REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBSA

FAMILY APPEALNO. 15 OF 2020

BRO …….....……. APPLICANT

VERSUS

WJNW (Suing as Mother and next friend of

DJO (MINOR)…….....……. RESPONDENT

RULING

1. Vide Children case no 266B of 2018, Tononoka Children's court, the respondent the plaintiff in that case filed a suit against the applicant then the defendant seeking orders for payment of Kshs 212,000 being maintenance expenses in favour of the subject herein.

2. In its judgment delivered on 6th March, 2019, the trial court pronounced itself and made several orders among them, payment of an all-inclusive sum of Ksh 65,000 to cater for rent, food and daily up keep for the minor. The applicant was however to pay house rent on condition that the respondent did not entertain any other man in that house and if she did, she would herself take care of that rent.

3. Aggrieved by this decision, the applicant/defendant lodged a memorandum of appeal dated 16th July,2010 and filed on 17th July, 2020. On its heading, the applicant indicated that he was appealing against the orders and or ruling delivered on 10th July, 2020 and that he wanted the said orders set aside and the same be substituted with court orders that were fair to both parties.

4. When the appeal formerly registered as Civil Appeal No 144/2020 and later renamed as Family Appeal 2/2020 came for hearing, the same was dismissed on 11th September, 2020. The main ground for dismissing the appeal was that, the applicant (appellant) had made reference to orders made on 10th July,2019 instead of the orders made on 6th March, 2019. That the ruling delivered on 10th July,2019 was a culmination of the orders and decree made on 6th March 2019.

5. The court went further to state that the appeal was not properly conceived as the argument of the appeal was pegged on the orders of the judgment and not the ruling on the notice to show cause delivered on 10th July, 2019.

6. Upon realizing the mistake committed, the applicant/appellant filed a fresh memorandum of appeal dated 15th September, 2020 now citing the correct orders being appealed against.

7. Contemporaneously filed with the memorandum of appeal is a notice of motion of even date which is the subject of this ruling. He therefore seeks orders that;

i. That this application be certified urgent and heard exparte in the first instance.

ii. That in the interim this honourable court be pleased to order stay of execution of the ruling and order of honourable L.K.Sindani issued on 6th March 2019 and all consequential orders pending the hearing and determination of this application interpartes.

iii. That in the interim this Honourable court be pleased to order that the applicant continues to pay Ksh 25,000 to the benefit of the child as he has been doing pending the hearing and determination of this application.

iv. That this Honourable court be pleased to order stay of execution of the judgment and all consequential orders of the Honourable L. K. Sindani, issued on 6th March,2019 pending hearing and determination of the intended appeal.

v. That this court be pleased to enlarge time and grant the applicant herein leave to file an appeal out of time against the judgment dated 6th day of March, 2019 in respect of Mombasa TCC No. 266B/2018

vi. That costs of the application be provided for.

vii. **That this Honourable court be pleased to issue any other or further orders as it may deem fit and just to grant**.

8. The application is based on grounds advanced on the face of it and an affidavit sworn on 15th September, 2020 by BRO the applicant herein. According to the applicant reference of the orders made on 10th July, 2019 instead of those made on 6th March 2020 was a mistake committed by his advocate.

9. He contended that he is still desirous of pursuing the appeal as he is not supposed to pay rent as per the lower court order now that the respondent is staying with another man in the same house in which he has been paying rent.

10. In his view, pending hearing and determination of the intended appeal he should continue paying Ksh 25,000 as he was paying when family case Appeal No 2/2019 was pending pursuant to the orders of Justice P.J Otineo issued on 4th November, 2019. When the application was placed before the duty judge, the same was certified urgent and the applicant directed to serve. However, no interim orders were granted.

11. In response to the application, the respondent filed a replying affidavit sworn on 28th September, 2020 in which she averred that the applicant has previously disobeyed the court orders given by refusing to pay Ksh 65,000 as directed. That the appeal having be dismissed he cannot revive it through another appeal.

12. She contended that by filing this appeal, the applicant is deliberately denying her the fruits of her judgment and that the court should take into account the best interests of the child.

Applicant's submissions

13. Parties having agreed to dispose of the application through written submissions, the applicant did file his on 28th October, 2020 through the firm of Cootow and Associates. Basically, counsel submitted that pursuant to Section 78 of the Civil Procedure Act, the applicant has sufficient grounds to justify filing the appeal out of time. In support of this submission, counsel placed reliance in the finding in the case of **PaulMusili Wambua Vs Attorney General and 2 others (2015) e KLR** where the court stated that extension of time to appeal out of time is within the discretion of the court after taking into account the length of the delay, the reason for the delay, chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted.

