



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CIVIL APPEAL NO. 40 OF 2017**

**OGM (Suing as the father of KGW).....APPELLANT**

**VERSUS**

**FG.....1<sup>ST</sup> RESPONDENT**

**PGM.....2<sup>ND</sup>RESPONDENT**

**RULING**

**INTRODUCTION**

1. There are two Applications before the Court the first is brought by the respondents/applicant dated 10<sup>th</sup> June 2020, and filed on 11<sup>th</sup> June 2020. The respondents seek stay of execution of orders pending appeal of the Judgement delivered by this court on the 18<sup>th</sup> of May 2020, annexed to it is a notice of appeal dated 29<sup>th</sup> May 2020.

2. The Application sets out the Grounds on which it is based, which are, inter alia;

- a) That the applicant do surrender the subject to the respondent.**
- b) That the subject has never lived with the respondent and has been staying with the appellant all her life.**
- c) That the applicant was dissatisfied with the judgement and filed a notice of appeal.**
- d) That the respondent wishes to execute the judgement on 12.06.2020 , that the minor will stand to suffer substantial loss.**
- e) That it is in the interests of justice that the application is allowed.**

3. The second application was brought by the appellant dated 18<sup>th</sup> June 2020 and filed on 19<sup>th</sup> June 2020. In which the appellant seeks assistance from the OCS at Kerugoya Police Station to provide security and compliance and execution of the decree dated 18<sup>th</sup> May 2020. In the alternative that the minor be surrendered before the deputy registrar of this court for surrender to the appellant.

4. The Application sets out the Grounds on which it is based, which are, inter alia;

- a) That this court allowed the appellant's appeal on 18<sup>th</sup> May 2020.**
- b) That all advocates are aware of the decree of this court and the same was served upon the respondents by the court bailiff.**
- c) That on 8<sup>th</sup> June 2020 the respondents were informed that the appellant would pick the minor on 12<sup>th</sup> June 2020 but they refused to comply with the orders.**
- d) That the authority and dignity of the court must be protected at all times and its orders obeyed by all.**
- e) This court issued temporary stay orders vide the order dated 18<sup>th</sup> June 2020.**

## **STATEMENT OF THE FACTS**

5. The respondents in their written submissions dated 9.7.2020 relied on the case of **Blunt vs Blunt Mombasa HCCC No.8 of 2014** that held the requirements under **Order 42 rule 6** must be complemented by the overriding consideration of the best interest of the children in accordance with **Article 53 (2) of the Constitution**.

6. The respondents/applicants submitted that pending the determination of the appeal in the court of appeal, if the child is uprooted to live with the appellant and upon successful appeal, they will be destabilized and this would be against the best interest of the child. They relied on the case of **M.A VS R.O.O HCCCA No.21 of 2009**.

7. The respondent submitted that the minor refers to the grandmother as mum, as she took care of her from when she was an infant, as her biological mother died at child birth. The respondents thus submit that section 2 of the Children's Act and Kenyan Case law allude to the fact that custody of a minor of tender years should be with the mother. Therefore, taking the mother away from the minor would affect the child psychologically.

8. The appellant in his submissions dated 17<sup>th</sup> July 2020 opposing the application dated 10<sup>th</sup> June 2020, relied on the cases of **Gitarau Peter Munya vs Dickson Mwenda Kithinji -Supreme Court Application No.5 of 2014 eKLR** and **Amal Hauliers Ltd vs Abdulnasir Abukar Hassan Civil Appeal No. 18 of 2007** that set out the conditions for stay pending appeal.

9. The appellant submitted that the application for stay must fail as the respondent's failed to annex a draft memorandum of appeal, thus the court would not be able to determine whether the appeal was prima facie arguable or had a high chance of success. Secondly the appellant claimed that the respondent failed to prove substantial loss on the part of the minor and he relied on provisions of the African Charter on the rights and welfare of the **Child Article 19**, The UN convention on the Rights of the Child and **Article 9(3)** on the right of the child to live with her parents, and the case of **Noordin -vs- Karim Miscellaneous Civil Case No. 58 of 1985**.

