



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 69 of 2012

(Appeal from the Judgment and decree of Hon. P. Areri Senior Resident Magistrate in Bungoma Civil Case no.684 of 2011)

**JOTHAM SIMIYU WASIKE.....1ST APPELLANT
LEAH NGAIRA MPAPALE.....2ND APPELLANT**

~VRS~

**JACKSON ONGERI.....1ST RESPONDENT/APPLICANT
JOSEPH ANANGWE.....2ND RESPONDENT/APPLICANT
BRAMWEL MALANGA.....3RD RESPONDENT/APPLICANT
GRACE ONGERI.....4TH RESPONDENT/APPLICANT
JOSEPH KUI.....5TH RESPONDENT/APPLICANT**

AND

PIUS BITONYAKE MUKENYA.....1ST INTERESTED PARTY

**ROBIN BYRNES.....2ND INTERESTED PARTY
WILLY BARASA.....3RD INTERESTED PARTY**

RULING

[1] The Appellants made two applications; one dated 20/11/2012 and the other 26/11/2012. Both were consolidated on 29/11/2012. This ruling therefore will relate to and is a disposal of both applications.

[2] Essentially the Appellants are seeking for either of the following orders:

- a) Stay of execution of decree arising from the judgment in BGM CM CC No.684 of 2011 or
- b) A temporary injunction

[3] The parties have filed their written submissions.

[4] The Appellants argue that unless an order of stay is granted:

- a) Their appeal will be rendered nugatory,

b) The children's rights in the children home in the suit premises will be prejudiced,

c) The Respondents have been and are abusing the court process in the proceedings by evicting the Appellants.

d) That this case should be judged on its peculiar circumstances and exempted from the stringent conditions under Order 42 Rule 6 (2) of the Civil Procedure Rules. Instead, the court should fall back to Order 42 (6) of the Civil Procedure Rules which is a fetter on the discretion of the court to order a stay.

e) That substantial justice should triumph in this case and the court to issue a temporary injunction.

Respondents oppose the application

[5] The Respondents opposed both applications.

[6] In their submissions they posit that at the time of the filing of the applications by the Appellants herein, there was another application for stay that was pending before the trial court. Therefore the filing of these applications is a multiplicity of suits and an abuse of court process.

[7] I note the application for stay made in the lower court was dismissed on 22/11/2012 albeit *ex-parte* without notice to the Appellants.

[8] The Respondents argue that the applications do not meet the conditions set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.

[9] That the Appellants are not on the premises and have been replaced, a fact the Appellants admit, and so there are no orders that could be amenable to a stay.

[10] They also argue that the Children's Department should be involved to ascertain if there was a replacement of the house parents. The fear of violation of children's rights is therefore unfounded. Nonetheless, they further argue that the children department is not a party to this suit and are obliged to apply if they need a remedy from this court.

[11] Besides the fear of children rights being affected, the Appellants have not shown any loss that they suffer if the orders sought are not granted.

ISSUES

[12] I see two major issues. One, whether the Appellants are entitled to any relief of either stay of execution or a temporary injunction. Two, are the children rights at stake, and if so, what appropriate orders should the court make? There is however another minor issue; whether pendency before or determination of an application for stay by the trial court is a bar to an application for stay to the appellate court.

Pendency of a similar application

[13] Let me tackle the minor issue first. That issue has been decided before in **BGM HCCA NO 31 OF 2102 TARBO TRANSPORTERS LIMITED V ABSALOM DOVA LUMBASI** that:-

[26] Under Order 42 rule 6(1), the Applicant is allowed to file an application for stay to the appellate court, even if a similar application had been previously rejected by the court appealed from. There is no any statutory restriction on the discretion of the appellate court in entertaining and determining such application for stay under Order 42 Rule 6 of the CPR. Even with extreme ingenious craft, rejection of a similar application by the lower court is not a fetter on the discretion of the appellate court under Order 42 Rule 6 of the CPR.

[27] *This very procedure has been adopted in the Court of Appeal Rules. It is a common and legal procedure in many jurisdictions, and is one of the legal instances where exception is made to the rule of res judicata. The procedure is so designed in order to offer an intermediate measure that is necessary to preserve the subject matter of the appeal, and also protect the rights of the parties in the appeal. I have said elsewhere in this case and in others that the appellant's right of appeal includes the prospects that the appeal is not rendered nugatory... Order 42 rule 6 of the CPR provides for the manner of moving the court for stay pending appeal which is perfectly legal.*

Nothing much would therefore turn on that ground of objection by the respondents.

Appellants not on the suit premises

[14] It is not in doubt that the Appellants are not in the premises. That is why the court ordered upon consent of the parties on 27/11/2012:

“a) That the Appellants, as they are already out of the suit property, will remain as such until further orders from this court, if at all.”

[15] The essence of that order was that the Appellants had been evicted pursuant to a court order. The question of eviction is a substantive matter which can only be canvassed in the main appeal. Whether the eviction order was lawfully obtained or lawfully executed cannot be decided on this application as framed.

[16] In any event, the fact has already taken place, and would require a mandatory positive order to reverse the situation on the part of the Appellants. A stay of execution under Order 42 Rule 6(1) is forward looking. It is not backward looking and so it cannot undo events which have already taken place. Similarly, a temporary injunction would not also be an appropriate remedy in respect of the Appellants as they are already out of the suit premises.

