



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E037 OF 2020**

**AB.....APPLICANT/APPELLANT**

**VERSUS**

**HRJDP.....RESPONDENT**

*(Being an Appeal against the Ruling of Hon. Mary A. Otindo, SRM given in the*

*Children’s Court at Nairobi, Children’s case No. 229 of 2018 on 10<sup>th</sup> September 2020)*

**HRJDP.....PLAINTIFF**

**VERSUS**

**AB.....DEFENDANT**

**RULING**

1. Before this Court for determination is a Notice of Motion dated 5<sup>th</sup> October, 2020 and taken out under **Sections 4(2)** of the Children’s Act, **Sections 65(1) (b) & 78(1)** of the Civil Procedure Act, **Order 42 rule 6, Order 51 rule 1** of the Civil Procedure Rules and all other enabling Provisions of the Law. The Applicant/Appellant seeks orders of stay of execution of the Ruling issued by Hon. Mary A. Otindo, Senior Resident Magistrate on 10<sup>th</sup> September, 2020, pending the hearing and determination of the appeal therefrom.

2. The applicant relies on the grounds on the face thereof and her supporting affidavit dated 5<sup>th</sup> October, 2020. The grounds of the application are firstly, that the Children’s Court lacked jurisdiction to hear and determine the matter once the minors left the jurisdiction of the Court. Secondly, that the learned magistrate erred in law and fact by issuing final orders in an application for review, in a clear departure from her initial judgment. Further, that the learned magistrate based her ruling on a Children’s Officer’s report ignoring all other evidence that was already on record before the court.

3. In her affidavit in support of the application for stay of execution, the applicant depones that she is an Indian Citizen having relocated to New Delhi with the minors in 2018. She avers that the minors, the subject matter of these proceedings never acquired Kenyan citizenship and neither did the respondent. She states that the Children’s Court in its judgment delivered on 8<sup>th</sup> July, 2020 granted actual custody of the minor to her. That consequently, the respondent filed an application for review and the court overturned its decision and granted actual custody to him on 10<sup>th</sup> September, 2020. It is her case that the court failed to take cognizance of the evidence and applied wrong principles in determining the issue of custody. Further that the court ignored the best interest of the child.

4. In response to the application for stay of execution, the respondent filed a replying affidavit dated 12<sup>th</sup> October, 2020. He contends that the court allowed the Applicant to leave the jurisdiction of the Court with the minors pending the hearing of the children’s matter but despite directives from the court during hearing for the production of the minors, the Applicant failed to comply. He asserts that the issue of jurisdiction was already raised and determined in a preliminary objection, with the court finding that it had jurisdiction. It is his case that the application does not meet the threshold for granting an order of stay of execution.

5. Learned Counsels Ms. Enricah Dulo and Mr. Mutemi made oral submissions for the Applicant and the respondent respectively. They each reiterated the contents of the affidavits in support and in opposition to the application for stay of execution, respectively.

6. I have considered the application, the affidavits filed herein and the oral submissions by counsel representing the parties in support and in opposition thereto. Although the parties have raised several issues in their arguments to advance their respective cases, I note that to venture

into the demerits and or merits of the filed appeal at this stage would prejudice the appeal itself. At this stage, the court only needs to be satisfied that the Applicant has an arguable appeal and if stay orders are not granted, the appeal will be rendered nugatory.

7. The conditions for granting a stay of execution pending Appeal are now settled. An order for stay is a discretionary remedy. The discretion is however, premised on the conditions set out in **Order 42, rule 6(2) of the Civil Procedure Rules, 2010** which states thus:

“No order of 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.”

8. In granting or refusing stay of execution pending appeal, the court exercises discretion which must, however, be based on sound judicial principles, as espoused in **Sections 1A and 1B of the Civil Procedure Act** which provides the overriding objectives of the law, thereby enlarging the conditions under **Order 42 rule 6(2) of the Civil Procedure Rules** for stay pending appeal.

9. The orders that the Applicant seeks to stay relate to children. In law, in any matter concerning children, the best interest of the children is paramount. **Section 4(3) of the Children Act**, reads as follows:

“(3) All judicial institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to -

- a) safeguard and promote the rights and welfare of the child;
- b) conserve and promote the welfare of the child...”

10. The impugned orders made by the Children’s Court, which this Court has been invited to stay state as follows:

- i. The parties shall exercise joint legal and actual custody
- ii. The plaintiff/applicant(father) shall be the resident parent during the school holidays
- iii. The respondent/mother shall have unlimited access during school holidays within the jurisdiction of the Court with liberty to travel with the minors outside the Court’s jurisdiction at the cost of the Applicant.

11. The Applicant has not in her grounds or the supporting affidavit specifically stated that she stands to suffer substantial or irreparable loss and damage if the orders of stay do not issue as prayed. She has also not specifically demonstrated in what manner the substantial or irreparable loss will be occasioned. While arguing this application, the Appellant merely mentioned the circumstances that led to the filing of this appeal and how she has an arguable appeal.

12. Going to the specifics, on the first limb, the application for stay of execution was filed on 5<sup>th</sup> October 2020, the impugned ruling having been issued on 10<sup>th</sup> September, 2020. I find that this application was brought without unreasonable delay from the date of the order sought to be stayed was issued.

13. On the second limb of substantial loss, the decisions which commend themselves to the circumstances of this case are to be found in the cases of **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**, in which Mwera J (as he then was) stated that:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”

In the case of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, Musinga, J (as he then was) explained substantial loss in the following terms:

“...substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

14. The case before me involves the custody of minors rather than a money decree. Reference to substantial loss must be quantified from the point of view of the affected children, as they are the subject of the orders appealed from and are the ones likely to suffer the most herein. There is no dispute that since 2018 the minors have been in the custody of the Applicant who is residing in India. The Applicant and the respondent are divorced and living in different countries.

15. The upshot of the above analysis is that, the Notice of Motion dated 5<sup>th</sup> October, 2020 is hereby dismissed with no order as to costs. Consequently, I direct that the Appeal herein be fixed for hearing on priority basis, for the expedited hearing and disposal of the same.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 17<sup>TH</sup> DAY OF DECEMBER, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of .....Advocate for the Applicant/Appellant

In the presence of .....Advocate for the Respondent