



ANK v RNM (Civil Appeal E094 of 2023) [2024] KEHC 3469 (KLR) (3 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA**

CIVIL APPEAL E094 OF 2023

REA OUGO, J

APRIL 3, 2024

BETWEEN

ANK APPELLANT

AND

RNM RESPONDENT

*(Being an appeal against the judgment of Hon. T.M Olando (P.M)
delivered on 9th August 2023 in Bungoma Children Case No. 9 of 2023)*

RULING

1. The appellant filed a Notice of Motion dated 1st September 2023 seeking an order of stay of execution of the judgment dated 28/7/2023 in Bungoma CMC Children Case No. E009 of 2023 pending the hearing and determination of the appeal.
2. A brief background to this appeal is that the case between the appellant and respondent relates to custody and maintenance of their children. They have four children: BW, BM, MA, and BT, aged 24, 20, 19, and 13 years respectively. The respondent filed a plaint in the subordinate court alleging that she has been single-handedly paying school fees, footing medical bills and general upkeep of the minors. The respondent pleaded that BT and B are in [Particulars Withheld] College while M and B are in Form 4 and Grade 7 respectively. She claimed that the court grant an order of payment of school fees and all academic requirements for the children; she be granted maintenance for the children; the appellant to pay Kshs 50,000/- for food, Kshs 10,000/- for clothing, Kshs 20,000/- to cover medical bills; Kshs 50,000/- for shelter and Kshs 20,000/- for miscellaneous expenses.
3. The appellant in response filed his defence and counterclaim. He acknowledged that he is the father of 4 children and in addition, he has other children, SM, PJ, DB and AN. Interestingly, the contents of his defence were in response to the respondent's Notice of Motion dated 22nd March 2023. The appellant urged the trial court to dismiss the plaint because she was misleading the court as only one



of the children was a minor and the others were adults. He advanced that he had been paying school fees and catering for the medical maintenance of the children.

4. The trial magistrate entered judgment as follows:
 1. That I grant custody of the minor children to the mother.
 2. The father shall have the right to visit the children at any time so long as it does not interfere with the children's education.
 3. That the father shall pay the school fee, all the education expenses and medical expenses for the children.
 4. The father shall pay medical expenses for the children.
 5. The father shall pay Kshs 10,000 per month to the mother as maintenance as long as the children are not in boarding school.
 6. The mother to pay rent, clothing and other basic needs.
5. The appellant dissatisfied with the judgment of the court, filed a memorandum of appeal dated 1/09/2023 seeking that the judgment be set aside. The appeal is premised on the following grounds:
 1. That the learned trial Magistrate erred in law and in fact when he delivered a ruling that (sic) unconstitutional to the extent that it gave parental responsibility to the appellant instead of sharing it equally.
 2. That the learned trial magistrate erred in law and in illegally ordering the appellant to maintain children who were adults without their knowledge, consent, participation, extension of parental responsibility and/or as required by the law.
 3. That the learned trial magistrate erred in law and in ordering the appellant to pay for maintenance that was exorbitant, excessive, unnecessary and beyond the appellant's means without first requiring and considering affidavit of means of both parties.
 4. That the learned trial magistrate erred in law and when he directed (sic) to pay rent yet the respondent occupies the appellant's residential house where she does not pay rent.
 5. That the learned trial magistrate erred in law and (sic) well he delivered a judgment in a defendant suit devoid of a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions as required under the Civil Procedure Rules.
 6. That the learned trial Magistrate erred in law and when he failed to purportedly analysis, evaluate and/or determine the evidence adduced and thereby arrive at an erroneous verdict.
 7. That the learned trial Magistrate erred in law and when he delivered a judgment that demonstrated bias against the appellant and occasioned a miscarriage of justice.
6. The respondent filed a replying affidavit dated 15th January 2023 opposing the appellant's application.

Determination

7. I have considered the record of the subordinate court and the application filed by the appellant seeking a stay of execution of the judgment of the subordinate court. The principles for granting a stay of



execution in children's matters was well settled in the case of Bhutt v. Bhutt Mombasa HCCC No. 8 of 2014 (O.S.) where the Court stated as follows:

“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 overriding consideration of the best interest of the child in accordance with Article 53 (2) of the Constitution.”

8. The court in LDT v PAO [2021] eKLR, stated as follows:

“18. While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted. I however note that the applicant averred that he will suffer great prejudice as he will be condemned to pay school fees twice if an order of stay is not granted.

...

20. The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense.”

9. I agree with the finding of the court in RWW v EKW Civil Appeal No 13 of 2013 [2019] eKLR where the court held that:

“As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about it. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”

10. According to the evidence on record, the appellant did not contest the paternity of the children, and it was undisputed that they were the offspring of both the appellant and the respondent. The appellant has not established that if the application is denied, then there is a likelihood that some hardship would be occasioned to the minors. On the contrary, granting a stay of execution order could potentially disrupt the children's education and impede their access to basic and medical necessities.

11. In the end, I find that the application dated 1st September 2023 is without merit and is consequently dismissed. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3RD DAY OF APRIL 2024.

R.E. OUGO

JUDGE

**In the presence of:

Applicant in person- present



Respondent in person- present

Wilkister -C/A