10. The appellant submitted that he and his wife are eager to welcome the minor in their family unit. He requested the court to take judicial notice of the press release dated 7<sup>th</sup> June 2020 that stated schools would resume in January 2021, therefore the minor's school would not be disrupted as alleged by the respondents.

11. The appellant submitted that the respondents acted in bad faith and refused to release the minor because of ulterior motives being that the appellant had abandoned the dowry negotiations of the minor's late mother. He submitted that the actions of the respondents were not in the best interest of the minor and that they lacked an arguable appeal.

12. The Respondent in his submissions dated 10<sup>th</sup> July 2020 in opposition to the application dated 18<sup>th</sup> June 2020, submitted that the interim orders are still in force, and have not been issued in vain. They submitted that the application by the appellant to enforce an order that had been stayed was premature and an abuse of the court process and should be dismissed with costs.

13. The appellant in his submissions dated 6.07.2020 in support of his application dated 18.06.2020 claimed that upon service of the order on the respondents the 1<sup>st</sup> respondent escaped with the minor. That it would be in the interest of justice that the police assist in the execution and compliance of the order.

14. The respondents refuted this in their submissions and claimed that there was no need for police assistance as this was not a monetary decree.

## **ISSUES IN CONTENTION**

The issues that the court must decide include:

**i. Whether the application for stay of execution pending appeal dated 10.6.2020 has merits.**

**ii. Whether the orders for assistance with the compliance with the Judgement delivered on 18<sup>th</sup> May 2020 should be granted to the appellant?**

## **ANALYSIS**

### **Whether the application for stay of execution pending appeal dated 10.6.2020 has merits.**

15. The conditions for stay pending appeal are set out in the **Civil Procedure Rules Order 42 rule 6 sub-rule 2** as follows:

*“No order for stay of execution shall be made under sub-rule (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.”*

16. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under **Order 41 rule 6 of the Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

17. Under this authority the threshold for stay pending appeal is therefore:

- a. sufficient cause being established.
- b. Substantial loss to be suffered by the applicant and
- c. the application was made without unreasonable delay
- d. The security given by the applicant

18. The Court of Appeal case in Kenya Hotel Properties Ltd V Willesden Investments Ltd (2007) eKLR held that where undue hardship is occasioned on the applicant then the balance of convenience is in his favor.

19. When the court has to determine an application for stay of execution, it is bound to consider whether the said application meets the threshold and requirements for granting the order as stipulated under **Order 42 rule 6**. The merits of the appeal is not one of the considerations. This was stated in Housing Finance Company –v- Sharok Kher Mohamed Ali Hirji & Another 2015 eKLR where the court stated that it cannot over emphasize that it was not supposed to go to the merits of the appeal. In Carter and Sons Ltd –v- Deposit Protection Fund Board & Two Others Civil Appeal No. 291/1997 Quoted in Runda Water Limited & Another –v- Timothy John Nicklin & another (2017)eKLR, it was stated:-

*“The mere fact that there are strong grounds of appeal would not, in itself justify an order for stay the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would result from a refusal to grant a stay, and thirdly the applicant must furnish security and the application must of course be made without unreasonable delay.”*

20. The court is supposed to determine whether the applicant has established these grounds. The first consideration is whether or not the applicant has filed an appeal in the Court of Appeal.

21. In this case the application was made timeously without unreasonable delay. The grounds to consider are sufficient cause, substantial loss and overriding objective of the best interest of the child as argued by the applicants.

