did she state whether, if the decretal sum of Kshs.59,115/= is paid to the respondent, it cannot be refunded. In his affidavit in reply to the application, the respondent went ahead and exhibited a bank statement from Co-operative Bank, CNN7 which indicates that he earns a salary and is not an impecunious man and would not be unable to refund the decretal sums in the event the appeal succeeds.

I find that the applicant has not demonstrated that she will suffer any loss if an order of stay is not granted.

As regards security, the applicant did not allude to offering any security so that the court could determine what security was sufficient.

Whether this application was filed within reasonable time, the ruling was read on 12/8/2019. The appeal was filed on 10/9/2019, but this application was not filed until 25/11/2019, just over three months since the ruling was read. The applicant did not offer any explanation why the delay of over three months. The respondent exhibited four letters dated 7/6/2019, 4/6/2019, 2/9/2019 and 17/10/2019 in which the applicant was requested to settle the said sums to no avail.

Instead, the applicant came to court after the respondent had shown an intention to execute. The delay of over three months has not been explained and this court finds that there was inordinate delay in filing this application.

In the end, I find that the applicant totally failed to meet the threshold for the grant of an order of stay under Order 42 Rule 6 Civil Procedure Rules. The application lacks merit and is hereby dismissed. Costs to the respondent.

Dated, Signed and Delivered at *NYAHURURU* this *23rd* day of *July,* 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Both counsel – absent

Eric – court assistant