



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO.14 OF 2013
(As consolidated with Civil Appeal No.60 of 2013 -
S S R –Vs- K K)

K K.....APPELLANT

VERSUS

S S R.....RESPONDENT

R U L I N G

The Appellant and the Respondent are husband and wife. Their marriage has been blessed with one child K K K (the Child) who was born on 7th November 2011. According to the pleadings filed before the Children’s Court, the child is a special needs child. The marriage between the Appellant and the Respondent appears to be facing challenges. The Appellant and the Respondent are no longer cohabiting together. They are estranged. The Appellant moved to the Children’s Court in **Children’s Case No.203 of 2012** seeking various orders in relation to the maintenance of the child. As has become the norm in such cases, the Appellant filed an application and obtained temporary orders requiring the Respondent to take out a medical cover for the child. The Appellant further sought orders to compel the Respondent to pay maintenance for the upkeep of the child. The Appellant also obtained an order that sought to restrain the Respondent from leaving the jurisdiction of the court.

Upon being served, the Respondent resisted the orders that were issued by the Children’s Court. The applications were argued interpartes resulting in the two appeals that have now been filed before this court. In **Civil Appeal No.60 of 2013**, the Appellant challenges the interlocutory orders issued by the Children’s Court restraining him from leaving the jurisdiction of the court. Contemporaneous with filing that application, the Respondent filed an application before this court seeking to stay the execution of the order of the Children’s Court pending the hearing and determination of the appeal. The second appeal i.e. **Civil Appeal No.14 of 2013** that was lodged by the Appellant, she challenges the decision of the Children’s Court that required her to refund the unexpended sum of Kshs.400,000/- to the Respondent. The Appellant was aggrieved that the Children’s Court had made this order despite the fact that she continued to incur further medical expenses for treatment of the child. It was this order that the Appellant sought to stay pending the hearing of the appeal.

The two appeals lodged respectively by the Appellant and the Respondent were consolidated for the purpose of the applications for stay of the execution of the orders that were issued by the Children’s Court. These applications would have been long considered by the Court were it not for the fact that the Appellant and the Respondent filed numerous applications with a view to gaining advantage over the

other. From the affidavits filed, it became apparent that since the separation of the Appellant and the Respondent, they have extended their fight to court. The applications that they have filed betrayed their mistrust and lack of respect for each other. The applications for stay of execution of the orders of the Children's Court should therefore be considered in that context.

This court heard oral rival submission made by the Appellant, who was acting in person and by Mr. Isoe acting for the Respondent. This court has carefully considered the said submission. The issue for determination by this court is whether a case was made for this court to stay the execution of the orders that were issued by the Children's Court that the Appellant and the Respondent, respectively, intend to impeach in their respective appeals to this court. The principles guiding this court in determining whether or not to stay the execution of the orders issued by the Children's Court is provided under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. The Appellant and the Respondent are required to establish that they would suffer substantial loss if the order of stay of execution is not granted. They are also required to provide security, if at all, for the due performance of the order. The application for stay must be filed without undue delay. This court is further guided by the decision in **Butt –vs- Rent Restriction Tribunal [1982] KLR 417** at p.419 where Madan JA (as he then was) held thus:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, Brett, LJ in Wilson –vs- Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case Cotton LJ said at p 458:

“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 nugatory.”

In the present applications, the issue in dispute relates to the welfare of a child. **Article 53(2)** of the **Constitution** requires this court to place the best interest of the child as of paramount importance in its determination. **Section 4(3)** amplifies this requirement. It provides thus:

“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 interest of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –

- a. *safeguard and promote the rights and welfare of the child;*
- b. *conserve and promote the welfare of the child;*
- c. *secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”*

From the affidavits filed in support of the two applications, it is clear that at the heart of the dispute between the Appellant and the Respondent is the issue of custody and maintenance of the child. The other issue that came to the fore is the medical management of the child, who is a special needs child. As stated earlier in this Ruling, the appeals lodged respectively by the Appellant and the Respondent relate to interlocutory decisions that were made by the Children's Court in the course of the trial. However, the actual suit filed by the Appellant is yet to be heard. Similarly too, the counterclaim lodged by the Respondent is yet to be heard. This court is of the considered view that the applications and counter applications filed by the Appellant and the Respondent have shifted the focus from the real issue in dispute, which is the custody, maintenance and medical management of the child. This is the unintended consequence of the Appellant and the Respondent concentrating their arsenal on each other instead of addressing the wellbeing of their child. Some of what has been deponed to by the parties in the affidavits on record cannot be reproduced in this Ruling. Suffice for this court to say that, in its considered opinion, the best interest of the child has not been served by the manner in which the Appellant and the Respondent have proceeded in their conduct of the applications before this court.

As stated earlier in this Ruling, the principles to be considered by this court in determining whether or not to grant stay pending the hearing of the appeals are well settled. In this court's evaluation, the best interest of the child overrides the specific interest of either the Appellant or the Respondent. What emerged from the pleadings filed before this court is that, because of the way in which the applications were canvassed before the Children's Court, the real issue in dispute i.e. the custody, maintenance and medical management of the child have not been considered on their merits. If this court were to grant an order staying proceedings before the Children's Court, it would mean that the welfare of the child would be placed in the back burner as the Appellant and the Respondent battle before this court to settle issues that are personal to them. This court is of the view that neither the Appellant nor the Respondent has established that they would suffer substantial loss if this court makes an order that the hearing of the two appeals lodged before this court be stayed pending the full hearing, and determination of the dispute relating to the custody, maintenance and medical management of the child by the Children's Court.

In the premises therefore, the order that commends itself to this court with a view to advancing the best interest of the child is to stay the hearing of the respective appeals lodged by the Appellant and the Respondent before this court pending the full hearing and conclusion of the case before the Children's Court. The orders is issued by this court in the course of these proceedings are also stayed pending the hearing and determination of the case by the Children's Court. The Appellant and the Respondent are hereby ordered to complete discovery and the filing of the requisite documents so that the case can be heard by the Chief Magistrate at the Children's Court within 30 days of today's date. The Respondent shall in the meantime continue paying maintenance of Kshs.50,000/- per month that was earlier ordered by the Children's Court. The Respondent shall also cater for the medical expenses of the child pending the hearing and determination of the case by the Children's Court. The Children's Court shall be at liberty to make any appropriate orders that shall advance the best interest of the child in the interim pending the hearing and determination of the case. Since this application involves a family, there shall be no orders as to costs. Each party shall bear their costs. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF AUGUST 2016

L. KIMARU

JUDGE