FOBO & another v EAO (Family Appeal E024 of 2023)
[2024] KEHC 416 (KLR) (18 January 2024) (Ruling)

Neutral citation: [2024] KEHC 416 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

FAMILY APPEAL E024 OF 2023

SM MOHOCHI, J

JANUARY 18, 2024

BETWEEN

FOBO ..... 1ST APPELLANT

KOO ..... 2ND APPELLANT

AND

EAO ..... RESPONDENT

RULING

Introduction

1. Before me is an application filed under certificate of urgency whereby FOBO and KOO the grandmother and grandfather of Minors SCO and EJO aged 10 and 8 years are seeking stay of execution of judgment of the Chief Magistrate's Court in MCCHCC NO E132 of 2022 dated 18th December 2023. This was a child custody where the EAO the biological father obtained a successful judgment on custody of the minors.

2. The Applicants had initially sought an injunction which was abandoned midstream in submission.

Applicant's Case

3. Mr. Omotti Advocate for the Applicant submitted that the Applicants invoked Order 42 Rule 6 and that the law was well settled that;

4. The application must be made without undue delay and in this instance the Applicants moved the High Court two days after delivery of judgment as such satisfy this principal.

5. That the 22nd Applicant's Supporting Affidavit dated 20th December 2023 demonstrates that if the Stay sought is not granted irreparable harm, shall occur

6. That the impending Appeal involves two minors who have been in their grandparents custody for the last two years and if the execution is not stayed pending appeal then the minors lives shall be disrupted with substantial prejudice upon the Applicants and substantial harm on the minors.

7. That the minors are already in school and would be better served if they continued.

8. On the issue of security for costs the Applicant argued exemption of this requirement owing to the nature of the proceedings the Applicant however submitted that they are ready to deposit security should they be so ordered.

9. Finally, the Applicants argued that they have satisfactorily demonstrated "just cause" by showing threatening messages emanating from the Respondent. The Applicant thus prays that the Application be allowed as prayed.

Respondents Case

10. Mr. Simiyu for the Respondent submitted that the Applicants have not moved the court with clean hands, that it is not disputed that the Respondent is the Biological father to the minors and that the Respondent's wife and mother to the minors passed away on 12th June 2020 after nine (9) years of blissful union and that the Respondent buried his wife and relocated to Nakuru.

11. That it was during a vacation to M where the Grandparents (the Applicants) took the minors away from the Respondent triggering the Chief Magistrate's Court in MCCHCC NO E132 of 2022. That the initial taking away of the minors from their biological father was illegal, criminal and unlawful.

12. That the Applicants had not demonstrated irreparable injury that it is the Respondent who having lost his whife has now been denied his own children and that the minors lack parental love.

13. The Respondent Prays that the Application be disallowed and that the Respondent be Ordered to hand custody of the minors to him

Analysis and Determination

14. I have given due consideration to the application and the submissions made in favour of and in opposition to, herein by learned counsel. Order 42 Rule 6 of the *Civil Procedure Rules*, pursuant to which the application has been brought, provides that:

> " 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 application 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..."

15. Thus, the conditions an applicant for stay of execution of decree or order needs to satisfy, as set out in Rule 6(2) of Order 42 aforementioned, are:

    a. that substantial loss may result to the applicant unless the order is made;

    b. that the application has been made without unreasonable delay.

c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

16. The rationale for the conditions aforementioned was aptly given in *Machira T/A Machira & Co. Advocates v East African Standard (No. 2)* [2002] KLR 63, thus:

> " The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

17. It is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the children in question be given utmost consideration. In *Bhutt v Bhutt*, Mombasa HCCC NO. 8 of 2014 (O.S.), this principle was expressed thus:

> " In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 rule 6 of the *Civil Procedure Rules*, must be complemented by an overriding consideration of the best interest of the child in accordance with the injunction of Article 53(2) of the *Constitution*..."

18. Hence, with regard to the best interest of the minors, there is no dispute that the subject children are minors aged 10 and 8 years respectively. They are already in the a contested custody of the Applicants and it would be in the interest of the minors and the interest of justice to reverse custody back to their biological father before hearing the parties on the appeal; particularly in the absence of concrete evidence that the respondent is unsuitable to look after the welfare of his own children in the interim.

19. However, Section 83 of the *Children's Act* sets out the following principles guiding the court in making a custody order. The court must consider the following:

i. The conduct and wishes of the parent or guardian of the child

ii. The ascertainable wishes of the relatives of the child

iii. The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his/her home in the last 3 years before the application to the court.

iv. The ascertainable wishes of the child.

v. Whether the child has suffered any harm, or is likely to suffer any harm if the order is not made,

vi. The customs of the community to which the child belongs.

vii. The religious persuasions of the child

viii. Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether or not those orders remain in force.

ix. The circumstances of any sibling of the child concerned; and of any other children of the home, if any.

x. The best interest of the child.

20. Accordingly, although, the application was filed without undue delay, I am far from convinced that substantial loss will be visited on the Applicant unless the orders sought are given. Indeed, the welfare of grandchildren dictates that the lower court order be complied with in every aspect thereof by the appellant, pending further orders of the Court upon the hearing of the appeal.

21. In the result, I find no merit in the application dated 10th January 2024. The same is hereby dismissed with no order as to costs.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 18TH JANUARY 2024

MOHOCHI S.M

JUDGE