



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.50 OF 2018

CW.....APPELLANT/APPLICANT

Versus

CLW.....RESPONDENT

RULING

1. The Application coming for consideration is the one dated 29.5.2018 seeking the following orders;

(i) THAT this Application herein be certified as urgent.

(ii) THAT pending hearing and determination of this application, this Court be pleased to order stay of order made on 6th April 2018.

(iii) THAT pending hearing and determination of this application, this Court be pleased to stay the Ruling delivered on 6th April 2018.

(iv) THAT this Court be pleased to stay the Ruling delivered on 6.4.2018 pending the hearing and determination of the Appeal from the Ruling and orders of the Hon. T. B Nyangena (SPM) delivered on 6.4.2018

2. The application which is supported by the affidavit of CWM is based on the following grounds;

(i) THAT the Children's Court has on 6.4.2018 rendered its ruling on the Respondent's Notice of Motion dated 28th April 2017 in Children's Case No. 522 of 2011 inter alia.

a) THAT the Defendant to pay expenses incurred as sought by the Plaintiff of Ksh.221,883.22

b) THAT in default Warrant of Arrest do issue.

(ii) THAT the resultant order therefore is that the Appellant be committed to Civil Jail.

(iii) THAT the Appellant intends to appeal and has filed a Memorandum of Appeal against the said decision of the learned Magistrate.

(iv) THAT the Appellant is apprehensive that despite having acted in the best interest of his children the Respondent will proceed to obtain Warrants for his arrest and Committal to Civil Jail.

(v) THAT it is therefore for the ends of Justice that the orders sought herein be granted as prayed.

3. The Respondent filed a Replying Affidavit dated 15.10.2018 in which she deposed as follows:

(i) THAT the Appeal lacks in merit and nothing will be achieved by the stay.

(ii) THAT trial Magistrate embraced the best interest of the Child Principle set out under Section 4 of the Children Act 2001 when issuing the orders being challenged.

(iii) THAT the Application does not meet the Principles of stay as it is an effort by the Applicant to avoid his obligations.

(iv) THAT the Applicant has not come to Court with clean hands as he has not made any effort to comply with the orders of the Court.

4. The Applicant filed Written Submissions in which he stated that he has satisfied two conditions which are necessary in granting an order of Stay

a) THAT the present appeal shall be rendered nugatory unless order of stay of granted.

b) THAT the Applicant will suffer substantial loss arising from arrest and incarceration in jail.

5. The Respondent who vehemently opposed the Application submitted in writing as follows:

(i) THAT the Application does not meet the Principles of Stay of Execution as it is an effort by the Applicant to avoid his obligations and the same is frivolous and vexatious.

(ii) THAT in paragraph (g) of the Application, the Applicant acknowledges that he has a responsibility towards the Children and therefore he cannot suddenly claim inability to pay back what was originally his responsibility to pay.

(iii) THAT the applicant should be compelled to deposit the full amount in a joint interest earning account should the stay be granted.

(iv) THAT the trial Court embraced the best interest principle as set out in Section 4 of the Children Act.

6. I have considered the rival Submissions by the parties in this case, I find that as observed in ***Bhutt v. Bhutt*** Mombasa HCCC NO. 8 of 2014 (O.S.), in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 rule 6 of the Civil Procedure Rules must be complemented by an overriding consideration of the best interest of the child in accordance with the injunction of Article 53 (2) of the Constitution –

7. In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 rule 6 (2) of the Civil Procedure Rules to be satisfied that –

(i) The applicant will suffer substantial loss if stay is not granted;

(ii) The application for stay has been brought without undue delay; and

(iii) The applicant has provided security for the due performance of the decree or order appealed against.

8. In the circumstances of this case, which involves minor children of the parties, there is additional consideration imposed by Article 53 (2) of the Constitution which requires that **“a child’s best interests are of paramount importance in every matter concerning the child.”** The best interests of a child are superior to rights and wishes of parents, and they incorporate not just the physical comfort of the child but the welfare of the child in its broadest sense. The orders sought would result in depriving the minor of the maintenance amount which in my view would militate against the best interest of the child.

9. The applicant/Appellant and the Respondent have a case which is yet to be determined in the trial court and granting a stay order cannot be in the best interests of the child. This issue will best be considered at the hearing of the main suit.

10. In this regard, I am persuaded by Musyoka, J. in the ***Z M O v E I M [2013] eKLR*** where he observed as follows with regard to stay pending appeal:

“The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children’s Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”

11. I agree that where the duty to maintain a child is imposed on a parent by statute, it is not in the best interests of the child to suspend a maintenance order particularly where parentage is not in dispute and that an expedited hearing of the main suit might be a solution where there is a challenge on quantum of maintenance rather than staying the orders of the trial court .

12. Having taken all factors into consideration I draw the conclusion that the grant of the orders sought herein would not be in the best interests of the child. Accordingly I dismiss the Application dated 29.5.2018 but with no order as to costs.

13. In keeping with the foregoing general principle I find that any further delay in this matter will be prejudicial to the welfare of the child. I therefore direct that the main hearing before the trial court be fixed for hearing on priority basis, for the expedited hearing and disposal of the same.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 25TH DAY OF JANUARY, 2019

ASENATH ONGERI