14. Learned counsel submitted that the dismissal of family Appeal No 2/2019 is curable under Article 159 of the (2) (d) of the Constitution which provides that courts should determine matters without undue regard to technicalities.

15. That the application herein and the draft memorandum of appeal were filed 2 days after the judgment in Family Appeal No 2 /2019 was delivered hence there is no unreasonable delay. That a party should not be punished for a mistake committed by his counsel. To support this proposition, counsel made reference to the finding in the case of **Benjamin Mwea Mwanthi Vs East Africa Spectre Limited (2020) e KLR.**

16. To further fortify the argument that mistakes do occur, Counsel referred to the case **of Philip Keiptoo Chemwolo & another V Augustine Kubende (1986) eKLR** where the court of appeal held that blunders will continue to be made from time to time and it does not mean that because a mistake has been made that a party should suffer by not having his case heard on merit.

Respondent's submissions

17. Through the firm of Momanyi, and Company Advocates, the respondent filed submissions dated 6th November, 2020. M/s Momanyi submitted that the applicant has not met the threshold for grant of stay of execution as required under Order 42 rule 6 of the CPRS. That this being a children's matter, the court ought to consider the best interest of a child before granting such orders. To buttress this position, reference was made in the case of **ANM VS RKM (2018) e KLR.**

18. Counsel submitted that the amount being paid by the applicant currently is not sufficient to cater for the child. That the applicant has not demonstrated that his interest supersedes that of the child which is more superior than his a factor that was considered in ANM case (Supra).

19. Concerning enlargement of time, counsel urged that since 6th March, 2019 to date there is inordinate delay which is not reasonable and therefore not compatible with Section 79G of the Civil Procedure Act.

20. M/s Momanyi submitted that the guidelines set out for consideration in enlarging time as set in the case of **Bagajo V Christian's Children Fund INC (2004)2KLR** has not been met. She further made reference to the decision in the case **of Nichols Kiptoo Arap Korir Salat vs IEBc and 7 others (2014)eKLR** where the court stated that extension of time is not a right but an equitable right available to a deserving party.

Determination

21. I have considered the application herein, affidavit in support, replying affidavit and oral submissions by both counsel. Issues that

crystalize for determination are:

i. Whether the applicant has satisfied the requirements for enlargement of time to appeal out of time.

ii. Whether the applicant has met the threshold for grant of stay of execution orders

Whether the applicant has satisfied the requirements for enlargement of time to appeal out of time.

22. There is no dispute that this is a second appeal that is being preferred by the applicant challenging the orders made by the trial court in Tononoka children's court case No 266B of 2018. As stated above, family appeal No. 2 /2019 was dismissed on 11th September ,2019 for quoting wrong orders or decree dated 10th July, 2019 instead of the one issued on 6th March, 2019.

23. There is no doubt that the original appeal (Family Appeal No 2/2019) was dismissed on a technicality. Having been heard fully implies that the appeal was properly filed and admitted. Immediately after the appeal No 2/2019 was dismissed on 11th September, 2019 the appellant moved with speed and filed this application on 30th September, 2019 together with a draft memorandum of appeal.

24. It is clear that time for filing the appeal started running from 6th March, 2019 when the impugned judgment/decree was issued or made. The question is whether the period taken before filing a proper appeal is within the period provided for in law and if not, whether there was sufficient cause for the delay.

25. Under Section 79G of the Civil Procedure Act, an appeal from the subordinate court to the High court must be filed within 30 days from the date of the decree or order appealed against.

26. However, there is a rider (proviso) that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

27. However, the discretion whether to extend time or not lies with the court adjudicating over the matter after due consideration of the circumstances leading to the delay and whether they are viable. In the case of **Paul Musili Wambua V Attorney General and 2 Others (Supra)** the court had this to say regarding extension of time;

> **"…It is now well settled by a long line of authorities by this court that the decision of whether or not to extend time for filing an appeal the judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s)not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted''.**

28. It is incumbent upon the applicant to prove any of the factors above stated in his favour. In this case, the delay is attributed to the mistake committed by the advocate representing him by making reference to a wrong decree. The dismissal was based on a technicality and not on merit due to what the Judge referred to as an improperly conceived appeal.

