



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 89 OF 2017**

**SWM.....APPELLANT/APPLICANT**

**VERSUS**

**LNB..... RESPONDENT**

(An Appeal from the ruling/order delivered by the Honourable T.B. Nyangena, Senior Principal Magistrate, Children's Court, Nairobi on 27<sup>th</sup> November 2017 in Nairobi Children's Court, Civil Suit No. 670 of 2013)

**RULING**

1. By a ruling dated 27<sup>th</sup> November 2017, the learned Senior Principal Magistrate at the Children Court in Civil Suit No. 670 of 2013 ordered firstly; the attachment of 1/3 of the defendant's salary with effect from the month of December 2017 to cover payments into the maintenance of the minor the subject of this suit, shelter, school fees and medical expenses as ordered by the court through its order of 28<sup>th</sup> June 2013; Secondly, both counsel to take account of and reconcile the amounts paid in the past but which was disputed.
2. Being dissatisfied with the said ruling, the appellant lodged an appeal vide a memorandum of appeal dated 16<sup>th</sup> December and filed on the 22<sup>nd</sup> December 2017 contemporaneously with an application for stay of execution of the lower court's order as well as stay of proceedings in Children's Cause No. 670 of 2013 pending hearing and determination of the appeal.
3. The application was premised on the grounds that the applicant being aggrieved with the ruling of the learned Senior Principal Magistrate has filed an appeal; that his salary has been attached from January 2018 leaving him with a negative income and in a desperate situation as he is unable to fend for the rest of his family; that the said attachment of the applicant's salary has implications of rendering the appeal nugatory and causing the applicant untold suffering and substantial loss thus the need to stay the said order pending the hearing and determination of the appeal; that the attachment of his salary has consequences of him facing disciplinary action, which may include losing his job hence suffering substantial loss; that the applicant has a wife and five other children who are all in school and to whom he is responsible for their school fees and daily upkeep and he is likely not to meet their needs unless the court intervenes; that the applicant is willing to furnish security for due performance of the order by strictly complying with the order of 28<sup>th</sup> June 2013 with effect from the month of December 2017 until the hearing and determination of the appeal and to take into account and settle amounts, if any, found to be due and owing from him in arrears; that the applicant will suffer substantial loss unless the order for stay pending appeal is granted; that the application is timeous and has not been made without delay and; that the minor will not suffer prejudice as the applicant is willing to continue providing for her as he has done in the past in accordance with the court order of 28<sup>th</sup> June 2013. The application was supported by the supporting affidavit and further affidavit of the applicant dated 20<sup>th</sup> December 2017 and 6<sup>th</sup> June 2018 respectively.
4. The application was opposed by the respondent through her replying affidavit sworn on the 24<sup>th</sup> May 2018. It was her case that the applicant had not fulfilled the requirements set out in **Order 42 rule 6** of the **Civil Procedure Rules** that warrant stay of execution; that he had not demonstrated that he would suffer substantial loss unless the orders sought are granted; that the applicant did not offer any security for the due performance of the orders of 20<sup>th</sup> May 2013; that the applicant could not offer a better security than the guaranteed monthly deduction of a 1/3 of his salary to cater for the needs of the child in question which needs are not a one-off affair and; that the orders sought to be stayed were meant to deal with the applicant's inconsistent, piecemeal and utmost delayed payments that would negatively affect the welfare of the child in question..
5. During the hearing, both counsel opted to file written submissions in disposition of the matter instead of orally canvassing the application
6. Through submissions filed on 19<sup>th</sup> June 2018 by the firm of Wanyonyi and Muhia counsel representing the applicant/appellant, it was submitted that the applicant had fulfilled the principles considered in an application for stay as provided under **Order 42 Rule 6** of the **Civil**

**Procedure Rules** inter alia; proof that the applicant is likely to suffer substantial loss in the event the stay order is not granted ;that the application has been filed without undue delay and; that the applicant has furnished sufficient security in the due performance of the decree.

