



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. 99 OF 2015

K M M.....APPELLANT

VERSUS

J I L.....RESPONDENT

RULING

INTRODUCTION

The Appellant/Applicant by way of Notice of Motion on the 2nd October 2015 sought a stay of execution of the court orders emanating from the Ruling of the Honorable Munyi (SRM) Children’s Court delivered on the 21st September 2015 pending the hearing and determination of the Application and Appeal. By the Ruling delivered on the 08th of February 2016, the Court upheld the Ruling of the Trial Court particularly relying on **Section 24(3)(a) of the Children’s Act of 2001**.

PLEADINGS:

The Applicant filed an Application on the 12th February 2016 and sought stay of execution of the Court Order of 8th February 2016 more specifically on the release of the minor/child to the mother, the Respondent, who works and resides in Dubai pending hearing and determination of the appeal. The grounds are that the child is well settled in Kenya with the Applicant’s family and in school.

Since then the hearing of the matter has been fixed for hearing interpartes in the Children’s Court on the 21st of April 2016 in the **Children’s Court Case 158 of 2015**. Also, the child is in the middle of school term with school holidays ending on the 22nd of April 2016 and his academic year ends on the 10th April 2016. Therefore it would not be in the best interest of the child to destabilize him from the environment that he is accustomed to at home and in school.

In any event it would be difficult for the Applicant to maintain the child’s school fees and other needs in Dubai. That if the court’s ruling is effected before the hearing and determination of the suit the outcome shall be rendered nugatory. By further affidavit of 24th February 2016 the Appellant reiterated that the minor is not unhappy in his current environment and he does not intend to prevent the Respondent from access to the minor. She has access to the child. The Respondent did not produce documents of enrolment of the child in a school in Dubai.

PLEADINGS:

The Respondent filed a Replying Affidavit on the 22nd of February 2016 and stated that the court was *functus officio* by delivering its ruling on the Application on 8th February 2016. The court also dismissed the Oral Application for stay of execution Order made on the same date of the Ruling on 8th February 2016. The Application was for interim orders of stay of execution pending an Appeal which has not been filed to date. The Applicant has not filed an Appeal against this Court's orders.

There are no new and important issues for determination that have been presented to this court. The hearing date of the matter in the Children's Court was obtained at the instance and Application of the Respondent's Counsel and not by the Applicant's Counsel. The reliance of this hearing date is to delay the execution of court orders. There is non confirmation whether an Appeal of the Children's Court's order is filed to be heard or the appeal against this Court's Orders will be filed or the Children's Court is to proceed with the hearing. The Applicant has no intention of obeying the High Court Orders.

The Applicant has proceeded to have the child undergo psychological counseling without seeking the Respondent's input or consent.

As deponed in the Affidavit of 21st March 2016, the Respondent has complied with the Orders of this Court's conditions for release of the child to travel to Dubai. She annexed all the documents to prove the fact "JK1", "JK2" and "JK3" of the affidavit.

The Respondent stated that the child came to Kenya through mutual agreement as there were no Pre-school institutions in Dubai. The Child joined Gigiri [particulars withheld] through mutual agreement of both parents. She has since enrolled the child in [particulars withheld] School in Dubai and is ready to proceed with him to stay and study in Dubai and allow access to the father. The Respondent is ready and willing to foot the child's educational needs if she has custody of the child.

The Respondent reiterated that she does not have unrestricted access when the child is in custody of the father to the child, she does not talk to the child on phone or Skype or except through the Applicant and Nanny.

LAW:

The law on stay of execution is provided by,

Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;

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.***

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

(3) ***Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution***

pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

DETERMINATION:

Based on the competing submissions of the parties in this matter and the provisions on stay of execution the Court states the following;

- a. There is no provision on stay of execution of the High Court Orders pending a hearing before the subordinate court. The stay of execution is applied for before the Trial court and the Appellate court. Therefore the fact of seeking a stay of execution pending the hearing of the matter in the Children's Court scheduled for the 21st of April 2016 cannot be the basis of a stay of execution application.
- b. The Court ruling of 08th February 2016 was on the basis of interim orders pending appeal of the Court Order of 21st September 2015. Once the Appeal has been filed and heard the orders of this court shall vacate forthwith unless adopted or affirmed on Appeal.
- c. The fact of obtaining a hearing date in the Children's Court is a separate arrangement that has no bearing to the Ruling of this Court. The ruling was a culmination of the facts presented to the Court at the time and the hearing date of the suit in the Children's Court was after the Ruling of this Court's was delivered. The hierarchy of courts as prescribed in **Article 165 (6) and (7) of the Constitution 2010** is such that the hearing and determination of matters in the Children's Court cannot hold up the High Court neither can the High Court hold up the Court of Appeal and so on and so forth. The orders of the High Court supersede the orders of the Trial Court and shall be complied with in the absence of an Appeal.
- d. This court was persuaded by **Section 24 (3) of the Children's Act 2001'** that though both parents of the child have done a commendable job to protect and provide for the child, a child of tender years; 4 years old is best placed to be with the mother unless compelling circumstances are presented. The mother shall have parental responsibility in the first instance when the parents of the child are not married.

The facts deponed in the Applicant's and Respondent's affidavits were also canvassed by the parties and were taken into account in the ruling of 8th February 2016. The Court can only rely on its Ruling in this matter.

It is from the above mentioned reasons that the Application for Stay of Execution is dismissed with Costs.

READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22nd DAY OF APRIL, 2016

MARGARET W. MUIGAI

JUDGE

In the presence of,

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