Fetters on discretion of court

[16] What raises curiosity in any legal mind, is the argument put forth by Mr. Khakula in his submissions that:

“..... we are aware of the fetters on the court's discretion to order stay. The fetters are imposed by the provisions of Order 42, Rule 6 (2)..... These fetters have disturbed judicial discretion for a long time. In our opinion they are not applicable to this case.”

[17] I do not think Order 42 Rule 6 (6) removes the “*fetters*” imposed by Rule 6 (2) of Order 42 of the Civil Procedure Rules. I understand the fetters to refer to the conditions under the Order which should guide the exercise of discretion by the court. To me, Rule 6 (6) of Order 42, establishes an entirely different remedy of a temporary injunction. What that means is that other than a stay of execution, the court could grant a temporary injunction pending the hearing of an appeal. This is to enlarge the prospects of intermediate measures which are necessary to protect some right, or the suit property, or prevent a violation or breach of some law. The Constitution lays the foundation for this enlargement as it too provides for an injunction as one of the reliefs that could be granted in a constitutional application under Article 22 (3) of the Constitution in order to prevent a violation of a right or infringement of the Constitution.

[18] Since the remedy of temporary injunction has its own principles which were settled in the case of **Giella v. Casman Brown**, the principles applicable to the grant of stay of execution pending appeal will not therefore apply in the grant of a temporary injunction. The words “*notwithstanding anything contained in subrule 1*”... in Order 42 Rule 6 (6) mean that, the grant of a temporary injunction pending appeal will abide by the applicable principles, and not on the conditions applicable in the grant of stay of execution pending appeal.

[19] I do not therefore think that sub-rule 6 (b) removes the requirements for grant of stay of execution under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. In short, the two sub-rules relate to two different remedies to which different legal thresholds attaches. The party applying should be able to discern and apply for remedy that is appropriate in the circumstances of the case. In granting any of the remedy, the court's discretion should be exercised judicially and judiciously; guided by the law and the applicable principles.

THE CHILDREN'S HOME

[20] Bad times come. Innocent children in Robin Nest Orphanage have found themselves entangled in these proceedings. That really is what concerns the court at the moment. Matters of children and child rights are of pivotal significance in every nation, and have gained great momentum in the world, that rights of a child should be protected at all costs anywhere they have become an issue.

[21] The Constitution and the Children Act are very clear on the rights of a child and how these rights should be protected by a court of law. Even International instruments, treaties and agreements on rights of a child are as categorical and it does not matter at what stage of a proceeding rights of a child have become threatened, for, the court is under perpetual obligation to protect the rights of a child.

[22] This issue was dealt with by the trial magistrate and he gave certain clear directives on how the children in the orphanage were to be dealt with. Most importantly the trial magistrate ordered:

a) *The District Children's Officer, Bungoma South District to investigate whether Robin Nest Orphanage is registered and approved by the National Children's Council under section 30 of the Children's Act as a charitable Institution as defined under section 58 of the said Act.*

b) *As the Orphanage has not shown it is registered and approved by the National Council as a children home, the District Children's Officer to remove any children found at the Orphanage to an Institution which is properly registered and approved pending investigations in (a) above.*

[23] None of the parties have enlightened the court on the true status of the Orphanage and compliance with the above court orders. Parties are just preoccupied with issues that concern them without really acting in the best interest of the children in the Orphanage. The Appellants are merely using the plight of the children as a basis for their application for stay and or temporary injunction without addressing the particular vulnerabilities of the children in light of the orders of the trial court which I have pointed out above.

[24] The children in the Orphanage need not be joined as parties in these proceedings for their rights to be vindicated by the court. Their plight became an issue before the trial court, and the court is under an obligation to see that aspect touching on the children is dealt with conclusively and objectively. These powers of the court are not derived from the parties in the suit, but from the Constitution, statutes and international treaties on children which are *jus cogens* and seek to enforce peremptory norms in international law. In such an appeal the appellate court is enjoined under the Constitution and particularly article 22 (3) to issue appropriate remedy.

[25] On that basis, I order that the Children's Officer, Bungoma South District, to file within 21 days a status report of Robin Nest Orphanage particularly on:

- a) The number of Children in the Orphanage
- b) Any children who have been moved from the Orphanage, if at all, after the Order of the trial court, and the current destination of children so moved.
- c) The legal status of the Orphanage
- d) The foster parents in charge of the Orphanage at the moment.

e) Any other useful information in the protection of rights of a child in the circumstances of the case.

[26] This order be served upon the Children's Officer, Bungoma South District immediately.

[27] Upon receipt of the said report, the court shall make further appropriate orders.

[28] At the moment the Appellant to remain away from the suit premises unless otherwise ordered by the court.

Dated, signed and delivered in open court at Bungoma this 6th day of February, 2013

F. GIKONYO

JUDGE

In the presence of:

Nyamu for Ocharo for Respondents

Dola Indidis holding brief for Mr. Khakula for Appellant

Alusa: Court Assistant

Court: Ruling read in open court. Mention on 28/2/2013. Khakula to serve the order.

F. GIKONYO

JUDGE