



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E025 OF 2020

ANK..... APPELLANT/APPLICANT

VERSUS

PAO.....RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 21<sup>st</sup> July 2020 brought under Order 42 rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 by ANK the appellant/applicant, seeking 4 orders, 2 of which have been spent as follows –

1. *(spent)*

2. *(spent)*

3. *That the honourable court be pleased to order a stay of execution of the order given on 10<sup>th</sup> July 2020 by Hon. H. M. Mbatia (Mrs) in case No. 36 of 2020 (PO –vs- AN) ordering the appellant herein to pay Kshs 30,000= per month as maintenance and instead the appellant be allowed to pay Kshs 15,000= per month pending filing of the record of appeal, hearing and final determination of the appeal herein.*

4. *That the costs of this application be in the cause.*

2. The application has grounds on the face of the Notice of Motion which are that the trial court in Nairobi Children Court Case No. 36 of 2020 (PO –vs- AN) ordered that the appellant/applicant pays Kshs 30,000= per month from 20<sup>th</sup> July 2020 as maintenance while the appellant earned only Kshs 35,000= per month and that the court also ordered that the appellant should raise the amount from loans, and lastly that the appellant would suffer substantial loss if the stay orders sought were not granted. The appellant stated further that he was willing to pay Kshs. 15,000= per month.

3. On the hearing date, Mr. Juma for the appellant/applicant in oral submissions urged the court to grant the orders sought. Counsel further submitted that an appeal had already been filed, and that this application was filed without delay. Counsel also argued that the applicant would suffer substantial loss if the orders sought were not granted as he earned only Kshs. 35,000= per month and currently resided with his sister N who assisted him in rent payment.

4. Mrs Andego for the respondent on the other hand opposed the application for stay of execution pending appeal and submitted that the matter involved parental responsibility of two minors aged 6 years and 2 years and that since the parents separated on 25<sup>th</sup> June 2019, the appellant/applicant had only paid Kshs. 10,000= for maintenance and only after the ruling of the trial court was delivered. Counsel emphasized that the best interests of children were protected by the Constitution and must prevail, and added that there could be no issue of substantial loss to be suffered by the applicant as parental responsibility could not be wished away. Counsel lastly submitted that the proposal by the applicant to pay Kshs. 15,000= per month pending appeal, would if granted, amount to pre-determining the appeal.

5. This is an application for stay of execution of a court judgment or ruling pending appeal. Though I have not been availed a copy of the Children’s Court decision in question, the orders of the trial court are not in dispute. Be that as it may, such applications are governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows –

**“6(2) No order for 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.”***

6. It is not disputed that the decision of the Children Court Case No. 36 of 2020 that is sought to be stayed pending appeal was delivered on 10<sup>th</sup> July 2020. The present application was dated 21<sup>st</sup> July 2020 and filed same day, which was a period of eleven days. In my view, that period was not an inordinate delay, as the appeal was filed on 13<sup>th</sup> July 2020. I find that the application was filed without reasonable delay.

7. Will the applicant suffer substantial loss if the orders sought are not granted? This issue is highly contested by the respondent in the application herein. While the applicant’s counsel has argued that the applicant does not have financial income to pay the amount ordered in the Judgment, the respondent’s counsel has argued that parental responsibility cannot be wished away and that there can be no substantial loss to be suffered by a parent due to payment for maintenance of children.

8. Indeed, parental responsibility cannot be wished away. However, in my view, depending on circumstances, a parent can suffer substantial loss, since a parent needs to survive first and make income before providing for a child. Thus if the order will render a parent destitute or collapse his business, then in such cases a parent can suffer substantial loss, and that is why the law requires that parents file in court affidavit of means to assist courts issue appropriate orders in maintenance cases. Thus though at the general level I agree with respondent’s counsel that discharging parental responsibility cannot be termed as causing substantial loss to a parent, in cases where complying with a court order has the effect of disabling the parent, then it can be termed as causing substantial loss.

9. Coming to our case, the applicant has said that he cannot currently pay Kshs. 30,000= ordered by the court for maintenance but has offered Kshs. 15,000= per month. In the circumstances of this case where it has been stated that the applicant is servicing loans and is dependant on assistance from a sister, in my view, not granting the stay orders sought could completely bring the applicant down, which amounts to substantial loss to be suffered by both the applicant and consequently the child. I find and hold that the applicant will suffer substantial loss if the stay orders sought are not granted.

10. With regard to provision of security, the applicant has offered to pay Kshs 15,000= for maintenance in the interim. In my view, such offer in a family setting is adequate security. It should be remembered also that the amount of maintenance for a child or children need not be static, as circumstances of the child’s requirements and the incomes of parents could change with time. In my view, the applicant herein has satisfied this requirement for provision of security.

11. On the argument of the respondent’s counsel that granting the orders sought will pre-determine the appeal, I do not think so since the appeal will be determined on the consideration of all the evidence on record in the proceedings before the trial court. At this stage, the court cannot go to the merits of the appeal.

12. I thus allow the application and order as follows –

**1. I grant stay of the execution of the orders of the children court herein pending appeal.**

**2. The applicant will pay Kshs 15,000= per month for maintenance of the children, from the date of the decision of the trial court, otherwise the stay orders granted in (1) above will automatically lapse.**

**3. Costs will follow the decision in the appeal.**

**Dated and delivered at Nairobi this 26<sup>th</sup> October, 2020.**

**George Dulu**

**JUDGE**