



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 39 of 2017

A N M APPELLANT/APPLICANT

VERSUS

R K M RESPONDENT

RULING

1. By a Notice of Motion dated 6.12.17 and filed under Certificate of Urgency, A N M, the Appellant/Applicant seeks in the main stay of execution of the orders of the Children's Court made by the Tononoka Children's Court in Case No. 275 of 2017 on 13.11.17.

2. The brief background of this case as can be gleaned from the record is that the Appellant/Applicant and R K M, the Respondent herein began to cohabit in 2006. The parties thereafter solemnized their union on 22.2.10 at the Registrar's Office in Mombasa. The marriage is blessed with 2 children R K born in 2006 and F M born in 2011. The marriage experienced strain and in April 2016, the Appellant/Applicant left the matrimonial home. She moved to the Children's Court vide TCC No. 275 of 2017 and by an application dated 22.8.17 sought *inter alia* an order that the Respondent be ordered to pay 50% of school fees, upkeep and accommodation for the children. The Appellant/Applicant claimed that the entire responsibility regarding the children fell on her solely and sought that the Respondent be compelled to discharge his parental responsibility.

3. In her ruling of 13.11.17, the learned Magistrate being satisfied that the Respondent was under financial constraints made interim orders that the Respondent contributes $\frac{1}{4}$ of school fees, transport and Kshs. 10,000/= as monthly upkeep. The Respondent was granted access of the children during half the school holiday and parties were to agree on which of them would have the children on which half of the holiday. On 20.11.17, the Children's Court directed the Applicant to hand over the children to the Respondent on 9.12.17 at Mombasa Sports Club and return them to the Applicant on 27.12.17 at the same venue. It is these orders that the Applicant has appealed against and now seeks stay in respect thereof. The order of 20.11.17 has however been overtaken by events. This ruling thus relates to the order of 13.11.17.

4. The Application is premised on the grounds on the face thereof and on the facts set out in the affidavit of the Appellant/Applicant sworn on 6.12.17. The Appellant/Applicant avers that since the separation of the parties, the Respondent has not seen the children save for a few minutes on one occasion. The Appellant/Applicant is aggrieved because to her, the order granting the Respondent access to the children is tantamount to partial custody over half the school holidays. Further, the order was out of the blue as there was no prayer before the Court by the Respondent for custody or access. The Appellant/Applicant is of the view that the order for access is inimical to the welfare of the children as they would be under the care of persons with whom they have seldom spent time. The Respondent has not seen the children for over 18 months and has only given Kshs. 30,000/= for their upkeep. The Applicant further avers that no order for access was sought and ought not to have been given prior to the full hearing of the matter and where custody is an issue.

5. In his Replying Affidavit sworn on 7.2.18, the Respondent asserts that he is the father of the children and that the Appellant had denied him access to them for over 1½ years. He stated that he was with them in Meru during the holiday and that they were happy to be with him. The Respondent contends that he is not asking for full custody of his children but that as their father he deserves to be with them once in a while. He is of the view that this is not too much to ask. He avers that he is a responsible father but is undergoing financial strain. He urged the Court not to interfere with the order of the lower Court.

6. I have given due consideration to the matter herein together with the submissions filed by the Appellant/Applicant. From her pleadings and submissions, it would appear that the order for access of the Respondent to the children is what the Appellant/Applicant is unhappy with. The issue for determination therefore is whether or not to stay of the order made on 13.11.17 granting the Respondent access to the children herein for half the school holidays pending appeal.

7. Grant of stay of execution of an order pending appeal is discretionary. Order 42 rule 6 (2) contains the factors that the Court must consider in exercising its discretion in determining whether or not to grant a stay of execution:

"(2) No order for stay of execution shall be made under subsection (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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant"

8. Beyond the requirements of Order 42, this being a matter concerning children, the Court is enjoined by the Constitution of Kenya 2010 and of the Children Act, to consider the best interests of the Children. The Constitution of Kenya 2010 provides at Article 53(2) that:

"A child's best interests are of paramount importance in every matter concerning the child.

The Children Act on the other hand provides at Section 4(3) that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

9. Was the Application for stay sought without considerable delay? The Order appealed against was delivered on 13.11.17. Both the Memorandum of Appeal and the Application herein were filed on 7.12.17. I am satisfied that the application has been made timeously and without unreasonable delay.

10. On the issue of substantial loss, the Appellant/Applicant, argues that this being a matter concerning children, the guiding principle is the best interests of the children. She argued that the order may be quite destabilizing for the children given their age. She urged that *status quo* prior to the order be maintained. I have considered the submissions by the Appellant/Applicant. Other than merely stating that the children will be destabilized if stay is not granted, the Appellant/Applicant has not stated just how spending half the school holiday with their biological father would destabilize the children. It is the view of this Court that children should not be deprived of one parent's input in their lives regardless of that parent's relationship with the other parent. It is unfortunate that very often when a relationship between 2 parents fails and they part ways, the domiciliary parent seeks to deprive the other parent access to the children in the mistaken belief that they are punishing that parent. Sadly, it is the children who suffer from such deprivation. Many fail to understand that very often, children who grow up with the presence of both parents in their lives, though separated, end up more balanced than those who are denied the opportunity of having the other parent in their lives.

11. Further, the Children's interest supersede those of the parties and the Court in considering an application for stay must weigh the interests of the Children against those of the Appellant/Applicant and uphold the interests of the Children. In the case of C.K.K v C.M.M [2016] eKLR, Achode stated:

"In the circumstances of this case it is Baby C.M.M and not the two protagonists who stands to suffer loss since we are not dealing with a material claim.

Likewise in the instant case, it is the children and not the Appellant/Applicant who stand to suffer substantial loss if the orders sought are granted. The rights of the children override the rights of the Appellant/Applicant.

12. The Appellant/Applicant has not demonstrated to this Court the substantial loss the children stand to suffer if the order for stay is not granted. To grant a stay of execution therefore is to suspend the rights of the children to be with their father pending the hearing and determination of the appeal. In the circumstances, I consider that a stay of execution would not be in the best interests of the Children herein. Accordingly, I find and hold that the Application dated 6.12.17 lacks merit and the same is hereby dismissed but with no order as to costs. In accordance with the general principle under section 76(2) of the Children Act I direct that the Appeal herein be fixed for hearing without delay for the expedited hearing and determination of the same.

DATED, SIGNED and DELIVERED in MOMBASA this 13th day of April 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant/Applicant**

..... **for the Respondent**

..... **Court Assistant**