AWK v EKM (Family Appeal E003 of 2024) [2024] KEHC 4886 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4886 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E003 OF 2024

G MUTAI, J

MAY 9, 2024

BETWEEN

AWK ..... APPLICANT

AND

EKM ..... RESPONDENT

RULING

1. Before this Court is the Notice of Motion dated 23rd January 2024. *vide* the said Motion, the Appellant/Applicant seeks the following orders:-

    a. Spent;

    b. That pending the hearing of this application, the honourable court be pleased to grant an order for stay of execution of the judgement dated 10th January 2024, directing that respondent is entitled to supervised access and having physical custody of the minor who is barely two years old from 9 am to 5 pm on all the weekends;

    c. That pending the hearing and determination of the appeal filed in the High Court, being Mombasa High Court Family Appeal No. (E003) of 2024, the honourable court be pleased to grant an order of stay of execution of the ruling dated 10th January 2024, finding that the respondent is entitled to supervised access and having physical custody of the minor who is barely two years old from 9am to 5pm on all the weekends and only providing a barely minimum of Kenya shillings 7500/= per month for maintenance; and

    d. That costs of this application be provided for.

2. The application is premised on the grounds stated in the body of the Motion and also on the supporting affidavit of the applicant sworn on 22nd January 2024.

3. The Appellant/Applicant deposed that the orders of the trial court expose the minor to unnecessary trauma as the minor is still breastfeeding and that it has also exposed the minor to danger, considering

the evidence regarding the respondent's character and moral antecedent. She stated that she has received constant threats from the Respondent. In the interest of the minor, his well-being should be safeguarded by the court by ensuring that he does not suffer untold misery. She averred that the Respondent may proceed to execute the judgement, which will put the minor's life into emotional turmoil, as well as violate his rights.

4. She thus urged the court to allow the application as prayed.

5. In response, the Respondent filed a Replying Affidavit dated 5th February 2024. He denied the allegations made by the Appellant/Applicant and stated that the applicant had denied him access to the child. Further, he urged the court to reduce the maintenance sum to Kes.5,000/- as he could not afford the higher amount ordered by the Court. Regarding his conduct, the Respondent averred that the criminal case is still ongoing, and thus, he is presumed innocent until proven guilty.

6. The Appellant/Applicant filed a Further Affidavit sworn on 11th March 2024. She reiterated the averments she had made in the Supporting Affidavit and urged the court to suspend the trial court's orders until the child attains school going age. She also urged the court to order for provision and maintenance of the minor in the sum of Kes.112,000/- per month, to be paid for equally by both parties. She urged that in the best interest of the child, she be granted full custody of the minor.

7. Parties were directed the parties to file their written submissions. The Appellant/Applicant, through her advocates, Messrs Mutisya Mwanzia & Ondeng, filed her written submissions dated 11th March 2024. The said submissions were however in regard to the appea, and not on the application. The Respondent, on the other hand, did not file his submissions.

8. The only issue, in my view, is whether I should grant the orders sought.

9. Order 42, Rule 6 (1) and (2) of the *Civil Procedure Rules* provides that:-

    1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

    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

        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.

10. From the provision above, it is evident that Courts, when considering whether or not to issue orders of stay of execution, consider three factors namely:-

    i. Substantial loss:

    ii. The application has been made without unreasonable delay; and

    iii. Security.

11. On substantial loss, the court in the case of *Premier Industries Limited vs Stephen Kilonzo Matiliku* [2021] eKLR stated:-

> "...Put differently, the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of *Kenya Shell Kenya Ltd v Kibiru & Another* [1986] KLR 410 cited by the Respondent. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:
>
> > "1. .....
> >
> > 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
> >
> > 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
> >
> > 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

The decision of Platt Ag JA, in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

> "The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in the two courts..."

12. The Applicant has submitted that the minor is still under breastfeeding and that if the access orders are enforced the child be exposed to unnecessary trauma and health complications if he fails to breast feed. He impugned the character of the Respondent and averred that to put the child in his possession would be harmful.

13. The court in the case of *A M vs M A M* [2012] eKLR stated:-

> "In deciding children's matters, it is incumbent upon the courts to bear in mind that children are vulnerable members of society and are therefore susceptible to physical, psychological and other types of abuses. The courts remain the upper guardians of children's rights and interests, and where necessary, have a final say in determining the overall welfare of the child.

This they do through a relatively delicate balancing of sensitive interests that relate to family status and touch on private lives of individuals."

14. Although it is doubtful if the child is still breastfeeding, given his age, the possibility that he could be makes the risk of harm to the child probable. This, coupled with the fact that the Respondent has a pending criminal case, calls for caution on the part of this Court when making the determination it is called upon to make herein.

15. In view of the foregoing, I find and hold that the child, whose best interests I must safeguard, might suffer substantial loss unless I grant the orders sought herein.

16. On whether the application was filed without unreasonable delay, It is my view that the same was filed without unreasonable delay.

17. I do not consider security necessary as this is an appeal arising out of proceedings in the Children's Court.

18. I am unable to consider maintenance and access issues at this point. The same will be dealt with conclusively during the hearing of the appeal.

19. From the foregoing, it is clear that I have found that the application has merit. The same is allowed.

20. Regarding costs, I am of the opinion that costs are inappropriate. I therefore make no orders as to costs.

21. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 9TH DAY OF MAY 2024

GREGORY MUTAI

JUDGE

In the presence of:

Mr Chege holding brief for Mr Ondeng for the Appellant/Applicant;

No appearance for the Respondent; and

Arthur – Court Assistant.