



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL NO. 15 OF 2015

C C D APPELLANT/APPLICANT

VERSUS

E N BRESPONDENT

RULING

1. By a Notice of Motion dated 24.6.15 and filed under Certificate of Urgency, the Appellant/Applicant seeks in the main stay of execution of the order of the Children's Court made in the Tononoka Children's Court in Case No. 65 of 2014 on 28.5.15 directing him to contribute the sum of Kshs. 61,290/= per term for minors Y.M. and E.J.C, pending the hearing and determination of the appeal herein. The Memorandum of Appeal is dated 17.6.15 and filed on even date.

2. The Application is founded on the grounds set out on the face of the application and on the facts set out in the affidavit of the Appellant/Applicant sworn on 24.6.15. The Respondent in spite of being served by substituted service with leave of the Court did not file any response.

The Appellant/Applicant's Case

3. In his Supporting Affidavit sworn on 20.8.15, the Appellant/Applicant takes issue with the decision of the trial Court for directing him to pay the said sum of Kshs. 61,290/= per term for minors Y.M. and E.J.C. The Appellant/Applicant's case is that he is not the father of the minors and has never assumed parental responsibility over them. It is also his case that he has never been married to the Respondent so as to assume parental responsibility over the minors. He argues that that he has an arguable Appeal with a high probability of success and the same will be rendered nugatory if the orders are not granted. The Appellant/Applicant further expresses his apprehension that if he pays the said amount, he may not recover the same from the Respondent should the Appeal succeed.

4. The Application was canvassed before me by Mr. Wachenje learned counsel for the Appellant/Applicant. Counsel submitted the orders sought are intended to protect the Appellant/Applicant pending the hearing and determination of the Appeal. He argued that the orders are merited because the Appellant/Applicant has never assumed parental responsibility of the minors. He submitted that the Appellant/Applicant was never married to the Respondent nor cohabited with her for any period that would give rise to a presumption of marriage. Counsel further submitted that the Appeal will be rendered nugatory because the termly school fees paid by the Applicant will not be recoverable from the Respondent. Counsel urged the Court to grant the stay of execution of sought.

Determination

5. I have considered the Application, the Affidavit in support thereof, the Memorandum of Appeal and the oral submissions before me. The Applicant did not file written submissions nor did he provide any authorities to assist the Court in the determination of the matter herein. The issue for determination is whether or not a stay of the orders made on 28.5.15 pending appeal should be granted.

6. 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”

7. Was the Application for stay sought without considerable delay? The Civil Procedure Act at Section 79G provides that

“every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against...”

The Judgement/Order appealed against was delivered on 28.5.15. The Memorandum of Appeal was filed on 17.6.15. This was well within the thirty day period provided by law.

8. On the issue of substantial loss, the Appellant/Applicant, the Applicant states that if he pays the amount directed to pay by the trial court in school fees, he will never recover the same. The Appellant/Applicant has not tendered any evidence to show that the Respondent will not be able to repay the amount should the Appeal herein succeed. He ought to have shed more light on this claim for the Court to make an informed decision.

9. Security for due performance is critical where an appeal fails and an appellant is saddled with the costs thereof. The Appellant/Applicant herein has not offered any security for due performance. The Respondent ought to be insured against the Appellant/Applicant’s inability to pay or to perform any other obligation under the original decree.

10. 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 **“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...”**

11. Beyond the requirements of Order 42, this being a matter concerning children, this Court is enjoined by the above provisions of the Constitution and of the Children Act, to consider the best interests of the children herein.

12. As stated by Musyoka J in Z M O v E I M [2013] eKLR

“as a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying

the matter before the Children's Court to wait the outcome of the appeal”.

13. This Court is alive to the fact that the paternity of the children in this case is not disputed. The children are not the Appellant/Applicant's. The Court is also aware that the dispute is not on the quantum payable. What is disputed is the parental responsibility imposed on the Appellant/Applicant, leading to the order appealed against. In these circumstances, I consider that a stay of execution would not be in the best interests of the children herein. However, an order for the expedited hearing and determination of the Appeal herein will meet the justice of the case.

14. Consequently, I decline the request for stay of execution of the orders of the Tononoka Children Court made in Case No. 65 of 2014 on 28.6.15. In accordance with the general principle under section 76 (2) of the Children Act, I direct that the matter be mentioned before Court on 9.3.16 with a view to fixing an early hearing date of the Appeal.

DATED, SIGNED and DELIVERED in MOMBASA this 23rd February 2016.

M. THANDE

JUDGE

In the presence of: -

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

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

..... **Court Assistant**