



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL APPEAL NO: 76 OF 2012

B K C.....APPELLANT

Versus

B C S.....RESPONDENT

RULING

The application for determination is dated 17th October 2012. It seeks stay of execution of orders of the Children's Court made on 20th June 2012 and 28th September 2012 pending hearing and determination of the appeal herein. Several grounds are set out on the face of the application. The appellant is basically arguing that the orders are offensive as they impose maintenance commitments that are well beyond his means. He has filed a replying affidavit, which seeks to substantiate the grounds on which the application is guided. The respondent was served with the application and he filed a reply to it. According her affidavit sworn on 27th November 2012, the Children's court made certain orders against the appellant and the appellant has failed to comply with them have the effort to enforce them.

The Children's court made several orders in its ruling on 20th June 2012. There were orders relating to custody, medical care, school fees and related expenses and substance. It is the latter two that this court is concerned as the appellants appeal centers on these two. The trial court outlined the appellant to pay school fees and related expenses, and to pay on a monthly basis a sum of Kshs. 17,000.00 to meet food, house help and clothing expenses. The ruling of 20th September 2012 did not affect the orders of 20th June 2012 so far as they related to school fees/expenses and monthly upkeep. The memorandum on record is on the ruling of 28th September 2012. The grounds upon which the appeal is founded are largely that the order on school fees and related express was not just and fair.

The application is grounded on several provision of the Civil Procedure Act and the Civil Procedure Rules. The principle prayer is for stay of execution pending appeal. The application therefore falls for determination properly on the basis of Order 42 rule 6 of the Civil Procedure to grant of stay pending appeal are set out in Order 42 rule 6(2), which provides as follows:-

“(2) No order for stay of execution shall be made under sub rule (11) unless-

(a) the court is satisfied that substantial loss may remit to the applicant unless the order is made and that the application has been made matter uneandearable 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”.

The conditions are three in number. Before stay of execution pending appeal is granted, it must demonstrated that the three conditions have been met. All three must be positive. The appellant argues

that his application meets all the three conditions.

On the first condition, that he would suffer substantial loss, should the stay be denied, he says he came to court in good time as he faced difficulties in paying fees at [particulars withheld] Academy. If the order is not granted he will be forced to pay what he considers to be extremely high and exorbitant fees which is struggling to pay. Continuing to pay such high fees is a burden to him, so he says. On the second condition, that the application is made without delay, he confirms that he moved the High Court as soon as possible.

The ruling being challenged was made on 28th September 2012, and the Motion for stay on the same day. On the third condition, security for due performance of the decree, he says that he has been paying school, though with much difficulty, there is good faith on his part and that constitutes sufficient security.

Where whereas stay of execution of a decree or order is provided for in ordinary civil matter, the Children Act and the subsidiary legislation made under it do not expressly provide for it with respect to decrees and orders made under the Children Act decrees and orders and Children's cases are the best interests of the child. The Children Act at **Section 4(3)** expects courts making decision on children to be guided by what should be the best interest of the child in the circumstances. **Section 4(3)** of the Children Act provides:-

“(3) All judicial... institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat interests of the child as the first and paramount consideration to the extent that this is consent 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...”

Flowing from the provision in **Section 4(3)** of the Children Act, it is to be presumed that the children's court in making the orders of 20th June 2012 and 28th September 2012 had this principle in mind, and there orders therefore were made in the best interests of the children. That should remain the position until it is demonstrated on appeal that the said orders were not in the children's best interests.

The question now that arises is whether orders that were made in the best interests can be safe guided to the meet the interests of their parents? The appellant's case appears to be that although the orders were made in the best interests of the children they are oppressive and the purports to be made are exorbitant. This is what he shall seek to demonstrate on appeal. He shall be asking the appellant court to consider the best interests of the children against the background of his circumstances. Showed the trial courts therefore be stayed during the pendency of the appeal. I think not staying orders granted in the best interests of child is to defeat the spirit and intent of **Section 4(3)** of the Children Act. It will leave a void as no obligation will have been mis posed on either parent to provide for the child, and give a push and pull that is consider in cases of this nature, the child will be exposed to hardship and embarrassment. For example, the court treble in the instant case is on payment of school fees and school related expenses. Stay of the said orders would mean that none of the two parties in this case will be obligated to pay school fees and meet the school related expenses. It would be the child suffering with ultimately as he may be sort out of school on class over unpaid fees. This has in fact happened on two occasions as shall become clear later. Therefore, as a matter of principle, stay ought not be granted with request to orders relating to maintenance of children.

If the court were inclined to stay execution in the terms of Order 42 rule 6(2) of the Civil Procedure Rules, it has to be satisfied that the conditions set out in that provision have been met. Would the applicant suffer substantial loss? There would be loss no doubt. The appellant says the school fees he is paying is way beyond his means. If this is true, then it would mean that he has to strive extra hard to meet his obligations. He may have to take loans to enable him pay for a child giving through the formative stages of primary or basic education. More avails him. If he falls into arrears, there is the real possibility

that the respondent will take out execution proceedings, and the preferred mode of execution of cases of this nature appears to be that of committal to civil jail if the appellant is so committed then he no doubt will suffer loss of liberty.

