BMM v PMM (Family Appeal E034 of 2024) [2024] KEHC 5657 (KLR) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5657 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E034 OF 2024

G MUTAI, J

MAY 6, 2024

BETWEEN

BMM ..... APPELLANT

AND

PMM ..... RESPONDENT

(Order stay of execution of judgement delivered by the trial court on 5th February 2024 in Tononoka MCCHCC No. E230 of 2023)

RULING

1. What is before this Court is a Notice of Motion dated 26th February 2024. Vide the said Motion, the Appellant/Applicant seeks the following orders:-

    a. Spent;

    b. Spent;

    c. The Honourable Court pleased to order stay of execution of judgement delivered by the trial court on 5th February 2024 in Tononoka MCCHCC No. E230 of 2023; PMM v BMM and all consequential orders/proceedings and/or actions therein pending the hearing and determination of this appeal;

    d. The Honourable Court be pleased to grant any further relief and/orders it may deem fit and just; and

    e. The costs of this application be costs in the cause.

2. The application is premised on the grounds stated in the body of the Motion and also on the Supporting Affidavit of Michael Gitonga, Advocate, the learned counsel for the Appellant/Applicant.

3. In the said Supporting Affidavit counsel deposed that the Respondent was awarded custody of the minors effective from April 2024, vide the judgment delivered on 5th February 2024. Being dissatisfied with the said judgment, the Appellant/Applicant lodged an appeal before this court. The Appellant/ Applicant is apprehensive that if the orders sought are not granted, the Respondent will move the children to Nairobi, which will render the appeal nugatory. He stated that unless the orders sought are granted, the education and well-being of the minors will be affected.

4. Counsel averred that the application was filed without undue delay and urged the court to consider the best interest of a child principle and allow the application as prayed.

5. The Application was opposed. The respondent filed a Replying Affidavit sworn on 5th March 2024 vide which she opposed the application. The Respondent deposed that the application is premised on misrepresentation and concealment of material facts and was meant to mislead the court. She stated that she had secured a good school within close proximity of her residence and was ready to ensure the children attended school without fail. She urged the court to dismiss the application with costs.

6. The application was canvassed by way of written submissions. The applicant, through his advocate, Michael Gitonga, filed his written submissions dated 14th March 2024. Counsel relied on Order 42 Rule 6(2) of the *Civil Procedure Act* and submitted that in children matters the substantial loss of a child supersedes that of the parents. Further transferring the minor who is registered for the Kenya Primary School Education Assessment Examination (KPSEA) would greatly impact his well-being, and contravenes the principle of the best interest of a child. He further urged that a change of schools in the middle of an academic calendar for the minors will greatly impact their welfare.

7. Mr Gitonga submitted that the application was filed without delay and urged the court to allow the application as prayed.

8. The Respondent, on the other hand, through her advocates Odero-Osiemo & Co. Advocates, filed her written submissions dated 26th March 2024. I note that the submissions filed by the Respondent are in respect of the appeal, and not the application.

9. I have considered the application, the response and submissions filed by the parties. I must now determine whether the application has merit and if orders sought should issue.

10. The court in the case of *A M v 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."

11. The Appellant/Applicant seeks a stay of execution pending appeal. Order 42 Rule 6 (1) and (2) of the *Civil Procedure Act* 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 sub-rule (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.

12. It is clear from the above-quoted rule that Courts, when considering whether or not to stay execution pending appeal, must consider the following factors:-

   i. Substantial loss;

   ii. Whether or not the application has been made without unreasonable delay; and

   iii. Provision of security.

13. In discussing substantial loss, the court in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012]eKLR stated:-

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.
>
> The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:
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> "...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

14. As this is an appeal arising out of the proceedings before the Children's Court, I must, in addition to considering the test laid down in Order 42 Rule 6 (2) (a) and (b), consider the best interest of a child principle. I am guided by the case of *LDT v PAO* [2021] eKLR, where the court stated: -

> " While considering stay of execution in respect to children matters, besides 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...
>
> 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."

15. In my view, the Applicant did not provide proof of the substantial loss the minors would suffer if the orders sought in the application were denied. The children would still be able to go to school and

live with the Respondent. In any case, the court made provision for their maintenance. In view of the foregoing, I find and hold that the Applicant did not pass the first test. As no substantial loss was shown it is not necessary for me to consider whether or not the application was filed without undue delay or if security has been provided.

16. It is evident from the foregoing that I have not found merit in the application. The same is dismissed. In the interest of justice, this Court will hear the appeal on priority basis.

17. This being a matter about welfare of children I make no orders as to costs.

18. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF MAY 2024

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Gitonga, for the Appellant/Applicant;

Mr Osiemo, for the Respondent; and

Arthur – Court Assistant