



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 13 OF 2019

SGB.....APPLICANT

VERSUS

NKG.....RESPONDENT

RULING

1. In the application before me dated 10.5.19 (the Application), SGB, the Applicant seeks the following orders:

1. Spent.

2. Spent

3. THAT pending hearing and determination of the Appeal herein, this Honourable Court be pleased to stay execution of the ruling and order of Hon. J. Yator delivered on 9th May 2019 in Tononoka Children's Case Number 255 of 2018.

4. THAT costs for and incidental to the Appeal be provided for.

2. The grounds upon which the Application is premised are contained in the body of the Application and in the Applicant's supporting affidavit sworn on even date.

3. The Application is opposed by the Respondent by her replying affidavit sworn on 20.5.19. To the Respondent, the Application is incompetent on the ground that the Applicant has not filed any appeal against which an order of stay may be granted.

4. Before considering the merits of the Application, it is necessary to determine whether the same is properly before the Court. To begin with, although the Application is for stay of execution, it has been brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Section 4 of the Children Act and Article 53 of the Constitution of Kenya, 2010. It is to be noted that none of these provisions relates to stay of execution. The failure by the Applicant to move the Court under the correct legal provisions is however a procedural technicality that can be overlooked by the Court. This is because the Court is alive to the provisions of Article 159(2)(d) of the Constitution which require that:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities; and

5. The jurisdiction of the Court to grant stay of execution pending appeal is contained in Order 42(6) of the Civil Procedure Rules which provides:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

6. The foregoing provision refers to ***the court to which such appeal is preferred shall be at liberty, on application being made, to consider***

such application [for stay of execution] and to make such order thereon as may to it seem just. It is clear that the rule envisages an appeal being in place for the Court to consider an application for stay.

7. In Redland Enterprises Limited v Premier Savings & Finance Limited [2002] eKLR, Khaminwa, J. faced with a similar application had this to say about the rule:

The rule contemplates that an appeal must be in being before an application can be entertained. See the authority Singh v Runda Coffee Estates Ltd. [1966] EA 263... The wording indicates that it is the court to which an appeal has been filed not to which the appeal shall be preferred.

8. The Applicant himself appears to be aware that for stay pending appeal to be granted, the appeal must be in place. Indeed prayer 3 of the Application reads:

3. THAT pending hearing and determination of the Appeal herein, this Honourable Court be pleased to stay execution of the ruling and order of Hon. J. Yator delivered on 9th May 2019 in Tononoka Children’s Case Number 255 of 2018. (underlining mine)

9. The Applicant refers to the appeal herein. The matter herein is a miscellaneous application and not an appeal. Even if the Court were to disregard the procedural blunder of moving the Court under the wrong provisions, the Applicant would still run into headwinds as he has to contend with the fact that there is no appeal against which an order for stay can be granted. In the Application, the Court is being asked to stay execution pending an appeal which has not been filed. Although one of the documents exhibited in the Applicant’s supporting affidavit is a memorandum of appeal, the same is a draft and has not been filed. It is also not indicated in the Application when the same would be filed or why indeed the same was not filed.

10. Without an appeal in place, the Respondent being a successful litigant should not, by an order of stay of execution, be prevented from the enjoyment of the fruits of her judgment indefinitely. This was the holding of the case of Portreitz Maternity vs James Karanga Kabia HCA No 63 of 1997 (UR) where the Court stated:

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be just cause for depriving him of that right.”

11. In the end I find and hold that the Applicant seeks orders that cannot be granted. Accordingly, the Application dated 10.5.19 lacking merit is hereby dismissed. This being a matter concerning a child, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 27th September 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Applicant

.....for the Respondent

.....Court Assistant