

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 29 OF 2019 (FAMILY DIVISION)

NK.....APPELLANT

VERSUS

AL.....RESPONDENT

(Appeal from the Judgment and order of the Senior Resident Magistrate's Court of Kenya at Tononoka, the Honorable Children Magistrate Yator (S.R.M) dated the 10th July 2019 in Tononoka Children Case No. 93 of 2014, AL VERSUS NK)

R U L I N G

1. This matter was on the 13/8/2020 listed for mention before me as a duty court on 31/8/2020 purely for purposes of giving direction on how to deal with the Notice of Motion dated the 11/8/2020.
2. In the course of giving the directions, the applicant's advocate pleaded with the court to grant to him an interim stay of execution of the judgment without any clarity on what part of the judgment it needed to be stayed.
3. Upon inquiry from the court, the advocate clarified that he did not seek to stay the portion of the judgment granting joint custody of the three minors to parents and that he being unable to pay fees at [Particulars withheld] Academy, owing to the fact that he lost his source of income, he feared being arrested in execution of the judgment and therefore needed to be protected by an order of interim stay pending appeal.
4. That request was resisted by the counsel for the Respondent who said that there was no need for stay because the children were in school even at the time the matter was proceeding and that the school was prepared to financially aid the children provided the applicant availed documents to show that he had lost his income.
5. This being a matter concerning children, it is imperative that I take cognizance of the fact that whatever orders the court gives serves to meet the best interest of the children. Some of the rights every child is entitled to under the Constitution is the right to free and compulsory basic education and protection and care by both parents whether legally married or not. In this case it was reported to me that the parents are divorced but live under the same roof but in different rooms pending some other matrimonial dispute
6. The stay of execution sought is to protect the applicant against the order to pay fees. In the course of parties' submissions, I did not hear Ms. Osino to insist that her client should insist on the arrest of the Judgment debtor but her approach to the matter amiable one to the effect that provided the applicant demonstrates inability to pay fees, her client has approached the school and the school is prepared to financially aid the children for purposes of school fees.
7. That to this court is the reasonable approach to every personal family matter like the dispute in this appeal. That position ought to be encouraged, fostered and not aggravated by an order that tilt the scales in favour of one party. I think this is a matter that recommends itself for the parties to be encouraged towards a middle ground in the best interests of the children.
8. For that reason, I do not consider it expedient to grant any stay but direct that the applicant avails to the school evidence of loss of his known income toward the school's consideration for financial aid to the children on school fees. It is directed that he does so within 14 days from today.
9. In the same spirit, it is directed that while that middle ground gets pursued, the status quo now prevailing be mentioned and no precipitate action be taken as against the applicant till the 07.10.2020 when the matter will be heard before the trial court.

Dated, signed and delivered at Mombasa this 31st day of August 2020.

P.J.O. OTIENO

JUDGE