29. In my view, the dismissal of the original appeal on a technicality is not a bar to instituting another appeal to be determined on merit. Therefore, the mistake committed by mixing the dates of the impugned decree is a curable mistake under Article 159(2)(d) of the Constitution and the same can be rectified by filing a proper appeal. It is trite that a litigant should not suffer an injustice for explainable mistake committed by his lawyer. In this regard I am guided by the holding in the case of **Belinda Murai&others V Amoi Wainaina (1978) KLR** where the court stated that; a mistake is a mistake regardless of who commits it; that the door of justice is not closed because a mistake has been committed by a lawyer who ought to know better and that, the court should do whatever is necessary to rectify it. I find the ground advanced to be sufficient to justify the delay in filing a proper appeal. Where there is reasonable explanation for the extension of time, a party should be accorded an opportunity to exhaust his or her right of appeal.

30. The circumstances under which the mistake arose is explainable. I do not find any prejudice in granting leave to file the appeal out of time. Indeed, mistakes do occur and where justice will be met by granting such leave, then the court will be duty bound to so grant leave. As stated in the case of **Philip Chemwolo &another vs Augustine Kubende (supra**), blunders will continue to be made from time to time and that equity demands that unless there is fraud or intention to overreach, there is no error that cannot be remedied by paying costs.

31. The central consideration in extension of time is the delivery of substantial justice. See **Daphne Parry Vs Murray alexander Carson (1963) E.A546** where the court held that the provision for enlargement of time requiring "sufficient reason" should receive liberal construction, so as to advance substantial justice. see also **First American Bank of Kenya Ltd vs Gulab P shah & 2 others Nairobi Milimani HCC No 2255/2002) 1E A 65.**

32. In arriving at the above conclusion, I am further guided by the reasoning of Omolo J A in the case of **Itute Ngui and Another Vs Isamail Mwakavi Mwendwa Civil application Nai 166 of 1997** where he stated that whereas advocate's bonafide error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered .

33. For the reason above stated, I am satisfied that the extension of time to file the appeal out time is justified and the same is allowed. Accordingly, the appellant is directed to file his memorandum of appeal within 14 days and thereafter seek for further directions.

whether the applicant has met the threshold for stay of execution.

34. The provision governing stay of execution is Order 42 rule 6 of the Civil Procedure Rules which provides that for stay of execution to issue; the applicant must prove that he is likely to suffer substantial loss should the prayer be rejected; that the application for stay has been made without unreasonable delay and that, security for due performance of the decree has been provided.

35. On the issue of time, the court has already granted leave to file the appeal of out of time. The same explanation should apply to this prayer mutatis mutandis.

36. What substantial loss or prejudice is the applicant likely to suffer if stay is not granted. It is worth noting that proof that substantial loss is likely to occur is the key consideration for granting stay of execution orders. In the case of **Halai and another Vs Thornton and Turpin (1963) Limited (1990) KLR 365** the court held that;

> **"Thus, the superior court's discretion is tattered by three conditions; Firstly, the appellant must establish sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from refusal to grant stay, and thirdly, the applicant must provide security"**

37. The applicant in this case has not tendered any convincing reason to suggest that he is likely to suffer substantial loss if he continued paying maintenance expenses as ordered by the trial court. It is now two years since the orders were made and the applicant has been evasive in honouring the decree. Before a court would exercise its discretion, it should also take into account the conduct of the applicant in relation to obedience to the order being challenged.

38. It is trite that in children matters, courts should exercise extreme caution before granting stay of execution orders. This is because issues of maintenance do affect the welfare and livelihood of a minor. To allow stay will imply stoppage of some sphere of life e.g a child will not eat, dress drink or have shelter. The orders sought against the minor's mother have a direct negative effect to the welfare of the minor whose interest ranks first in priority to those of the parents.

39. In making the above conclusion, I am guided by the wisdom in the case of **ZMO Vs EIM (2013) eKLR** where the court held that the duty to maintain a child is imposed on a parent by statute. It is not in the best interest of a child to suspend maintenance but rather the solution lies in expediting the appeal process.

40. In the circumstances of this case, I do not find any prejudice likely to be suffered by the appellant if he continued paying maintenance expenses. In my view, the answer lies in expediting the hearing of the appeal and not suspending the maintenance order as doing so will prejudice the best interests of the child. If the problem is paying rent because of some men alleged to be staying in that house with the respondent, there is a remedy provided by the lower court that upon proof, the court can reverse the order for paying rent and the same to be paid by the respondent.

41. Accordingly, the prayer for stay is hereby declined. As regards costs, this is a family matter hence each party to bear own costs.

Dated, signed and delivered this 18th day of December 2020

HON. JUSTICE J. N. ONYIEGO

JUDGE