JKN v MNN (Civil Appeal 55 of 2021) [2023] KEHC 1021 (KLR) (8 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1021 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 55 OF 2021

SM GITHINJI, J

FEBRUARY 8, 2023

BETWEEN

JKN ..... APPLICANT

AND

MNN ..... RESPONDENT

(An Appeal from the Judgment in CM Child Case No.4 of 2017 Before Hon. (Dr) Julie Oseko – Chief Magistrate delivered at Malindi on 19th May, 2021)

RULING

1. The applicant/appellant herein has filed a notice of motion under sections 3, 3A and 12 of the *Civil Procedure Act*, orders 5 rule 8 (16) and rule 12 of the *Civil Procedure Rules 2010* seeking the following orders;

    1. Stay of judgment of the trial court given on May 19, 2021.

    2. Stay of any proceedings, orders and decrees subsequent to the said judgment pending the hearing and the determination of this application and the appeal.

    3. The Defendant's case be reinstated in its entirety and remanded for hearing in a court with jurisdiction to determine the matter.

    4. Custody of the children remain with the Applicant/ Appellant pending the hearing and determination of the application herein and the Defendant's appeal of the trial court's judgment.

    5. The Respondent to immediately pay arrears of Kshs 2,760,000.00 for the maintenance, failure to which one third of her monthly salary and immovable assets be attached.

6. The Respondent to immediately pay arrears of Kshs 783,000.00 being half of the children's school fees and other learning related expenses failure to which another one third of her salary be attached.

7. The Respondent to forthwith remit Kshs 30,000.00 monthly in child maintenance.

8. The Respondent to refund all monies drawn since its maturity from the Education Insurance Policy to the benefit of their first born and to immediately relinquish control of the same.

9. The Respondent be condemned to meet the costs of this application.

2. The application is supported by grounds on the face of it and the supporting affidavit sworn by JKN sworn on the June 24, 2022. He deponed that he was aggrieved by the trial court's judgment and preferred an appeal against it. That he was neither notified of the hearing of the suit nor served with the Plaintiff's submissions yet the trial court proceeded to deliver the judgment. According to him, he was condemned unheard and the Judgment is callous, unconstitutional and bad in law.

3. The respondent filed a replying affidavit in response sworn on the July 13, 2022. According to her, since the filing of the appeal which the appellant has never served, he has not taken any steps to set it down for hearing. That the applicant has been jolted into action upon being served with a notice to show cause which he ignored and orders were issued. She asserted that the appeal was filed 14 months ago and the appellant has never applied for proceedings to enable him prepare the record of appeal if at all he was serious with pursuing the appeal.

Submissions

4. This court has had only the benefit of looking at the respondent's submissions filed on the December 5, 2022. I have considered her submissions and I note that she has identified three issues for determination; whether the appellant applied for stay at the earliest possible time, whether he has a good and arguable appeal and whether the applicant stands to suffer substantial loss if the orders are not granted. It is her submission that the judgment in this suit was delivered on the May 19, 2021 and the application was only filed in June, 2022 after the appellant was served with an application for execution.

5. She also submitted that the appellant has no arguable appeal as he failed to appear for the hearing in the lower court matter and that his conduct during the proceedings in the trial court has been wanting and that this appeal is a mere waste of court's time. That the appellant ought to have applied to set aside the lower court judgment if at all he was not given an opportunity to be heard.

Disposition

6. I have considered the application and the averments by the parties herein and what is for consideration is whether the prerequisites for grant of stay have been demonstrated by the applicant. The principles for granting stay of execution in children's matters are well settled in the case of *Bhutt v Bhutt* Mombasa HCCC No 8 of 2014 (OS) 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*."

7. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 rule 6 of the *Civil Procedure Rules* stipulates: -

> 1. "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 orders 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."

8. In such an application, the applicant ought to satisfy the court that substantial loss may result to the minors unless the order is made, that the application has been made; without delay and that the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

9. With this in mind and taking into consideration that this is a children matter, this court in addition must consider the best interest of the children. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted. I have perused the application and have noted that the applicant has not stated what prejudice he himself will suffer if the order for stay is not granted.

10. The averments herein indicate that the appellant has had custody of the minors since 2014 and the respondent has severally denied access to the children despite the judgment in the trial court of the May 19, 2021. The best interest of a child is superior to rights and wishes of parents and in essence they should incorporate the welfare of the child in its widest sense. The provisions of article 53(2) of the *Constitution* provide that: -

> " A child's best interests are of paramount importance in every matter concerning the child."

On the other hand, the *Children Act* provides at section 4(2) that:

> " In all actions concerning the children, whether undertaken by public or private or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

11. Notably, in an application as the one before this court, it is the children and not the applicant who need be established to likely suffer substantial loss if the orders sought are not granted. Essentially, the rights of the children override the rights of the applicant and the applicant has not demonstrated what substantial loss the children stands to suffer if the orders for stay are not granted. Further, the appellant/

applicant has not rebutted that he has not honoured the court's orders since judgment was passed on May 19, 2021. This court also notes that the appellant has had custody of the minors and the Applicant has not shown that the respondent is not suitable to have the care, control, and custody of the minors.

12. On whether this application has been made without unreasonable delay, I note that judgment was delivered on May 19, 2021; the applicant thereafter filed his Memorandum of Appeal on June 17, 2021 and the application for stay made on June 24, 2022. The appellant has equally not explained the reason for the delay of one year. It is my view that the delay in filing the application is unreasonable and could have been filed as an afterthought prompted by the existing warrant of arrest and committal to civil jail.

13. In the end, it is my finding that this application is not merited and the same is dismissed with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF FEBRUARY, 2023.

S.M. GITHINJI

JUDGE

In the Presence of;

Mr JKN the Applicant

Ms MNN the Respondent

Applicant; -We can take directions on the appeal.

Court; -The record is not yet prepared and served. It be prepared and served within one month. Mention for further directions on 11th May, 2023.

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S. M. GITHINJI

JUDGE

08/02/2023

CORAM: Hon. Justice S. M. Githinji

Applicant/Appellant in person

Respondent in person