



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**APPEAL NO. E072 OF 2021**

**IN THE MATTER OF THE ESTATE OF BABY SLA**

**MK.....APPELLANT/APPLICANT**

**VERSUS**

**KA.....RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion application dated **26<sup>th</sup> July 2021** in which the Appellant/Applicant **MKW** seeks the following orders:-

**“1. Spent.**

**2. Spent**

**3. THAT there be a stay of the order of the Nairobi Chief**

**Magistrates Court delivered on 23<sup>rd</sup> July 2021 in CC 196 of 2019 pending the hearing and determination of the appeal.**

**4. THAT costs of this application be provided for.**

2. The application which was premised upon order **42 Rule 6(1)** and **6(5)**, **order 51 Rule 1** of the **civil Procedure Rules, Section 1A, 3** and **3A of the Civil Procedure Act** together with all enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **KA** opposed the application through his Replying Affidavit dated **31<sup>st</sup> August 2021**. The application was canvassed by way of written submissions. The Applicant filed written submissions dated **11<sup>th</sup> September 2021** whilst the Respondent relied upon his written submissions dated **4<sup>th</sup> October 2021**.

#### **BACKGROUND**

4. The present appeal and application arise from the judgment delivered on **23<sup>rd</sup> July 2021** by **Hon M.W. Kibe, Resident Magistrate** in **Nairobi Children Case No. 196 of 2019**. In that judgment, the learned trial magistrate made the following orders:-

**“1. THAT both parties shall have joint custody of the subject minor.**

**2. THAT both parties shall share actual custody of the subject minor.**

**3. THAT the Defendant/subject minor’s father shall have actual custody of the subject minor during weekdays of the school term. The 2<sup>nd</sup> half of every school holiday and the 1<sup>st</sup> and 2<sup>nd</sup> weekend of every month during the school term. The Plaintiff/mother on her part shall have custody of the subject minor on the 3<sup>rd</sup> and 4<sup>th</sup> weekend of every month starting**

Friday after school to Sunday 5.00 pm during the school terms and the 1<sup>st</sup> half of the school holiday in order to continue building and strengthening the maternal bond between her and her son. The Plaintiff shall have access to the subject minor in school within school rules to monitor the academic progress of the minor in school.

4. THAT the plaintiff shall pick the subject minor from school on the said Fridays and during 1<sup>st</sup> half of the school holiday or another place mutually agreed by the parties. Parties shall agree on dropping point of the subject minor.

5. THAT the Defendant/subject minor's father shall cater for the subject minor's shelter, minor's food, minor's medical cover, minor's clothing and any other needs of the minor. The Plaintiff/mother on her part shall cater for the subject minor's school related expenses and the minor's clothing and provide the minor with food and shelter when she has actual custody of the subject minor.

6. THAT both parties shall not remove the subject minor out of the Republic of Kenya without consent of the other parent or leave of the court.

7. THAT no order as to costs'

5. Being aggrieved by the some of the orders made by the trial court, the Applicant filed the Memorandum of Appeal dated 26<sup>th</sup> July 2021. That appeal is yet to be heard. Contemporaneously with the said Memorandum of Appeal the Applicant filed the instant application seeking a stay of the orders made by the trial court specifically order No. 5 which directed that the Plaintiff/mother (the Applicant herein) cater for the minors school related expenses.

6. The Applicant submitted that the orders made by the trial court requiring her to cater for the minors school fees have resulted in her bearing an unequal responsibility with respect to the maintenance and upkeep of the child. The Applicant argued that since the Respondent (the child's father) lives with the minor in his house, he would not have to incur any additional expenses towards the accommodation of the minor.

7. The Applicant further submitted that the trial court failed to take into account the fact that the Respondent has all along been facilitating the education of the child at a school of his choice and that the Respondent has not made any complaint about this. That she does not have the financial capacity to pay the minors school fees and that if the Applicant takes up the responsibility to pay school fees then the Respondent will be left with no real or tangible responsibility in respect of the minor.

8. The Applicant laments that she has been excluded from the minors school related activities like school open days and is therefore not aware of the child's academic progress.

9. Finally, the Applicant a single mother of another child submits that she stands to suffer substantial loss if the stay orders are not granted and that her appeal may well be rendered nugatory. As stated earlier this application for a stay was opposed by the Respondent.

10. The Respondent states that the Applicant abandoned the minor in the year 2012 when she went to Dubai to work. That during her absence the Respondent catered for all the child's expenses including maintenance and school fees. That even upon her return the Applicant refused to take up any parental responsibility for the minor.

11. The Respondent asserted that the Applicant being a permanent employee of the [Particulars Withheld] has the financial capacity to pay for the child's school related expenses. That the Applicant has failed to demonstrate what loss if any she is likely to suffer if the stay orders are not granted.

12. Finally, the Respondent submits that parental responsibility is shared between both parents and that the Applicant does not therefore have an arguable appeal. He urges the court to dismiss the application in its entirety.

