



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 182 OF 2017

JMM.....APPELLANT

VERSUS

PM.....RESPONDENT

(An application for stay of execution of the Judgment of Bartoo, SRM in Thika, Chief Magistrate's Court Children Case Number 28 of 2015)

RULING

1. Before me is an application by way of Notice of Motion filed on 22nd February, 2018 and brought under Sections 1A, 1B and 63(c) and (e) of the Civil Procedure Act, Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules. The main order sought is that the Court be pleased to order stay of execution of the judgement in ***Thika, Chief Magistrate's Court Children Case Number 28 of 2015***, pending the hearing and determination of the Applicant's appeal.
2. The application is premised on the key ground that the Respondent is set to proceed with execution and unless stay of execution is granted, the appeal herein, shall be rendered nugatory.
3. The Appellant/Applicant, **JMM**, swore a supporting affidavit. He deposed that judgment was delivered in favour of the Respondent and that the Respondent has taken steps to execute the said Judgment. Consequently, the Appellant being aggrieved by the said judgment wishes to appeal and his appeal has high chances of success. He states that he will suffer irreparably if the stay order is denied.
4. The Respondent filed her grounds of opposition on 6th March, 2018. To the effect that the children's best interests should prevail and that the application is meant to deprive the minors of their rights. Further, that the appellant is in contempt of the lower court's judgment hence his application should be dismissed with costs.
5. The application was canvassed by way of written submissions. The Appellant/Applicant submitted that a consent order was recorded earlier allowing the parties equal access to the children; that there were no circumstances to warrant the reduction of access to the children in respect of the Applicant. Reliance was placed on Article 53 of the Constitution which provides that all parents have equal right to access their children. It was submitted that the appellant caters for the children's fees and related expenses and yet the lower court judgment required him to additionally pay Kshs. 10,000/= for food, an order that has aggrieved the appellant. Lastly, the Appellant submits that his appeal is arguable and his facts are not disputed.
6. The Respondent through her counsel submitted that the Appellant has failed to comply with the judgment by the lower court. Counsel submitted that they did not object to the Appellant's access to the children but the same should be structured properly.
7. The court has considered the matters canvassed in respect of the application for stay of execution pending appeal. The subject matter of the proceedings in the lower court was the custody and maintenance of the three issues of Appellant and the Respondent who are currently estranged. The Applicant's key plank in support of the application is that the Applicant will suffer irreparable loss and his appeal will be rendered nugatory, and the interest of the minor issues adversely affected, if the stay order is not granted.
8. The Applicant was aggrieved not only with the custody orders but also the order that he pays a sum of KShs.10,000/= per month towards the provision of food for the minors in addition to catering for all their education needs. On the date of the hearing of the application, the parties recorded a consent order on custody and access to the minors pending appeal. Thus, the sole issue outstanding relates to the order for payment of KShs.10,000/= per month by the Applicant.
9. The principles upon which the court may stay the execution of orders appealed from are settled. The Applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the performance of the decree in the event the appeal does not succeed. These are the requirements stipulated in Order 42 r 6(2) of the Civil Procedure Rules.

10. The decision appealed from was handed down on 16th November 2017 and the appeal filed in the same month. The present application was filed on 22.2.18. The period is reasonable. The quintessential decision of the Court of Appeal in **Shell Ltd v Kibiru and Another [1986] KLR 410**.

11. **Platt JA** set out two different circumstances when substantial loss could arise as follows:

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts...”

The learned Judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
(emphasis added)

12. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the questions 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.”

13. What I hear the present Applicant to be stating is not so much that he may be unable to recover the monthly payments as ordered by the lower court if his appeal succeeds. But rather, that he will suffer difficulty in making the payments in light of other responsibilities he was ordered to shoulder in respect of the minor children. He goes on to allude to the likely detriment that could be visited upon the minors if execution is levied against him. He filed an affidavit of means in addition to his supporting affidavit. The Respondent relied on grounds filed in opposition to the application.

14. The court must be careful in dealing with the application so as to uphold the best interest of the minors, but also to avoid determining the merits of the appeal at this stage. The Applicant’s affidavit of means is not controverted and indeed, it is admitted, that the Applicant is responsible for providing for all the educational needs of the minors which include boarding school fees for the eldest child, fees including lunch, for the youngest twins and all related educational needs. He has asserted that he earns a sum of KShs.100,000/= in a “good month”. And while he has not provided firm evidence to that effect, the deposition is not controverted.

15. 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** are apt:

“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.....”

(See also **James Wangalwa & Another -Vs- Agnes Naliaka Cheseto [2012] eKLR.**)

16. Weighing all the relevant matters, considering the interest and welfare of the minors, and in light of the agreed custody arrangements between the parties, I am persuaded, pending the hearing and determination of the appeal to allow a partial stay of the execution of the order for the payment of KShs.10,000/= per month as provision for food. The stay will be in respect of half the sum ordered in the lower court, so that the Applicant will henceforth be liable to pay a sum of KShs.5000/= per month for the provision of food for the minors.

17. The stay is granted upon the following conditions:

a) The Applicant is to deposit into court, for payment to the Respondent, a sum of KShs.55,000/= being the outstanding food provision arrears total as at November, 2018, calculated at the rate of KShs.5000/= per month since December 2017.

b) The sum is to be deposited into court by close of business on 5th December 2018.

c) Further, effective from 5th January, 2019, the Applicant will pay the sum of KShs.5000/= monthly as food provision in respect of the minors. The payment is to be made before the 5th day of each succeeding month until the appeal is determined.

d) The Applicant is to file the record of appeal within 180 days from today's date, excluding the Christmas vacation.

18. The stay order will be vacated in the event of default on any of the above conditions. For the avoidance of doubt, the ruling relates only to the lower court's order No.3 which is in connexion with the monthly provision of food for the minor issues.

In light of the nature of the dispute, parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 23RD DAY OF NOVEMBER 2018

C. MEOLI

JUDGE

In the Presence of:

Miss Mulumba holding brief for Mr. Mwenda for the Appellant

Respondent – No appearance

Court Clerk - Kevin