#### Sufficient Cause:

22. On this issue it is true that the applicants have failed to attach the memorandum of appeal.

The applicants have not stated that they have demonstrated sufficient cause. There is uncontroverted averment that upon the delivery of the Judgment the appellant and the 1<sup>st</sup> applicant (Peter Githongo) on 7/6/20 and the appellant made arrangement to collect the subject. The respondents were then represented by Magee Wa Magee Advocates. The Notice of Appeal had then been filed. Having negotiated on how to handover the minor sufficient cause has not been established. The counsel for the applicant has argued that there is an overriding consideration of the best interest of the child. The best interest of a child is of paramount consideration in every matter concerning a child as stipulated under **Article 53(2) of the Constitution** and must therefore come into play together with the other laid down requirements under **Order 42 rule 6 Civil Procedure Rules. Article 53(1)(e) of the Constitution** overrides every other consideration. It states:-

*“Every child has the right to parental care and protection which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not.”*

Claims which go against this provision have no basis.

23. The onus is on the applicant to establish existence of a sufficient cause. There is no memorandum of Appeal to demonstrate this and the validity of the notice of appeal is in issue as it was filed by counsel who was not properly on record.

24. I will not delve into the issue of validity of the Notice of Appeal as the power to determine the validity is vested in the full bench of the Court of Appeal under rule 53 of the Court of Appeal rules.

25. Mere filing of Notice of Appeal is not enough to establish sufficient cause envisaged under **Order 42 rule 6 Civil Procedure Rules** a Memorandum of Appeal would in my view provide cogent evidence of existence of sufficient cause.

**Substantial loss** was defined in Bungoma High Court Misc Application No 42 of 2011 -James Wangalwa & Another vs. Agnes Naliaka Cheseto that: *“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.”*

In Gitarau Peter Munya vs Dickson Mwenda Kithinji -Supreme Court Application No. 5 of 2014 eKLR, the Supreme Court held that

conservatory orders should be granted on the inherent merit of a case. The Court reiterated the two requirements of an arguable appeal and that unless stay is granted the appeal would be nugatory/ substantial loss, it also included a third factor public interest.

26. The substantial loss argued by the applicants is as regards the change in environment for the minor and the disruption and subsequent change in environment again should the appeal be successful. This cannot be regarded as substantial loss or as a set of circumstances that could render the appeal as nugatory. Therefore, no substantial loss/ hardship has been proved by the applicants.

27. On the issue of the overriding objective as argued by the applicants, of the best interest of the child, the applicants have not proved how an order for custody of the minor with her biological father negates the best interest of the minor. This ground is without merits.

28. I find that the threshold for stay pending appeal has not been established by the applicants. The interim orders issued ex parte and extended the date of this ruling it has therefore lapsed. It is alleged that the 2<sup>nd</sup> respondent has proclaimed that he will never surrender the child. Appeal is lawful process and a party must demonstrate that he will comply with court orders. That is why the rules provides that security is a condition for grant of stay of execution. The respondents have not averred they are ready and willing to provide security. The application for stay of execution of the Judgment dated 18/5/20 is without merits.

**Whether the orders for assistance with the compliance with the Judgement delivered on 18<sup>th</sup> May 2020 should be granted to the appellant?**

29. The application for the appellant on assistance in the execution of the custody order is up for consideration. Guided by the case of **South Shore International Ltd v Talewa Road Contractors & another [2013] eKLR** that held :

*‘.....Police Officer’s role in execution of Civil orders ought to be inkeeping with their functions which relate mainly to the maintenance of law and order. To do otherwise would open the door to the police getting entangled in the Civil action and possibly being sued for wrong doing.’*

30. I find that in the best interest of the minor there is no need for involving the police as it would traumatize the child.

31. It is in the best interest of the child that it be done under the supervision of the Children Officer and in the presence of the Deputy Registrar. I hesitate to order the involvement of the police.

**CONCLUSION**

**i. The application for stay pending appeal dated 10/6/20 has not met the threshold for grant of stay of execution and is dismissed with costs to the appellant.**

**ii. The application dated 18<sup>th</sup> June 2020 is allowed. The minor be produced before the Deputy Registrar by the respondents within 14 days be handed over to the appellant, in compliance with the Judgement delivered on 18<sup>th</sup> May 2020.**

**Dated at Kerugoya this 14<sup>th</sup> day of August 2020.**

**L. W. GITARI**

**JUDGE**