REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 37 OF 2019

DNW.....APPELLANT/APPLICANT

VERSUS

FWK.....RESPONDENT

RULING

1. The parties herein are man and wife, respectively. They have two children who are minors. The youngest is aged 7 years and in the material period, was in the custody of the Applicant while the oldest child lived with the Respondent. By the judgment of the lower court, now challenged through this appeal, the trial court granted custody of both minors to the Respondent and ordered the Applicant to pay maintenance.

2. The Applicant is aggrieved by the said judgment and upon filing his appeal, filed an application to stay execution of the judgment. The motion filed on 20th March, 2019 is expressed to be brought under Articles 45, 50 & 53 of the Constitution, Sections 3 and 3A of the Civil Procedure Rules and Sections 4, 80, 83, 84 & 87 of the Childrens Act. The application primarily seeks an order that pending the hearing and determination of the appeal, this court does grant an order of stay of execution of the judgment and orders of the lower court made on 11th February, 2019 in **Thika Chief Magistrate's Court Children's Case No. 159 of 2018.** There is a further prayer to set aside the impugned orders which obviously cannot be entertained at this stage.

3. **DNW** swore the supporting affidavit to the application. He deposed that by the impugned judgment of the lower court, the Respondent was granted legal, physical and actual custody of the couple's two minors including the 2nd born minor who was previously in his full custody. He complains that the trial court failed to take into account that the Applicant had not been heard during the trial; that the Respondent had not been in contact with the 2nd minor since 2014 ; that execution of the judgment will not be in the best interest of the 2nd minor child and that the Respondent will not be prejudiced but that if stay is denied, the appeal would be rendered nugatory .

4. **FWK** opposed the application through a replying affidavit. Therein, she denied the claim by the Applicant that he was denied a fair trial, asserting that his counsel on record was always present in court, and that during the defence hearing the Applicant deliberately left the courtroom after the hearing was confirmed; that the instant application was only meant to delay the resolution of this matter and that the Applicant continues to deny the Respondent custody of the second born minor. She contended that she is capable of providing for the minors contrary to the Applicant's assertions. She asserted that if the orders sought are granted, she and the minors would suffer prejudice. Moreover, that the Applicant has not demonstrated likelihood of substantial loss or prejudice to be occasioned if the order for stay is not granted.

5. The application was canvassed by way of oral submissions. Miss Kamande, counsel for the Applicant submitted that the Applicant is the biological father of the minors. She asserted that the Applicant had been present in court at the hearing before the lower court but his prayer for adjournment on grounds of unavailability of his counsel was rejected. It was submitted that the custody of the second born minor was given to the Respondent as the minor is a child of tender years. Reiterating that the Applicant had custody of the youngest child since 2014, counsel contended, that the change of custody affects the emotional well-being of the child and that the wishes of the child were not taken into consideration. She expressed apprehension that the affected child risks being be destabilized if the stay order is not granted.

6. Mr. Gitonga, counsel for the Respondent submitted that stay pending appeal is granted upon a demonstration of substantial loss which is assessed by the totality of consequences to the Applicant. He argued that no such ground had been demonstrated in this case. Reliance was placed on the case of **RWW vs. EKW (2012) eKLR**. Counsel further pointed out that the Applicant was granted visitation rights by the lower court. The court was urged to balance the rights of both parties. The Respondent was said to be willing and capable to care for both minors.

7. The court has considered the material canvassed in respect of the motion by the Appellants. In order to succeed, an applicant invoking the provisions of Order 42 and 6(1) and (2) of the Civil Procedure Rules is required to satisfy three conditions. He must: -

a. Approach the court without unreasonable delay.

b. Satisfy the court that substantial loss may result unless the order sought is granted.

c.

d. Furnish security for the due performance of the decree appealed from.

8. At this stage, the court is not concerned with the merits of the grounds of appeal which the Appellants have addressed in their submissions. The application herein was filed timeously.

9. Has the Applicant demonstrated likelihood of suffering substantial if stay is denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] KLR 410**.

Holdings 2, 3 and 4 therein are particularly relevant. These are that:

> **"1. …..**
>
> **2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.**
>
> **3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**
>
> **4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.**
>
> **5. …..**"

10. Hancox JA in his ruling observed that:

> "**It is true to say that in considering an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would… render the appeal nugatory.**
>
> **This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-**
>
> "**I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.**"
>
> **As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.**"

11. The case before us is unique as it 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 minor child, as he is the subject of the orders appealed from and likely to suffer the most prejudice in comparison to the parties herein. There is no dispute that since 2014 when the subject minor was two years old, he has been in the custody of the Applicant. And though the circumstances leading to that state of affairs is disputed, it is agreed that the Respondent literally handed over the minor to the Applicant. Thus, until the judgment of the lower court, the child lived with the applicant.

12. It is not difficult to anticipate that the child may be destabilised if suddenly handed over to the Respondent. And yet, he is a minor of tender years. The best interests of the child must prevail in the end. If stay were not granted, it would be confusing for the young child, if at the end of the day, the custody arrangement were to change yet once more. If stay of execution is granted pending appeal, and the appeal resolves in the Respondent's favour, the child will hopefully experience change in custody just once. In the meantime, the court could make appropriate orders to ensure that the Respondent isn't unduly prejudiced in this connection and that the appeal is expedited.

13. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR,** citing the decision of Sir John Donaldson M. R. in **Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** remain relevant in an application of this nature:

> "**We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff……**
> **It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal……**"

That too is the import of part of the court's observations in **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR** and the **Shell** case above.

14. In my considered view, the best interest of the child and justice of the case calls for the maintenance of the status quo, pending the determination of the appeal. The court will therefore grant stay of execution pending appeal. However, the Respondent shall have custody of the minor during school holidays as well as visitation rights. In order to expedite the appeal, the court directs the Applicant to file the record of appeal within 45 days of today's date, and thereafter prosecute his appeal within 12 months of admission. For the avoidance of doubt, the appeal stands formally admitted as of today's date. Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER 2019

C. MEOLI

JUDGE

In the presence of:

Mr Odongo holding brief for Miss Kamande for Applicant.

Mr Karinya for Respondent.