



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.89 OF 2015

J K K.....APPELLANT

VERSUS

I N K.....RESPONDENT

RULING

This ruling is in respect of the application by J K K (hereinafter the applicant) dated the 2nd of July, 2015. The same is premised under **Order 42 rule 6** of the **Civil Procedure Rules and Sections 4(3), 6(1), 23(1) and (2), 82, 90 (e), 91, 93, 96 and 98** of the **Children Act**. The orders sought are:

1. Spent

2. Spent

3. THAT pending the hearing and determination of the appeal, there be a stay of execution of the ruling and orders of the court delivered on 24th June, 2014 on such terms as the court may deem just.

4. That costs of this application be in the course.

The application is based on grounds as seen from the face of thereof namely:

a) That the applicant herein filed a suit in this court to be granted parental responsibility in respect to the minor herein. The suit was motivated by the fact that the respondent herein had admitted that the minor herein was fathered by a third party.

b) That the Respondent filed an application asking for monies for the maintenance of the minor. This application was filed before the suit for declaration of parental responsibility was heard. The court heard the matter and declared that the applicant should pay Kshs.15,000/= for food and further Kshs.10,000/= for perishables.

c) That the ruling and the order of the trial court is prejudicial to the appellant and it is the subject matter of the appeal already filed. The appellant has two principal grounds of appeal. First, a sum of Kshs.15,000/= for food is excessive for one child yet the appellant has seven other children. Secondly, the order has been made before the court has granted the appellant parental rights to the minor.

d) That the appeal is therefore meritorious and the appellant prays that this court grants an order for stay of execution of the orders of the court pending the hearing and determination of the appeal. The appellant offers to purchase a voucher for Kshs.5,000/= and to take a medical cover for the minor.

In support thereto is an affidavit sworn by the applicant on the 2nd July, 2015 and filed on the same day.

It is the applicant's case that being aggrieved by orders of the Children court requiring him to pay Kshs.15,000 for food and a further Kshs.10,000/= for perishables, he had preferred an appeal based on 4 grounds as seen on the annexed memorandum of appeal marked JK1.

It is averred that the amounts ordered by the children court are excessive and further that the Kshs.10,000/= ordered over and above the Kshs.15,000/= is for undefined expenditure. The applicant indicates that he has other children who depend on him.

In his oral submissions, counsel for the applicant emphasized that the discretion to grant a stay of execution pending appeal is unfettered. The applicant need only demonstrate substantial loss. The court can order security for the performance of the decree.

It is urged that the applicant spends Kshs.372,355/= per year on school fees alone on his other children. On average that is Kshs.6,000/= per month. He also clothes the 5 other children. The applicant is now required to pay Kshs.25,000/= for one child who is below 1 year now. This is tantamount to this child getting five (5) times more that all the other children combined.

Counsel concludes that the applicant has demonstrated that he is likely to suffer substantial loss. He urges the court to adjust the usual requirement for security for due performance of a decree to fit into the circumstances of this case. It is the applicant's position that an offer of Kshs.5,000/= voucher per month would suffice. It is noted that the applicant has already taken out a medical cover under Jubilee Insurance for both in and out patient medical expenses.

In response to the application, I N K (hereinafter "the respondent") has sworn a replying affidavit sworn and filed on 29th September, 2015. She depones, *inter alia* that the award was not excessive at all as she had even asked for more for maintenance of the minor but the honourable court saw it fit to give the award. The award given should not be interfered with as it would accord the minor herein the same kind of lifestyle and provisions and/or as close as possible as that enjoyed by his siblings who are in custody of the applicant and not to punish the applicant. She goes ahead to deny the allegations on adultery.

In her submissions, Counsel for the Respondent opened by challenging the school fees receipts exhibited stating that what the applicant ought to have exhibited were income statements e.g pay slip or a statement. The Respondent was summarily removed from home and went away with the minor herein. It is urged that the court should allow the child to access what was ordered before the appeal is prosecuted. The child should not live at a different style from the other children.

I have had occasion to consider the application, the grounds in support, the affidavits on record and submissions by counsel. For determination at this stage is whether the applicant has met the threshold for the grant of a stay of execution pending appeal. The power of the court to grant a stay of execution pending appeal is a discretionary power.

The principles applicable were laid down by this court in the case of **Machira t/a Machira & Company Advocates V. East African Standard**, (Civil Case No.612 of 1996) where it was held that:

"1. In such applications for stay of proceedings, the court cannot proceed on initial presumption that the appeal or intended appeal shall succeed and so *prima facie* the applicant is the preferred party. The matter must remain in the discretion of the court to be exercised upon considering all material circumstances and not the interests of one party.

- 2. In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage**
- 3. A successful party at whatever stage should have access to the consequences of that judicial finding and decision. Any subsequent decision which tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in exceptional circumstances.**
- 4. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or other evidential material that substantial loss may result.**
- 5. In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars.**
- 6. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.**
- 7. The applicant will obtain a stay of further proceedings if he can show that an impecunious party may squander what may be needed restitution or that the subject matter may be destroyed if the appeal succeeds.**
- 8. In granting a stay of proceedings the court may consider the delay in making the application and the requirement of security for due performance.**
- 9. The application in this case came late and without good reason. The Plaintiff should be allowed to move on.”**

In our instant application, I note that the parties made submissions that bordered on the main issues in the appeal.

Care must be taken to ensure that the propriety or otherwise of the decision appealed from is determined at the hearing of the appeal.

On the material before me, the applicant has shown that substantial loss may result if the decree in the lower court was not stayed. There is evidence of the existence of other children who are likely to be adversely affected by the execution of the lower court's orders. The applicant has provided specific particulars of the fees currently paid for these children. What the applicant may or may not afford are issues better left to the main appeal but on the whole allowing execution at this stage is not only likely to prejudice the applicant but other children.

As correctly put by Counsel for the Applicant, the requirement for security for due performance of the subject decree cannot apply in the usual manner as in ordinary litigation given that this is a Children cause on maintenance. Even as the issues before court are canvassed at appeal this court takes cognisance of the fact that the affected minor continues to live breathing the free oxygen provided by the creator. He obviously will not survive on oxygen awaiting the outcome of the appeal. This court must go ahead and make orders for the maintenance of the child during the pendency of the appeal.

I note the applicant has already secured a medical cover for the minor. The minor is below one (1) year and therefore apart from shelter which is for now being catered for by the Respondent, the other immediate necessary essentials will be food and clothing. I take judicial notice of likely special consumables by a child of this tender age and come to the conclusion that the confirmation of the interim orders of this court of 2nd July, 2015 would serve the interest of justice in the matter pending the hearing and determination of the appeal.

With the result that there shall be a stay of execution of the ruling and orders of the court delivered on 24th June, 2015 on condition that the Applicant pays a sum of Kshs.8,000/= by way of voucher from a reputable supermarket. The said voucher to be provided on the 2nd of every succeeding month from the date hereof.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 12th day of November, 2015.

A. K. NDUN G'U

JUDGE