REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 101 OF 2015

C K K.....APPELLANT/APPLICANT

VERSUS

C M M.....RESPONDENT

R U L I N G

1. Before this Court for determination is a Notice of Motion dated 6th October, 2015 and taken out under **Order 51 Rule 1, Order 40 rule 7, 43 Order Rule 1(1)(u)** of the **Civil Procedure Rules 2010** and **Section 3A** of the **Civil Procedure Act, Cap 21 laws of Kenya**. It seeks orders of stay of enforcement of the Orders of the court in **Nairobi Children's Case Number 1860** of **2013**, **CMM vs CKK** as contained in the court's Ruling of 25th September 2015 pending inter parties hearing of this application.

2. The Applicant also prays that there be a stay of execution of the court's Orders in the above case pending the hearing and determination of this appeal.

3. The Applicant further prays for orders that the Respondent be ordered to pay 50% of the minor's school fees directly to the minor's school [Particulars Withheld], Kshs.10,000/= towards the monthly maintenance of the minor and to remit this payment directly to the Appellant's Advocates on record by the 10th day of every month beginning from October 2015.

4. For purposes of the Respondent's visitation rights, the Applicant prays that his access be done in a Children's Office under supervision as recommended by the Children's officers in their reports. That the Respondent be ordered to collect the minor, accompanied by the Children's officer, only from Kyumvi Machakos at Athi River Block 1/ [Particulars Withheld] where she is residing with the Applicant and the Applicant's mother. That such visitation be on Saturdays once every month, from 9.30 a.m. and to return the minor to the same place latest by 5.30 p.m. of the same day, regardless of the school calendar.

5. The application is premised on grounds that the orders touching on the minor made in the Children's court ruling on 25th September 2015 were in total disregard of the law, the evidence adduced at the hearing thereof and the findings and recommendations of two Children's officers. The Applicant alleges that the said orders are not in the best interest of the minor, who is a young girl aged 5 years, since the Respondent does not have a fixed abode or any evidence of income. The Applicant asserts that she intends to appeal against the said ruling, and prays that the court grants the orders sought.

6. The Respondent has opposed the application, in his Replying Affidavit dated 29th October 2015. He avers that the application is incompetent untenable and a non-starter. He contends that the Applicant has not appealed against the Ruling of the Nairobi Children's case No. 1860 of 2013 delivered on 25th September 2015 and cannot seek stay of execution of an order which is not appealed against. He argues that he has not been served with a memorandum of appeal and that his advocates have not been served with the application.

7.The Respondent avers that the Applicant has not complied with mandatory provision of Order 42 Rule 6(2) of the Civil Procedure Rules to warrant a stay of execution; that the Applicant's Advocate is improperly on record as he has not complied with mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules. The Respondent argues that the application was brought under the wrong provisions of law in that the Orders quoted in the application, Order 40 and 43 Rule 1(1)(u) deal with injunctions.

8. Counsels on record filed written submissions. Mr. Muli submitted for the Appellant that the Appellant and the Respondent are divorced, and that during the subsistence of their marriage, they sired a female child named C. M. M. who was born on 3rd December 2009. That the Respondent instituted Nairobi Children's case No.1860 of 2013 and filed an application by way of Notice of motion dated 24th December,2013 seeking access to the minor and orders restraining the appellant from removing the minor outside the jurisdiction of the court.

9. Mr. Muli urged that prior to the prosecution of the application, the magistrate ordered Children officers from the respective areas where the parties resided to compile reports regarding the status of the parties in order to assist her in making orders regarding the custody of the minor. That both reports recommended that the minor be left in the Applicant's custody and that access by the Respondent be supervised, which the magistrate strangely ignored. Counsel argued that the magistrate in her second order, allowed the Respondent to have unsupervised access to the child on Saturdays and during holidays. That the Respondent not having a fixed abode and the child being a young girl this would be detrimental to her life and wellbeing.

10. Mr. Muli contended that the court ordered the Appellant to contribute Kshs.10,000/= for the upkeep of the minor while it had given her actual custody of the minor and opined that that order was intended to apply to the Respondent. Counsel referred the court to the case of **L.K. (M.M.M. Baby) –VS- H.M.K (2013) Eklr HC MERU CIVIL APPEAL No. 25 OF 2013**.

11. Opposing the application on behalf of the Respondent Mr. Kimeu attacked the application on the grounds that the Applicant's advocate is improperly on record as he has not complied with mandatory provisions of Order 9 rule 9 of the Civil Procedure Rules. He urged that there was change of advocate after judgment had been passed and that such change could not be effected without an order of the court. Counsel contended that the firm of Kimathi Wanjohi Muli Advocates being improperly and unprocedurally on record, the entire proceedings that they have filed are incompetent.

12. Mr. Kimeu referred the court to the case of **Willie Kiritu v Batholomew Muruli & 3 others [2014] eKLR** (Civil Suit No. 199 of 1977) where the court held as follows:

> **"Murimu Ndumia & Mbago & Muchela Advocates did not comply with provisions of Order 9 Rule 9 of the Civil Procedure Rules and are irregularly on record. I find that the Plaintiff's advocate is improperly on record and that renders the application incompetent."**

Counsel maintained that the Advocates who are on record for the Respondent have not been served with a notice of change of Advocate.

