SHM v HMD (Civil Appeal E002 of 2025) [2025] KEHC 6547 (KLR) (6 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6547 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CIVIL APPEAL E002 OF 2025

FR OLEL, J

MAY 6, 2025

BETWEEN

SHM ..... APPELLANT

AND

HMD ..... RESPONDENT

RULING

1. The application before this court for determination is the Notice of Motion application dated 25th February 2025 brought pursuant to provisions of Section 3A of the *Civil Procedure Act*, Order 42 Rule 6(2), Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of law. The applicant prays for orders that this court be pleased to stay execution of the ruling and orders issued on 5th February 2025 in Moyale Children's case No E019 of 2024, pending the hearing and determination of this Appeal.

2. This application is supported by the grounds on the face of the said application and the affidavit of the applicant, dated 25th February 2025. The respondent has opposed this application through her replying affidavit dated 14th March 2025.

3. The Appellant averred that he is wholly dissatisfied with the Ruling of Hon K.L. Matawi, Resident Magistrate, dated 5th February 2025, delivered in Moyale Children's case E019 of 2024, and had preferred an appeal against the same as the trial court had failed to consider crucial evidence regarding his financial capability. He thus had an arguable appeal, which had high chances of success.

4. The Appellant further averred that he was already in debt on settling the decretal sum payable and was apprehensive that the respondent would apply for warrants of execution, consequent to which she was likely to attach his property. That would cause him substantial loss and render the appeal filed to be rendered nugatory. Finally, the Appellant stated that he was ready and willing to furnish security for the due performance of the decree and that the Respondent would not be prejudiced if the orders sought were granted.

5. The Respondent did oppose this application through her Replying Affidavit dated 14th March 2025. She averred that the court should be guided by the best interest of the minor and noted that the orders issued related to parental obligations/responsibilities, which the Appellant had abandoned to date. Further, the applicant had not demonstrated what substantial loss or prejudice he would suffer should the orders sought be declined. To that extent, the Application filed was frivolous, unmeritorious, and she urged the court to dismiss the same suo moto.

6. The respondent further averred that the Applicant had moved court with unclean hands in equity as he had deliberately failed to comply with the "children maintenance orders", issued by the trial court. She noted that the Applicant was a civil servant working at [Particulars Withheld] Ministry and earned a monthly salary of Kshs 62,920/=. He was therefore capable of paying Kshs 10,000/= being his monthly share of parental responsibility as directed by the court. The said amount was not unreasonable, bearing in mind the current tough economic situation prevalent within the country.

7. The respondent reiterated that the interest of the minor was paramount and could not be kept on hold and thus urged this court to find that the application was not merited and prayed that the same be dismissed with costs.

Analysis & Determination.

8. I have carefully considered the Application, its Supporting Affidavit, the Respondent's Replying Affidavit, and the Appellants' submissions. The only issue for determination is whether the Appellant has met the conditions necessary for the grant of an order of stay pending appeal.

9. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See Amal Hauliers Limited Vs Abdulnasi Abukar Hassan (2017) eKLR & Butt Vs Rent Tribunal (1982) KLR 417.

10. To the foregoing I would add that an order of stay of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the same, shall also consider the overriding objective stipulated under sections 1A and 1B of the *Civil Procedure Act*, which enables court give effect to its overriding objective, while in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.

11. On the likelihood of suffering substantial loss, and security of the appeal, the court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal, and also to ensure that the appeal is not rendered nugatory. Similarly, the court has to protect the interest of the Respondent who seeks to enjoy the fruits of his/her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See Attorney General Vs Halal Meat Producers Limited Civil Application No. Nairobi 270 of 2008; Kenya Shell Ltd Vs Kibiru & another (Supreme); Mukuma Vs Abuoga (1988) KLR 645.

12. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his

favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in Nduhiu Gitahi Vs Warugongo (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100.

13. Article 53 (1),(e) of *the Constitution* of Kenya 2010 provides that, every child has a right to "parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not." Further Article 53(2) of the said constitution provides that "A child's best interests are of paramount importance in every matter concerning the child."

14. The pleadings herein reveal that the parties herein are blessed with one child who, as of September 2024, was about ten months old. The suit was heard on merit and judgment issued on 27th November 2024, directing the Appellant to provide child support of Kshs 10,000/= monthly. The Appellant applied for a review of this judgment and vide a ruling dated 5th February 2025, the said application was dismissed, hence this Appeal.

15. The court, in considering this kind of Application, where children's rights are involved, has to observe the cardinal provisions of Article 53,(1),(c) & (3) of *the Constitution* of Kenya and place the best interest of the child in the forefront of its decision. The Applicant laments that the sum decreed is exorbitant and faults the trial court for failing to consider his evidence, especially the affidavit of means filed. The respondent, on the other hand, faults the Applicant for being inconsistent in his obligations and only sends Kshs 3,000/= intermittently towards his obligations to the minor.

16. At this point, the court cannot consider the merits or otherwise of the Appeal filed, but what is not in doubt is that should the Appellant succeed, any sums paid in excess can be netted off and be credited in his favour. On the other hand, the child's obligations remain constant, and if the decree issued is stayed, its effect would be to deprive the child of part of her basic needs, which proposition is not tenable.

17. The Court, in exercising its discretion, therefore opts for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589. The scale of justice tilts in favour of the minor getting monthly maintenance from her father pending quick disposal of this Appeal.

Disposititon.

18. The upshot is that the application dated 25th February 2025 lacks merit and the same is dismissed with no order as to costs.

19. The Appeal be fast-tracked and it be heard within the next 90 days.

20. It is so ordered.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 6TH DAY OF MAY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

In the presence of;

Present - for Appellant

N/A - for Respondent

Mr. Jarso - Court Assistant