



GM v SW (Civil Appeal 80 of 2017) [2023] KEHC 17379 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 80 OF 2017**

A MSHILA, J

MAY 12, 2023

BETWEEN

GM APPLICANT

AND

SW RESPONDENT

RULING

1. The court is called upon to determine the application dated 26th July 2022, brought under Articles 50 (1), and 159 (2) (d), (e) of *the Constitution*, 2010, Sections 1A & B, 3, 3A of the *Civil Procedure Act* and Order 50 Rule 1, Order 42 Rule 6 of the *Civil Procedure Rules* 2010. The application seeks orders of stay of further proceedings as well as stay of further execution of the ruling delivered on 5th January 2022, in the Thika Chief Magistrate Children Case No. 163 of 2015 pending the hearing and determination of the appeal.
2. The application is premised on the grounds that pursuant to the court order of 28th October 2015, the Appellant was condemned to pay children maintenance of Kshs.10,000/= aggrieved by the said order he then filed the current appeal; at the hearing of the appeal the parties reconciled and started living together from the year 2017 until the Respondent left the matrimonial home and remarried. The Respondent later filed an application in the trial court seeking arrears of Kshs. 480,000/=. The Respondent has caused the applicant to be arrested and committed to civil jail and released after payment of a certain amounts. The applicant now desires to prosecute the appeal to its final conclusion.
3. The application is supported by the annexed Supporting Affidavit of GM, who reiterates the grounds of the application. He further depones that he stands to suffer irreparable harm by being condemned unheard as he was providing for the minor prior to the filing of the Children’s case and even during the period when the parties had reconciled.
4. Opposing the application, the Respondent filed the Replying Affidavit sworn on 14th November 2022, in which she depones that the application is aimed at sabotaging the best interest of the minors. The



reconciliation and living together was short lived. The reconciliation was based on the promise by the Applicant to build the Respondent and the children a house to settle in, which the Applicant failed to honour and transferred the property of land to his other children and blood sister. That the Applicant was in arrears of Kshs.410,000/= having paid a sum of Kshs.70,000/= from the decretal sum. She depones the Applicant intends to avoid his parental responsibilities by filing the instant application and thus the current application is not in the best interest of the children. She urged the court to dismiss the application and order the applicant pay the monthly maintenance allowance in arrears of Kshs.410,000/=

5. At the hearing the Applicant urged the court to reduce the monthly contribution for the child maintenance from Kshs.8,000/= to Kshs.5,000/=.
6. On the other hand, S told the court the monthly contribution was reduced from Kshs.10,000/= to Kshs.8,000/= and urged the court to allow the payment of Kshs.8,000/=. She also informed the court that the Applicant removed the children from his NHIF card. According to Respondent the amount of Kshs.8,000/= contribution is not enough. The Applicant was in arrears of Kshs.410,000/= which ought to be paid for the best interest of the child.
7. In a rejoinder the Applicant submitted that they had reconciled in 2018 and had been staying together.

Issues for Determination

8. Having considered the application, the Supporting Affidavit, the Replying Affidavit and the submissions of the parties, the issue framed for determination is;
 - i. whether the application meets the threshold for granting the orders sought.

Analysis

9. The court in looking at the principles of stay of execution as laid down in Order 42 Rule 6 of the Civil Procedure Act in matters relating to the children should be mindful of the best interest of the child.
10. 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 1st 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. “
11. The applicant must satisfy three (3) conditions which are as follows: that there would be substantial loss, the application was made without unreasonable delay and the applicant has furnished the court with security.



12. This being a children's matter the best interest of the minor is paramount and the court should be mindful of the same in making any determination.
13. A brief history of the matter is the applicant filed the current appeal in 2017 against the ruling of the trial court delivered on 28th October 2015. When the appeal came up for hearing the parties informed the court they were negotiating an out of court settlement and in the circumstances the court allowed them to record a consent in the trial court. The parties reconciled and moved in together when the Respondent later left the matrimonial home in 2018 and later in 2022 moved the court to enforce the orders of the trial court.
14. This court has noted that the Respondent had gone silent and had not followed the Applicant to enforce the court orders after she left the matrimonial home the second time in the year 2018 and only moved the trial court in 2022 seeking to enforce the orders of 2015. This move in the court's view is not genuine and appears to aim at harassing, intimidating and frustrating and punishing the Applicant for not fulfilling the condition set in the reconciliation.
15. The Applicant submits the action by the Respondent has made him face mental anguish and turmoil which has affected his mental stability as well. The Respondent ought to have demonstrated that the children will suffer if the orders of stay of execution are not granted.
16. This court opines that staying the orders of monthly contribution will greatly affect the children and thus is satisfied that it is not in the best interest of the minor to stay the execution of the ruling delivered by the trial court.
17. Nonetheless, the Notice of Motion dated 26th July 2022 is found to be partially meritorious and is allowed provided the applicant to continues remitting the monthly maintenance of Kshs. 8,000/= but will stay the further execution the arrears of the amounts of Kshs. 410,000/= pending the hearing and determination of the appeal.

Findings & Determination

18. For the foregoing reasons this court makes the following findings and determinations;
 - i. The application is found to be partially meritorious and the stay of execution pending appeal is allowed on the following conditions;
 - ii. The Applicant to continue remitting the monthly maintenance of Kshs. 8,000/= with effect from the date of filing this application;
 - iii. Stay of further execution of the arrears in the amounts of Kshs. 410,000/= is hereby granted pending hearing and determination of the appeal.
 - iv. Mention on 27/07/2023 for directions on fixing a hearing date for the Appeal on a priority basis.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 12TH DAY OF MAY, 2023.

HON. A. MSHILA
JUDGE

