



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
FAMILY APPEAL NO. 16 OF 2020

HMI.....APPELLANT/APPLICANT

VERSUS

KBH.....RESPONDENT

RULING

1. The Appellant/Applicant herein filed a Notice of Motion Application dated 29/12/2020 brought pursuant to Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. In the Application, the Applicant prays for the following orders:

1. Spent;

2. THAT this honourable court be pleased to immediately stay all the proceedings and/or execution process currently ongoing at the Tononoka Children's Court, Mombasa in Tononoka Children's Case No. 435 of 2019 pending the full hearing and final determination of the Appellant/Applicant's Appeal lodged herein at the High Court of Kenya at Mombasa;

3. THAT costs of this Application be provided for.

2. The application is premised on the grounds on the face of it. It is supported by an Affidavit sworn on 29/12/2020 by HMI the Applicant herein.

Background

3. The Appellant/Applicant has been embroiled in a dispute over custody of JRH, a minor aged 3 years old at Tononoka Children's Court, Case No. 435 of 2019.

4. The Appellant/Applicant has come to court as the biological mother to the minor JRH aged 3 years, a child of tender age seeking stay of proceedings before the Tononoka Children's Court, Case No. 435 of 2019 and stay of execution of the Ruling issued on 16/12/2020 that grants custody of the minor for a period of over 40 days to the Respondent, a foreign national, who is a permanent resident of the United Kingdom and has no permanent residence in Mombasa.

5. The Appellant/Applicant further avers that the respondent is elderly (67 years) and that she is not aware of the environment nor the persons living with the child, and therefore fears for the child.

6. In response, the respondent filed a replying affidavit sworn on 28th January 2021 by the respondent thus opposing the application stating that; it does not meet the criteria for staying proceedings nor execution; application is a delaying tactic for the lower court proceedings; application is based on material misrepresentation of facts; applicant wants to use the baby as a source of wealth and, that the respondent does not intend to remove the child from the local jurisdiction of the court

7. During the hearing, Mr. Gichana for the applicant basically adopted the averments contained in the affidavit in support of the application. Unfortunately, there was no appearance on the respondent's side hence the application proceeded ex parte unopposed.

Analysis and Determination

8. Having considered the Application herein, the Affidavit in support and oral submissions by the applicant, the following are the issues for determination: -

- i) Whether the applicant has met the criteria for grant of stay of proceedings**
- ii) Whether the applicant has met the criteria for grant of stay of execution**

9. From the onset, I wish to state that the application before me was not challenged by the defendant during the hearing despite service of the hearing date having been effected. However, failure to challenge the application during the hearing does not automatically imply that the application must succeed.

10. This court is duty bound to evaluate, re-examine and determine whether the application has merit and make an independent decision. In this regard I am guided by the holding of the Supreme Court of Kenya **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR** where the court at paragraph 10 held: -

“...Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court...”

11. The crux of the application is that the applicant seeks stay of proceedings before Tononoka Children's Court, Case No. 435 of 2019 as well as stay of execution of order granted on the 16/12/2020 in the said children's case. The Appellant/Applicant is aggrieved by the grant of custody of the minor the subject of these proceedings to the Respondent who has no known permanent residence in Mombasa.

Whether the applicant has met the criteria for grant of stay of proceedings

12. The decision whether or not to grant stay of proceedings is discretionary. This Court has powers to stay proceedings pending appeal. This jurisdiction is derived from both Order 42 rule 6 (1) of the ***Civil Procedure Rules*** as well as the inherent jurisdiction reserved under section 3A of the ***Civil Procedure Act***. In **Global Tours & Travel Ltd HCWC No. 43 of 2000 Ringera, J** (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of

proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...

13. To amplify on court's powers and the ultimate test for consideration before a court could exercise its discretion in staying proceedings, the court in **Kenya Wildlife Service v James Mutembei [2019] eKLR** had this to say;

"...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent..."

