



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 117 OF 2019**

**(CORAM: F. GIKONYO J)**

**GC .....APPELLANT/APPLICANT**

**VERSUS**

**IG..... RESPONDENT**

**RULING**

[1] Before me is a Motion dated 14/10/2019 expressed to be brought pursuant to **Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law** in which the applicant seeks amongst other orders stay of execution of the decree issued on 13/09/2019 pending the hearing and determination of the appeal.

[2] The grounds upon which the application is founded are set out in the Motion, the supporting and supplementary affidavit of GC sworn on 14/10/2019 and 24/02/2020 respectively. It is contended that he is unable to comply with the orders of the court to pay a monthly contribution of Kshs. 20,000/- in addition to providing medical insurance for the minor, school fees and other related expenses when they become due. He gave his reasons for this inability. He stated that he is a member of the county assembly and earning a net salary of approximately Kshs.90, 000/- which cannot sustain payment of the decretal sum as well as his other responsibilities. He pointed them out; that he has five other children whom he takes care of and pays school fee for; he pays school fees for his late brother's children; and there are deductions made upon credit facilities he took from financial institutions. He denied the allegation by the respondent that he is a wealthy man as when they met in 2017 he had nothing. According to him, it is necessary that the interests of all the children be protected and warrants of arrest sought by the respondent against him before the trial court only militates against this reality.

[3] The application was opposed vide the replying affidavit of IG sworn on 22/10/2019. She deponed that the applicant is capable of paying Kshs. 20,000/- from his salary and income earned from his rental houses in his plot in [Particulars Withheld], petrol station situate in [Particulars Withheld] Market and miraa plantation on the 2 acres at [Particulars Withheld] Adjudication Section No. 4524. The applicant only has two other children apart from the minor. Besides, the applicant has not evidenced that he is taking care of his deceased's brother's children. Thus, the applicant is indeed a man of means who is capable of paying the amount ordered.

**Submissions**

[4] This matter was canvassed by way of written submissions. The appellant submitted that pending the hearing of the suit before the trial court the appellant was remitting Kshs. 5,000/- per month to the respondent as his contribution towards the upkeep of the child. He is ready and willing to support the minor but the upkeep of a sum of Kshs. 20,000/- for a one (1) year old child is excessive in the circumstances leaving very little to cater for his other children. Furthermore, he cannot be able to afford the amount ordered for he is an elected public servant who depends on his salary.

[5] A child is a joint responsibility and it is expected that either parent must make effort to provide for their upkeep. It is not enough for the respondent to state that she is unemployed and that the appellant to cater for the entire child's needs and place the sole responsibility on the appellant. If he is to pay the contribution it will prejudice the other children. He seeks for a partial stay pending the hearing and determination of the appeal. He relied on **EWM v RKK [2019] eKLR**, **JMM v PM [2018] eKLR**, **Joseph Waiganjo Ngatia v Margaret Ng'endo [2016] eKLR** and **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** to support his submissions.

[6] At the time of writing this the respondent had not filed her submissions.

**ANALYSIS AND DETERMINATION**

[7] The Constitution of Kenya, 2010 ushered in new order and scheme of justice; and its main gospel in adjudication of cases is that courts of law should strive to render substantive justice to parties. Accordingly, **Order 42 Rule 6 of the Civil Procedure Rules** being existing law, must accord to this command. As such, care should be taken to ensure that stay of execution of a decree on child support or maintenance or welfare is guided by the constitutional principle in article 53(2) of the Constitution that: -

### **A child's best interests are of paramount importance in every matter concerning the child**

[8] This principle follows after the peremptory commands in international treaties, covenants and conventions which ensure that the focus in adjudication of cases involving children remains on the best interest of the child. As that remains the overall objective, I should determine; (1) whether substantial loss will occur upon the applicant unless stay is granted; (2) whether the application was filed without unreasonable delay; and (3) whether it is appropriate to ask for security as may be ordered by the court for due performance of the decree or order as may ultimately be binding on an applicant.

### **Timeliness of application**

[9] The order the applicant seeks to appeal against was delivered on 29/08/2019. He filed the memorandum of appeal on 27/09/2019. He then filed his application on 14/10/2019. This is approximately one and a half months from the time the decision was delivered. In the case of **Kepha Moreno Bosire v Titus Naikuni & another [2020] eKLR** one and a half months was found not to be inordinate delay. I too take the view that the application has been made without unreasonable delay.

### **Substantial loss occurring**

[10] Of great importance is whether he will suffer substantial loss unless stay of execution is granted. The applicant bears the burden of proof to show that substantial loss would occur unless stay of the orders is granted.

[11] It is not enough to put forward mere allegations. **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410** at page 416 expressed himself as follows:

**“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules 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 this evidence it is difficult to see why the respondents should be kept out of their money”.**

On his part, **Gachuhi, Ag. JA** (as he then was) at 417 held:

**“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”**

[12] The applicant states that the amount of Kshs. 20,000/- monthly is excessive considering he is providing for nine (9) children. Four being his own and five his deceased's brother's. Moreover, he is on a public servant salary and being a member of the county assembly who earns a net of Kshs. 90,000/- also engages in functions among other things that require money.

### **The ultimate constitutional test**

[13] It bears repeating that in this case, the court should be guided by article 53(2) of the Constitution that: -

### **A child's best interests are of paramount importance in every matter concerning the child**

[14] I will nonetheless, be cautious not to compromise the appeal. [See **JMM v PM [2018] eKLR.**]

[15] The applicant's averments that he is not of means to meet the maintenance order herein were refuted by the respondent. She stated that the applicant is a man of means through his salary, rental income, income from miraa plantation. She also stated that he does not take care of the children of his late brother as he claims. He only has three other children of his.

[16] It has been admitted that the applicant has and takes care of three other children of his. See the birth certificates. He has also alleged that he takes care of five children of his late brother. This he bears the onus of proof. He produced one receipt showing that a school fee was paid on 2/09/2019. Nothing shows or proves that he paid the fee. He did not produce evidence of child support of these five children.

[17] The applicant stated that he has other official responsibilities which include travelling to functions. These are official functions and are catered for in his salary as travelling allowance. Besides, if he were to engage in functions related to his position then that ought to be catered for by his employer in his salary or in padium. Therefore, such official engagements are not charged to or catered for by his personal emoluments. Accordingly, I find that the applicant has failed to prove that substantial loss would ensue unless I order a stay of execution.

[18] In the final analysis, I dismiss the application for lack of merit. No order as to costs.

**Dated, signed and delivered at Meru this 23<sup>rd</sup> day of September, 2020**

**F. GIKONYO**

**JUDGE**

**Representation**

M/s Kiome for respondent

F.G Mugambi for appellant/applicant