



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CIVIL APPEAL NO. 40 OF 2013

**(From Original Ruling in Civil Case No. 23 of 2012 of the Chief Magistrate's Court at Malindi
CMCC No. 23 of 2012)**

P BAPPELLANT

VERSUS

J NRESPONDENT

RULING

Introduction

1. The background to the appellant's application brought under certificate of urgency on 25th September, 2013 is not in dispute and can be stated briefly. The appellant and the respondent are father and mother, respectively, of E W B a girl aged ten years. They are not a married couple and currently live separately. The appellant has for the last seven years been paying for the education of the minor at [Particulars withheld] School in Malindi.
2. The parties are involved in several legal disputes before the courts touching on different aspects of the alleged interest of and provision for the minor. This appeal emanates from one such matter, namely **Malindi Civil suit No. 23 of 2012 Janet Nderitu vs Patrick Becker**. The appeal is in respect of the order made by the Lower Court on 12th September, 2013 directing that the minor be enrolled in either one of two schools, being, [particulars withheld] Academy Mombasa or [particulars withheld] School Nairobi. It would seem that no boarding vacancy for a ten year old student was available at the former. The minor has already been withdrawn by the Respondent from her previous school and obtained a placement at [Particulars withheld] School Nairobi, whose annual fees are way higher than the shs. 300,000/- the appellant was paying at [Particulars withheld] School.

The Appellant's Case

3. The appellant is therefore seeking stay of execution of the order of the Lower Court pending this appeal. He contends that as a parent with joint responsibility for the minor, he was not consulted by the respondent when she made the decision to transfer the minor from [Particulars withheld] School, and that he cannot afford the annual fees in the sum of Shs. 3million he will be obligated to pay for the minor's schooling at [Particulars withheld]. That the Respondent herself is indigent and unable to make a contribution.

The Respondent's Case

4. For her part, the respondent asserts that [Particulars withheld] School was “inadequate” for the minor's education needs and that the minor herself expressed the desire to move to a better school and hence the admission into [Particulars withheld]. She further contends that the minor is accustomed to a well-to-do lifestyle. That the fees in the new school are not prohibitive to the appellant whom she describes as a man of means, well capable of meeting the obligation.

Arguments

5. During the hearing of the application, the court heard arguments from both sides, which principally centred on the provisions of Order 42 rule 6 of the Civil Procedure Rules (erroneously cited as rule 4 in the Notice of Motion).

Determination

6. Order 42 rule 6 of the Civil Procedure Rules is in the following terms

“ (6) (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on appreciation being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule

1. **unless-**

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

2. **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”**

7. The requirements under rr2(a) and (b) are that the application is made without unreasonable delay, that applicant satisfies the court that substantial loss may result to him if the order sought is denied, and finally, that security for the due performance of the decree is given by the applicant. There is no disputing that this application has been brought timeously by the appellant and that he has offered to provide security.

8. The sticking point is whether he will suffer substantial loss if the stay order is not granted. From the material tendered by the two parties, [Particulars withheld] School is no ordinary school, at least in terms of fees payable. To many ordinary people, it is probably an expensive school. It may well be that the appellant is a wealthy man. However, the capital outlay required to put the minor in the school, on short notice is not negligible at all. It is admitted that the respondent did not consult with the appellant before removing the minor from the previous school hence the suddenness of the monetary demand on the appellant could well occasion him substantial material loss, even loss of his liberty in the short term, if he fails to comply with the order of the Lower Court.

9. In light of the nature of the subject matter, there cannot be any question about the respondent's

ability to make restitution in the event the appellant succeeds. For two reasons; the respondent admits she is indigent, while the real plaintiff is the minor daughter of the appellant suing through her. At the same time, and more importantly, it is not lost on the court that the minor has not been in school since September, 2013 when this dispute broke out. This to my mind is the greater loss, not to mention the emotional trauma this dispute is inflicting upon her young mind.

Conclusion

10. In my considered view the ideal solution would be for the parents to arrive on a compromise regarding a temporary school in Malindi for the minor to attend as the appeal is under consideration by the court. I do encourage them for the sake of the minor to do so. Meanwhile this court, appreciating the urgency and delicacy of the situation will expedite the process of the appeal with a view to a quick disposition. Pending such disposal, the court deems it mete and just to stay execution of the order of the Lower Court in terms of prayer (c) of the Notice of Motion. This order is subject to the appellant depositing into court the sum of shs. 150,000/- as security, within five days of today's date.

11. I direct that this matter be mentioned before me on 31st October, 2013 for purposes of recording any consent by the parties regarding a temporary school placement and for further direction as regards the main appeal.

12. Each party will bear their own costs.

Delivered and signed at Malindi this **23rd** day of **October, 2013** in the presence of Mr. Ole Kina for the appellant, Mr. Gicharu for the Respondent.

Court clerk – Samwel.

C. W. Meoli

JUDGE