14. In the instant case, there is an appeal pending determination. The appeal will most likely be rendered nugatory should the proceedings in the lower court continue and conclude before the appeal is heard and determined. It is my considered view, that in the interest of justice and in exercise of this court's discretion, a grant of stay of proceedings will not prejudice the Respondent. In any event, the respondent did not challenge the application during the hearing to prove that he is likely to suffer prejudice if litigation is stopped before the Tononoka Children's Court. To that extent, to avoid parallel proceedings going on both in the High court and lower court, stay of proceedings before the lower court will suffice. Accordingly, Tononoka lower court proceedings in children case No.435 of 2019 are hereby stayed.

Whether the applicant has met the criteria for grant of stay of execution

15. In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution under Order 42 rule 6 of the Civil Procedure Rules, must be complemented by an overriding consideration of the best interest of a child in accordance with Article 53 (2) of the Constitution. This is further amplified by the Children Act Section 4(3) which 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 interests of the child shall be a primary consideration."

16. The court in exercising its jurisdiction to grant stay of execution as provided under Order 42 Rule 6 (2) the high Court must be satisfied that; the applicant will suffer substantial loss if stay is not granted; the application for stay has been brought without undue delay and, the applicant has provided security for due performance of the decree.

17. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion in granting stay of execution and held that:

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will

consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

18. Was the Application for stay sought without considerable delay? The Order appealed against was delivered on 16/12/2020. Both the Memorandum of Appeal and the Application herein were filed on 29/12/2020. I am satisfied that the application has been made timeously and without unreasonable delay.

19. On the issue of substantial loss, the Appellant/Applicant, argues that the Respondent has been granted custody of their child of a tender age of 3 years whilst he is an elderly man aged 67 years a British Citizen who has no known residence in Mombasa. The child, JRH is a child of tender age. The appellant is afraid that the people living with the Respondent are unknown to her and she fears for the safety of the child. The Appellant has further averred that the child has suffered injuries twice in the custody of the Respondent. The Appellant/Applicant fears that harm may befall the minor as the Respondent had wanted the pregnancy terminated. She is also apprehensive that the Respondent can at any time take the child to Britain without her consent and she may never be able to see her child again.

20. In the instant case, traits of special circumstances were demonstrated. The Appellant/Applicant has demonstrated the extent of substantial loss she is likely to suffer in terms of mental anguish should the child leave the country or jurisdiction of the court with the respondent who is a foreigner. The child JRH is of tender age of 3 years who should be under the care of his mother but has been granted to his father of 67 years of age. She has further demonstrated that the child might be taken out of the country at any time causing loss to her as well as the child who should have an opportunity to be brought up by both parents.

21. From the record, the Appellant/Applicant has been granted access only through calls and video calls. As a general rule, it is important for a child of 3 years, a tender age to be able to be taken care of by his/her mother unless there are exceptional circumstances to justify custody orders to the father. Having not challenged the application during the hearing, no exceptional circumstances were brought out for consideration.

22. The Judges of Appeal in the *Githunguri v Githunguri [1979] eKLR with approval quoted Roxburgh J. in Re S (an infant) [1958] 1 All ER 783, at 786 and 787:*

“...I only say this; the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule...”

23. The Court of Appeal in *J.O. v S.A.O (2016) eKLR* defined exceptional circumstance to be:

“...There is a plethora of decisions by this court as well as the High Court that in determining matters of custody of children and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother because mothers are best suitable to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral...”

24. For the above reasons stated, and in exercise of this court’s inherent and express supervisory jurisdiction over subordinate courts, I am inclined to make orders as follows;

(a) That proceedings in Tononoka children case no 432/19 are hereby stayed pending hearing

and determination of the appeal herein;

(b) That execution of the orders of the hon. Magistrate issued on 16/12/2020 is hereby stayed pending hearing and determination of the appeal herein

(c) That the Minor herein is on temporary basis restored to the mother (applicant) pending hearing and determination of the appeal

(d) That the respondent(father) shall have supervised visitation and access rights to the minor during weekends between 8.00 Am and 400Pm

(e) That Picking and return points of the minor shall be at Tononoka Children's Court under the supervision of the children protection officer Mvita

(f) That the DR to call for the original file from Tononoka children court

(g) That order numbers (C) and (D) above shall take effect from the weekend of 13th March 2021

(h) Mention on 11th March 2021 to confirm compliance

(i) This being a family matter, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH MARCH 2021.

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J. N. ONYIEGO

JUDGE