However, the inconveniences that I allude to above have to be weighed against the best interests of the child. Should the court stay the order and save the appellant the troubles he has enumerated, but in the process have the child stay at home? **Section 4(3)** of the Children Act in my view triumphs over Order 42 rule 6(2); the best interests of the child are paramount. Stay orders ought not be granted if they are likely to interfere with the best interest of the child. In any event, the order sought to be stayed concur parental responsibility, more specifically the responsibility of the parent to finish education. This is a right provided for in mandatory terms by **Section 7(1)** of the Children Act. The right is not negotiable. It cannot be concreted out of. In the instant case the appellant cannot escape it. A stay order would be in violation of this provision. Parental responsibility cannot be stayed, especially where paternity is not in issue. Questions can be raised about the rate of provision, in monetary terms of the responsibility. In such cases the orders can be reviewed, and that is the reasons for the court of appeal. Parental responsibility remains in place even as the parties await the review of the offending orders by the appellate. Review cannot be had in an interlocutory application, it must be on the appeal itself.

On the second condition, that the application should be filed without unreasonable delay. The order being challenged was made on 28th September 2012 and the application was filed on 18th October 2012. There was no delay and therefore this condition is met.

The appellant argues that he has been paying school fees and for that reason the condition as to provision of security for the due performance of the decree has been satisfied. Has the appellant been readily complying with the order as payment of school fees? It would appear not. The respondent on 7th February 2013 had to come to court under certificate of urgency complaining that school fees for the first term had not been paid. She blamed this on the orders made by the court on 14th December 2012, which she stipulated to wear compromising stay. Her application of 5th February 2013 sought the setting aside of the orders made on 14th December 2012. When the application came up for inter parties hearing on 8th February 2013 it became clear that indeed school fees had not been paid, for the appellant told the court that he had given a commitment to pay fees by 22nd February 2013. The matter was mentioned on 15th March 2013 when it was confirmed that the appellant had by then paid the fees.

It was directed on 15th March 2013 that the applications dated 17th October 2012 and 5th February 2013 were to be disposed of by any written submission. Ruling was reserved for 7th June 2013. The ruling was reserved for 7th June 2013, and the parties were advised to make ruling on 14th June 2013. On 14th June 2013, the ruling was still not ready, but the respondent mentioned to the court that there were emerging issues. The issue was that the child was not at school as school fees for second term had not been paid and therefore he had been sent away. To this the appellant, instead of informing the court whether or not school fees had been paid said that he was not aware that the child had been sent away because of non-payment of school fees. He assented that the child was on mid-term break. The court gave the parties time to try to resolve the matter. After a short break, the appellant came back assenting that there was stay order in force and therefore he was not obliged to pay school fees. He insisted that the school fees ought to be paid on a 50:50 basis. Quite clearly the school fees had not been paid and this was confirmed by the child after a private interview with the court. It emerges quite clearly that the conduct of the appellant is not of one who is obeying court orders. He pays school fees only when it becomes clear to him that he has no room for manoeuvre. It cannot in the circumstances be said the fact of payment of school fees by the appellant is sufficient security for due purposes of the decree.

The other consideration in application for stay is the conduct of the applicant. The court can deny an applicant the order on basis of the applicant's conduct. This would particularly be the case where it appears that the application is not brought in good faith given the way the applicant has conducted himself in the circumstances of the case. In this case, the trial court made a valid order regarding child maintenance and school fees. This is an order made by a competent court in exercise of jurisdiction properly conferred on it by statute. That order is still in force, it has not been varied nor set aside nor stayed. The appellant is therefore bound to obey it. Has he been in obedience of it? The events narrated

in the proceeding paragraphs of this rule point to a very reluctant obedience of the said orders. The appellant obeyed only when he was pushed to the wall, and only when the matter was raised in court. This is sufficient ground to dis entitle him to stay.

There is the issue of the order made by this court on 14th December 2012. Both parties appear to entertain the notion that the orders of 20th June 2012 and 28th September 2012 were stayed on 14th December 2012 pending hearing and determination of the application dated 17th October 2012. The notion is misconceived. Njagi J recorded as follows on 14th December:-

“After perusing the certificate of urgency, I am satisfied that the matter is urgent.

A hearing date be given by the registry for hearing urgently. The ruling pending in the lower court for delivery on 18/12/2012 be temporarily stayed until the date for the hearing of this application.”

Payment of school fees was not stayed by the order of 14th December 2012. What was stayed was delivery of a ruling by the lower court scheduled for 18th December 2012 on a Notice To Show Cause (NTSC). Therefore there are no orders in force staying temporarily purport of maintenance and school fees. Both parties ought to have perused the court record to satisfy themselves of the orders made on 14th December 2012 before they both misconceived them.

In the result I find no merit in the applications dated 17th October 2012 and 5th February 2013 and I hereby dismiss both applications with costs. The appellant is advised to take urgent steps to have his appeal heard and determined.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF June 2013.

W. MUSYOKA

JUDGE