13. Mr. Kimeu then argued that the Applicant has not appealed against the ruling of the lower court delivered on 25th September 2015 and hence cannot seek stay of execution of an order which is not appealed against. He referred the court to the case of **Nancy Musilli v Joyce Mbete Katisi [2015] eKLR** (Machakos Civil Appeal No. 189 of 2011) where Nyamweya J noted *interalia* as follows:

"Stay of execution can therefore only be considered against the decision of the lower court of 8th November 2011 which is the one appealed against, which in any event did not require any substantive action on the part of the Respondent that is capable of being stayed. Having not appealed against the decision to enter interlocutory judgment, the Appellant cannot ask for stay of execution of that judgment pending appeal ……and I accordingly dismiss the Appellant's Notice of Motion……"

He urged that the Respondent has never been served with a memorandum of appeal or any document to that effect in this application.

14. Mr. Kimeu contended that in any case the Applicant has not complied with the mandatory provisions of **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** to warrant a stay of execution being granted. Further that the application is erroneously brought under **Order 40** and **43 Rule 1(1) (u)** which deal with injunctions. He cited the case of **Aggrey Maula Malungu v Joseph Sanya Mwakavi [2015] eKLR**, on conditions that must be satisfied to warrant a stay of execution being granted.

15. Mr. Kimeu submitted that the Respondent has a fixed place of abode at Kithimani Yatta, that he works as a hotelier, that he has a property management firm at Kitengela and that he loves the minor and cannot harm her at all. He also asserted that the respondent is willing to pay school fees to whatever place as directed by the court.

16. Mr. Kimeu argued that the Applicant left for Norway where she stays with a stranger, one Mr. G whom she is now married to and urged the court to allow the Respondent to have custody of the minor since the minor resides with her maternal grandmother namely, SK and not with the Applicant. He urged the court to dismiss the application since it is an abuse of the process of the court.

17. On the issue regarding whether Counsel for the Applicant is properly on record, Order 9 Rule 9 of the Civil Procedure Rules is clear, that counsel coming on record after a matter is determined must do so with the leave of the court. Before leave is granted, counsel must have served the former advocate on record and other parties to the suit. Alternatively an advocate can come on record if the parties file a consent. None of these two scenarios obtain in this matter.

18. Be that as it may and guided by the principle in **Article 159(2)(d)** of the **Constitution 2010** which enjoins the court to administered justice to all without undue regard to procedural technicalities and being minded that there is a child involved in this legal tussle, the court proceeded to consider the merits of the application.

19. The Respondent contends that the Applicant has not appealed against the lower court ruling of 25th September 2015 and cannot therefore seek a stay. From a plain reading of Order 42 rule 6(1) of the Civil Procedure Rules, it is only a decree or order that is appealed against that can be sought to be stayed pending appeal. I note however, that whereas there may have perhaps, been failure on the part of the Applicant to serve the Respondent, there is a memorandum of appeal on this file setting out the grounds of the said appeal against the ruling of the lower court dated 25th September, 2015.

20. For the stay of execution to be granted, the applicant must satisfy the three conditions stated in rule 6(2) of the Civil Procedure Rules to the effect that:

a. **The application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;**

b. **The applicant must show that he will suffer substantial loss if the orders of stay is not granted, and**

c. **The applicant offers such security as the court may order to bind him to satisfy any unlimited orders the court make binding upon him**

On the first limb, I find that this application was brought without unreasonable delay from the date of the order sought to be stayed.

21. On the second limb of substantial loss, the decisions which commend themselves to the circumstances of this case are to be found in the cases of **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**, in which Mwera J (as he then was) stated that:

> ***"Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal"***

and of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368** of **2001**, in which **Musinga, J** (as he then was) explained substantial loss in the following terms:

> ***'...substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.'***

22. 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. **Section 4(2)** of the **Children Act** which provides that i*n all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

23. Therefore the starting point is that the orders sought pertain to a child and it is worth repeating, that the interests of the child who is at the centre of the dispute are superior to the rights and wishes of her parents over her custody. Her welfare must be considered in its widest sense. *This provision of the law gives expression to the guiding principle encapsulated in **Article 53(2)** of the **Constitution 2010**.*

24. What amounts to the best interest of the child has not however been defined by the law. This may be because the best interest of a child will depend on the particular circumstances of each child. The child in question is however one of tender years being aged about six years today. The definition of a child of tender years is provided under **Section 2** of the **Children Act** as follows:

> **"a child of tender years" means a child under the age of ten years."**

The courts in Kenya have accepted that custody of children of tender years ought to be with the mother, unless there are compelling reasons for the child to be removed from the mother and given to the father. - See the decision of Kimaru J in **HCC Appeal No. 21 of 2009, M. A. VS R.O.O.** These compelling reasons or exceptional circumstances must however be proved to court.

25. On the maintenance the provisions of **Article 53(1)(e)** of the **Constitution** provide the guiding principle stating that every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. The Respondent therefore has right to access and visitation and a duty to maintain the child. The primary care however is with the mother. The court was not given evidence that the Applicant is not available to look after the child besides the allegations of the Respondent.

26. I find therefore that the Applicant/Appellant has not demonstrated before this court, what substantial loss she stands to suffer if the order of stay was not granted. The court therefore dismisses the application dated 6th October, 2015 and orders that:

> i. the matter be returned to the lower court for review of the order for the Appellant/Applicant to contribute Kshs.10,000/= for the minor's upkeep yet she has actual custody if indeed this is an error on the face of the record.
>
> ii. The court do call for a Children officer's report concerning the child to appraise itself of the

current status.

There are no orders as to costs.

SIGNED DATED and **DELIVERED** in open court this **28th day** of **July 2016**.

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L. A. ACHODE

JUDGE