



AK v SMM (Civil Appeal E010 of 2022) [2023] KEHC 17767 (KLR) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17767 (KLR)

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

CIVIL APPEAL E010 OF 2022

JN ONYIEGO, J

MAY 19, 2023

BETWEEN

AK APPELLANT

AND

SMM RESPONDENT

RULING

1. Through a plaint dated February 24, 2022, filed before Mandera children’s court, the plaintiff/ applicant herein former husband to the respondent sought orders of custody of their children then aged below 3years on grounds that the respondent was suffering from epilepsy thus likely to fall on them. He also sought an order that the respondent be allowed supervised visit to the children. On her part, the defendant/respondent denied having any medical condition that was likely to endanger the life of the children and that by virtue of the tender age of the children, she was suitable to be given custody.
2. After hearing the evidence from both parties, the court delivered its judgment on September 23, 2022 thus ordering that; the defendant to take sole custody of the two children until they reach the age of 18 years; the defendant to provide basic nutrition, shelter, water, and sanitation facilities until they reach age of 18 years; the defendant to meet medical expenses for the children through NHIF or any other medical cover; the plaintiff to cater for the basic education in public schools including school and related expenses until completion of secondary school; the plaintiff to pay the defendant Kshs 20,000 as monthly maintenance expenses in default his salary be attached; the plaintiff to have limited supervised access to the children during alternate weekends and half of the school holidays; through the children officer, the plaintiff to access the children in an open public place and each party to bear own costs.
3. Dissatisfied with the decision of the court, the plaintiff/applicant filed a memorandum of appeal on October 6, 2022 challenging the same. Contemporaneously filed with the appeal is a notice of motion seeking stay of execution of the said judgment on grounds that the amount of Kshs 20,000 ordered as



maintenance was too high considering that he has 13 other children from other wives hence his salary of Kshs 127,000 per month cannot accommodate.

4. The application is anchored on grounds on the face of it and an affidavit sworn by the applicant on the same day. He urged the court to allow him pay Kshs 8,000 as maintenance expenses per month. When the matter came up under certificate of urgency, the court granted stay of execution on interim basis pending hearing and determination of the application interpartes.
5. During the hearing of the application, the applicant reiterated the content of the application and affidavit in support and pleaded with the court to allow him pay Kshs 8,000 per month. On the other hand, the respondent urged the court to implement the judgment as she was suffering with children. Although both parties stated that they had filed their respective submissions, only the respondent placed her copy in the court file reiterating that the application is unmeritorious and that the applicant is a person of means being a medical officer.
6. I have considered the application herein, response thereto and submissions by the respondent. Issues that arise for determination are:
 - a. Whether the applicant is likely to suffer substantial loss if the order of stay of execution is not granted.
 - b. Whether the application has been presented within reasonable time.
 - c. Whether security for due performance of the decree or order has been deposited.
 - d. Whether there is any sufficient cause to warrant issuance of the orders.
 - e. Whether the applicant is likely to suffer substantial loss if the order of stay is not granted.
7. Under order 42 rule 6 of the *civil Procedure Rules*, an applicant seeking stay orders is duty bound to prove the following elements; That he or she is likely to suffer substantial loss in the event a stay order is not granted; that the application has been filed within reasonable time; that security for due performance of the decree or order has been deposited or a proposal to do so has been made and or, whether after taking into consideration the circumstances of the case, there is any other sufficient cause to warrant the court to issue the order of stay.
8. It must however be borne in mind that to grant or not to grant a stay of execution order is a matter of discretion by the court seized of the matter. See *Butt v Rent Restrictions Tribunal CA Nai No 6 of 1979* where where the court held that the prayer to grant stay of execution is discretionary and should be exercised in such away as not to prevent an appeal. In other words, the court must reasonably balance both the applicant's and respondent's interest and weigh on the merits and demerits in granting or not granting the order.
9. However, it is settled law that proof of likelihood of suffering substantial loss is the cornerstone for granting stay of execution orders. In the case of *Kenya Shell Limited vs Benjamin Karuga Kabiru & another (1986) eKLR* Platt J had this to say:

' It is usually a good rule to see if order XLI rule 4 of the Civil Procedure rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case unless an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without evidence it is difficult to see why the respondents should be kept out of their money.'



10. Similar position was held in the case of *Halai and another v Thornton and Turpin (1963) Limited (1990) KLR 365* where the court expressed itself that:

' Thus, the Superior court's discretion is tethered by three conditions. firstly, the appellant must establish sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, and thirdly the applicant must furnish security'.

11. In the spirit of Article 53(2) of the *Constitution*, this court is enjoined to make orders that promote the paramount principle that in every decision made affecting the affairs of a child the best interests of the child must be taken into account. In this regard, I am guided by the decision in the case of *KMM vs JIL (2016) eKLR* in which the court held that:

' At the international level, the legal instrument or rights of the child, the international convention on rights of the child (UNCRC) and the African charter on rights and welfare of the child (ACAWC) focus on child's best interest, welfare and considerations as paramount'.

12. The applicant is claiming that his net salary is Kshs 127,000 and that he is ready to pay Kshs 8,000. This is an issue to be determined on the main appeal. In the intervening period, children must eat and enjoy life like any other normal child. To suspend payment of maintenance expenses will be prejudicial to the children as it will not serve the best interests of the children.

13. I have not been convinced that the applicant is not a person of means. In any event, it is now a settled principle that courts should sparingly grant stay of execution orders touching on children matters inter alia maintenance and education. see *KKPM v SWW (2019) eKLR* where Ongeri J held that:

' I agree that where the duty to maintain a child is imposed on a parent by statute, it is not in the best interests of the child to suspend maintenance order particularly where parentage is not in dispute and that an expedited hearing of the appeal might be a solution where there is a challenge of quantum values than staying the orders of the trial court'. The court went further to state that 'the best interests of a child are superior to rights and values of parents.'.

14. The applicant has not demonstrated to the court that he will suffer substantial loss should he continue paying the amount ordered pending hearing of the appeal when substantive orders can be made. In a nut shell, it is in the best interest of the children that the applicant continues paying the amount ordered pending further orders.

15. Regarding the issue whether the application was timeously filed, the same was filed within 13 days from the date the impugned judgment was delivered hence reasonable time. As concerns security deposit, this is not a suitable case to make such an order. Consequently, I do not find the application meritorious hence dismissed with no order as to costs. Interim orders in place are hereby lifted. Parties to expedite the hearing of the appeal.

Dated, signed and delivered this 19TH day of MAY, 2023

J.N. ONYIEGO

JUDGE