#### ANALYSIS AND DETERMINATION

13. I have carefully considered the application before me the Affidavit in reply as well as the written submission filed by both parties. It is trite law that in application of this nature time is of the essence thus the application must be filed without any delay. The judgment in issue was delivered on 23<sup>rd</sup> July 2021. The present application was filed on 26<sup>th</sup> July 2021 barely three (3) days after delivery of the judgment. In the circumstances, I am satisfied that the application was filed in a timeous manner.

14. Order 42 Rule 6 (2) of the Civil Procedure Rules, provides for the circumstances under which the court may exercise its discretion to grant a stay pending appeal as follows:-

“(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”.

15. The Applicant has claimed that she is likely to suffer substantial loss if the stay orders sought are not granted. However, the Applicant has not demonstrated the nature and/or extent of loss that she is likely to suffer. ‘**Substantial loss**’ is not an abstract principle. There must be tangible evidence to support the claim of substantial loss. In the case of **SAMVIR TRUSTEE LIMITED – VS GUARDIAN BANK LIMITED Milimani HCCC 795 of 1997 Hon Justice Warsame** (as he then was) held as follows: -

**“.....it is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means that the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.....”** (own emphasis).

16. It has been said that evidence of substantial loss is the key that unlocks the courts discretion to grant a stay. In the case of **DANIEL CHEBUTUK ROTICH & 2 OTHERS VS EMIRATES AIRLINES [2001]eKLR, Hon Justice Musinga** (as he then was) explained ‘substantial loss’ in the following terms-

**“...substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”**

17. In the case of **Adah Nyabok vs Uganda Holding Properties Limited (2021), Mwera J**, (as he then was) stated that:-

**“Demonstration what substantial loss is likely to be suffered, is the core to granting a stay order pending appeal.”**

18. Therefore Applicant cannot merely allege substantial loss without demonstrating the nature of such loss. The Applicant has failed to show what loss if any she is likely to suffer by paying her own child's school fees. Surely, it should be a matter of pride for a parent to contribute towards the education of her own child. It is trite law that in matter of maintenance and upkeep of a child, both parents have an equal responsibility to provide for the child. I have perused the orders made by the trial court. The learned magistrate apportioned to each parent certain responsibilities in respect of the minors maintenance in accordance with the law. Therefore, the Applicants allegation that the orders have placed on herself an unequal burden with respect to the maintenance of the child is not persuasive.

19. The court cannot lose sight of the fact that this matter concerns the welfare of a child. **Article 53(2) of the Constitution of Kenya, 2010** provides that **“A child’s best interests are of paramount importance in every matter concerning the child”**.

20. Likewise **Section 4(3) of the Children Act 2001** provides that:-

**“In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”**. (Own emphasis)

21. If the orders requiring payment of school fees for the minor are stayed what then would be the fate of this child. The child would have to drop out of school and this would certainly be detrimental to the child's best interest and well being.

22. The Applicant claims that she lacks financial capacity to pay the school fees whilst alleging that the Respondent is capable of paying the same. The question of the financial capacity of the parents is one which can only be determined upon a full hearing of the main appeal. To decide this matter at the interim stage would amount to pre-determining the appeal.

23. Moreover courts are often reluctant to interfere with or suspend maintenance orders in respect of a minor as this would not be in the best interest of the child. In the case of **ZMO – VS – EIM [2013] eKLR Hon Justice William Musyoka** held as follows:-

**“... As a matter of principle grant of stay of execution of maintenance orders in childrens cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide upkeep of their minor children. There are no two ways about it. Suspension of a maintenance order is not in the best interest of the child, particularly in cases as this one where paternity is not in dispute**

**..... The solution ideally was in expediting the disposal of the appeal.....”** (own emphasis).

24. Finally the court has been told that the Applicant has failed to comply with the orders made on **23<sup>rd</sup> July 2021**. She must be warned that if this is the case then she is treading on dangerous ground as her actions may be deemed to amount to contempt of court. It is trite that courts do not make orders in vain. A party to whom an order is directed has a legal obligation to obey those orders whether he agrees with them or not and no matter how unpalatable the order may be.

26. In the case of **Teachers Service Commission – vs – Kenya National Union of Teachers 2 others (2013) eKLR**, the court held that:-

**“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”**(own emphasis)

28. If the respondent has willfully defied a valid court she cannot come before the same court seeking that the court exercise its discretion in her favour. In the case of MN –VS – TAN & ANOTHER (2015) eKLR the court held as follows: -

**“A valid court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of law. It is not a mere wish or proposition. Disobedience or non-compliance with it attracts severe consequences. It would appear to me that the appellant believes that the orders of 30<sup>th</sup> July 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them”.**

29. In the of MN –VS – TAN & ANOTHER case (Supra) the court stated as follows: -

**The appellant has applied to the court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law.** (Own emphasis)

30. The Applicant is obliged to obey the orders made by the trial court until such time or said orders are set aside if at all. Based on the foregoing I find no merit in this application. The Notice of Motion **dated 26<sup>th</sup> July 2021** is dismissed in its entirety. This being a family matter each side shall pay its own costs.

**DATED IN NAIROBI THIS 11<sup>TH</sup> DAY OF FEBRUARY 2022.**

.....

**MAUREEN A. ODERO**

**JUDGE**