7. Regarding substantial loss, counsel submitted that the execution of the order of 27<sup>th</sup> November 2017 has and continues to subject the appellant and the rest of his family to great loss, untold suffering and placed him in a desperate situation as he has a wife and five other minors to provide for. Learned counsel contended that the appellant may not be able to recover the amounts already executed in the event his appeal succeeds hence likely to suffer substantial loss. In support of this position counsel made reference to the case of **Donald Maganga Mwachiofi vs Ruth Sambo Shuma(suing as the Administrator of the Estate of Elias Shuma mwakireti)[2015]eKLR.**

8. It was further submitted that the application was brought without undue delay as the ruling appealed against was made on 27<sup>th</sup> November 2017, leave to file the appeal granted on 7<sup>th</sup> December 2017 and the appeal filed together with the present application on 22<sup>nd</sup> December 2017. Regarding the security for due performance, he submitted that he had undertaken and offered to continue paying school fees and remitting the maintenance as per the earlier order of 2013 pending the conclusion of the appeal, and that even after the court made its order of 27<sup>th</sup> November 2017 he went ahead and made payments in compliance with the order of 2013.

9. In response to the Appellant's submissions, the firm of D. B. Wati appearing for the respondent filed their submissions on 5<sup>th</sup> July 2017. It was their submission that the applicant had not fulfilled the requisite conditions for granting of stay of execution as required by **Order 42 Rule 6 of the Civil Procedure Rules**; that the order of 27<sup>th</sup> November 2017 has helped streamline and promoted the interests of the minor in question as remittances are consistent, allowing for planning and timely payment of expenses of the minor hence setting aside the order will prejudice the welfare of the minor.

10. Regarding the timeliness of the application, it was submitted that, whereas the application was brought without delay, the same was a means of avoiding complying with clause 1 of the order and evading taking accounts as directed by the court.

11. Concerning security, it was their submission that children needs accrue on a daily basis and cannot wait for the convenience of the parent, and that the present case was not the kind of case for security for due performance. To buttress the above submission, counsel made reference to the case of **Antoine Ndiaye vs African Virtual University [2015] eKLR** in which the court emphasized on the principles to be considered before granting an order for stay as; proof of substantial loss, application being filed without undue delay and security for due performance of the decree or order.

12. I have carefully examined the application herein, affidavits for and against the application and submissions of both counsel. The issues that crystallize for determination are; Whether the applicant will suffer substantial loss if the order of stay is not granted; whether the application has been filed without undue delay ; whether security for due performance of the order has been deposited and; whether the appeal will be rendered nugatory.

13. The matter before me is principally touching on the best interests of a child against the convenience of a parent in honouring his parental responsibility or obligations. The best interests of a child principle is clearly captured in Article 53(2) of the Constitution of Kenya 2010 which provides that:-

**“A child’s best interests are of paramount importance in every matter concerning the child.”**

Section 4(3) of the **Children Act (Cap.141)** provides that:-

**“All judicial and administrative 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 this is consistent with adopting a course of action calculated to –**

**safeguard and promote the rights and welfare of the child; conserve and promote the welfare of the child; secure for the child such guidance and correction as is necessary for the welfare of the child in the public interest.”**

14. Under **section 6(1)** of the **Children’s Act** –

**“A child shall have the right to live with and be cared for by his parents.”**

A child has the right, under **Article 53(1)(e)** of the Constitution, to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. Kenya ratified the United Nations Convention on the Rights of the Child (UNCRC) whose **Article 18** provides that:-

**“States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”**

15. In **Butt –v- Bhutt HCCC No. 8 of 2014 (O.S.)** at Mombasa, the High Court noted that the best interests of a child are superior to the rights and wishes of the parents, and they incorporate not just the physical comfort of the child but the welfare of the child in the widest sense.

16. This application was made under **Order 42 rules 6(1), (2), (3) and (6) of the Civil Procedure Rules**. Under **Order 42 rule 6(2)**, before the Court can order stay of execution it has to be satisfied that; substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay and; the applicant has provided such security for the due performance of such decree or order as may ultimately be binding on him.

17. In the instant case, the applicant is seeking to stay the orders granted by the lower court in respect of the payment of the minor's school fees and upkeep in compliance with the court's orders made sometime May 2013. He is seeking the suspension of these payments and provision until the appeal is heard and determined.

18. The reason advanced for the said suspension is that, he may have overpaid the amount due since 2013 and that, he cannot afford to continue paying because he has another wife and five other children to provide for, and that he has been providing for the needs of the minor in question in compliance with the orders of 20<sup>th</sup> May 2013. Whether the lower court appreciated the fact that he has other children to cater for, and whether the court considered the contributions he has been making for the upkeep of the minor, are matters that the appeal will deal with. For the time being, the court is being asked to suspend the provision.

19. The child's rights to education, medical care and shelter are protected under **Article 53(1)(b) and (c) of the Constitution of Kenya 2010**. The provision of the child's education, medical care and shelter is a statutory and constitutional responsibility of the appellant from which he cannot escape. If the provision is suspended by order of stay it will mean that the child does not eat, have no shelter or walk naked for lack of clothing. The court cannot expose the child to such eventuality given the circumstances of this case. Such exposure would not be in the best interests of the child. **See Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR**.

20. On whether the appellant will suffer substantial loss if stay is not granted, the parties have each sworn an affidavit. The applicant states that he can barely meet his needs and those of the family owing to the execution whereas the respondent has sworn that the execution is the only way to guarantee the applicant's compliance with the orders of maintaining his child. The fear of the applicant is that he may have overpaid the amount ordered for maintenance since 2013 and that he should not continue paying before accounts are reconciled. His fear was addressed by the court directing counsel from both sides to reconcile accounts from 2013 to determine whether there was an overpayment or a shortfall.

21. In any event, it is ironical for the applicant to allege over payment and at the same time claim lack of enough sources of income. Be that as it may, the applicant will only pay the deficit if any after reconciliation and in case of over payment, the surplus will be used to offset future payments. As to the continued payment from December 2017 till the reconciliation of accounts or determination of the appeal is in the best interests of the child in the interim pending full determination of the appeal. On his own admission, the appellant stated that he has been faithfully paying as directed by the court. I am tempted to believe that even during that period he must have had his current wife and five children yet he was able to pay.

22. In fact, the applicant who has attached his payslip to prove how his salary and allowances of over Kshs 180, 000 have been committed to various loans has not attempted to explain when all those loans were taken to rule out a possibility of trying to defeat the execution of the decree through the back door. In my view, it has not been sufficiently shown that any substantial loss will be occasioned to the appellant if the application is not granted. In any event, it is the child who will suffer if the prayers sought are granted. To that extent that ground is not available to the applicant.

23. Regarding timely filing of the application, it is admitted by both parties that it was filed within reasonable time. The same was filed without undue delay hence nothing for consideration. Touching on the element of security, this is a special case involving the best interest of a child. This court in exercise of its discretion cannot suspend maintenance expenses of a child without rendering an option to the child to continue eating or dressing. Depositing security is not an option at this stage.

24. As concerns the appeal being rendered nugatory, the court is duty bound to balance the interest of the minor against that of the applicant (father). In the case of **Dhimani vs Shah (2008) eKLR page 165** the court of appeal stated that:

**“The principles upon which the court exercised its unfettered jurisdiction under the Court of Appeal Rules rule 5(2)(b) were: the applicant was required to show that the intended appeal or appeal was arguable and that unless the Court granted the order or orders sought (a stay of execution or an order of injunction or a stay of proceedings) the intended appeal would be rendered nugatory”.**

25. Without delving into the merits of the appeal, it is my finding that the appeal will not be rendered nugatory as the appellant will not suffer any prejudice as he continues to maintain the child a responsibility he has been executing before till the appeal is heard and determined. In any event, nothing has changed in terms of the orders he has been complying with.

26. Having held as above, it is my conviction that the application herein has fallen short of proof of the threshold set before granting an order of stay. Accordingly, the application herein is dismissed with no order as to costs. The Deputy registrar is hereby directed to call for the original file for purposes of fast tracking the appeal.

**DATED DELIVERED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2019**

**J.N.ONYIEGO**

**JUDGE**