



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 38 OF 2021

RKC, VC (suing through their mother and next friend) MNM.....APPELLANT

VERSUS

CCM.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Atiang Ngunyi & Associates, Advocates for the respondent

Oduor Simiyu & Co. Advocates for the Applicant

RULING

By a notice of motion dated 5.5.2021 expressed to be brought pursuant to Order 42 Rule (6) of the Civil Procedure Rules and 53 A of the Court Procedure Act, the application primarily seeks an order for stay of execution of the ruling/order dated 20.4.2021 made in CMCC No. 3 of 2016. It was the applicant's case that she is aggrieved with the decision for reasons stated in the notice of motion and corresponding affidavit in support filed on 7.5.2021. As the respondent as a rejoinder to the application filed is opposed to any grant of stay of execution as canvassed in his grounds of opposition to this matter dated 11.5.2021.

Determination

I have considered the application, the affidavit both in support and the grounds in opposition as filed by the respondent. The principles guiding the grant of stay of execution pending appeal are well settled. These principles are as expressly set out under order 42 Rule 6 of the Civil Procedure Rules. They include the following thus:

- (a) That the court must be satisfied that substantial loss may result to the applicant unless the order is made.
- (b) The application has been made without unreasonable delay
- (c) That security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant. For these see the cases of Vishran Ravji Halae v Thorntone & Turpin C. A. No 15 of 1990 (1990) KRL 365.

On substantial loss the court in *century oil trading Co Ltd v Kenya shell Ltd HCMCA No. 1561 of 2007* held inter alia, that, "the word substantial loss cannot mean the ordinary loss to which every judgment debtor is necessary subjected, when he loses his case and is deprived of his property in consequence..."

In the same breadth, the court in *Kenya Shell Ltd v Kiberu C (1986 klr 410* expressed itself as follows: "That substantial loss in its various forms , is the corner stone of both jurisdictions for granting stay. This has been amplified in the case of *Antoine Ndiaye vs African Virtue University, Nairobi Civil Suit No 422 of 2006 in which Gikonyo J* of stay: observed as follows with regard to the grant of orders of stay:

So, the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the

Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must prove (sic). *Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown.*" (Emphasis added)

The Court went on to state that:

"This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means. See Harlsbury's Law of England on this subject. In my view, substantial loss under order 42 Rule 6 is not in relation to the size of the amount of the decree or judgment because however large or small, the judgment debtor is liable to pay it. The fact that the decree is of a colossal amount will only be useful material if the Applicant shows that the Respondent is not able to refund such colossal sum of money; it is not that the Respondent should always be a person of straw; the opposite could be true and a respondent may be a lucratively well-endowed person, individual or institution, who is able to refund the colossal sum of money.I say all these things because both parties have rights; the Applicant to his appeal which includes prospects of success; and the Respondent to the fruits of his judgment and that right should only be restricted or postponed where there is sufficient cause to do so.

The Court concluded that:

"On the basis of the above, the Applicant has not established that substantial loss will occur unless stay of execution is made. The Applicant seems to rely more on the success of the appeal to the extent of almost urging the grounds of appeal on immunity. The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds. I have extensively discussed this matter above and I cite the case of Jason Ngumba [2014] eKLR that: '...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process. But what was stated in the case of Absalom Dova vs Tarbo Transporters [2013] eKLR is relevant, that: "The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination". How, therefore, will the court balance the rights of parties in the circumstances of this case"

Despite my findings above, I reckon that the Applicant is alive to the fact that even where stay is granted it must be on terms in the form of a security for the due performance of such decree or order as may M A & Another v Honourable Attorney General & 4 others [2016] eKLR Petition 562 of 2012 | Kenya Law Reports 2017 Page 9 of 10. ultimately be binding on the Applicant..." (Emphasis added)

The gist of the application is that the applicant was never given an opportunity to be heard on the notice to show cause for the demand of maintenance. That there are outstanding issues on maintenance which were not properly dealt with by the trial court necessitating the intended appeal. Further, the applicant contends that the existence of the high court judgment dated 20.09.2016, did grant the minors custody to the mother and the respondent was to retain access during the school holidays. The issue then is whether the decision of the trial court is compatible with the high court judgement. It is obvious that is a moot question which can only be canvassed on appeal.

The current issue for now is whether the applicant satisfies the criteria for grant of stay of execution. In light of the foregoing background and litigation history, the court has to be guided by the above principles in exercise of its discretion to decline or grant stay of execution. The other aspects of these case should have shown whether or not the detention of the applicant was the best interest of the minors. The dynamics of the law on stay of execution is not static and therefore a need for the court to make reference to any special circumstance to preserve the **Res** pending the determination of the appeal. It's trite the issue before the court is whether the applicant can be granted temporary stay to restrain the trial court from carrying out the order of depriving her fundamental rights to liberty and human dignity as enshrined in Article 28 and 29 of the Constitution. A discretion to grant or refuse stay must also take into account the competing rights of the parties as well as the circumstances of the case. The fundamental principle on the welfare and best interest of the child provided for under Article 53 of the Constitution and Section 4 of the children Act ought to naturally underscore the subject matter of the proceedings.

Therefore, any decision under order 42 Rule 6 of the CPR has to be considered keeping in view the welfare and best interest of the child who are at the center of this litigation. The applicant in her affidavit alludes to issues on custody and maintenance. The respondent in his rejoinder elected to oppose the application on the strength that the reliefs sought have since been overtaken by events whereas the judgment involves money the terms upon which stay is granted has to show existence of special circumstances. In the case of **SPDC vs Amadi & Others (2011) Vol5 5-7 Pt, 1 MJSC 1** the following special circumstances have received judicial approval to persuade the court to warrant stay of execution, if denied would:

- a) Destroy the subject matter of the proceedings
- b) Foist upon the court a situation of complete helplessness
- c) Render nugatory any order or orders of the appeal Court

d) Paralyze in one way or the other, the execution by the litigation of his constitutional right of appeal

e) Provide a situation in which even if the appellant succeeds in his appeal there could be no return to the status quo

I would find in this instance, concerns raised by the applicant which touches on the provisions of Section 38 of the Civil Procedure Act can be summed up as special circumstances which point to the issue of notice before the final order of detention was arrived at by the trial court. It is therefore my considered view that in the event an appeal succeeds on this ground on the right to be heard as anchored under Article 50 of the Constitution the applicant would have suffered substantial loss following his detention to police or prison custody. There is therefore substantial question of law to be adjudicated upon at an opportune time by this court sitting on appeal against the ruling of the trial court.

Based on the above facts there is an appeal about to be prosecuted by the applicant, to that effect there is a *prima facie* case with a likelihood of success as a ground of appeal. The making of the order on stay of execution is aimed at not to render the appeal nugatory. **See Butt v Rent Restrictions Tribunal (1979) and James Wangalwa & Another v Agnes Naliaka Cheseto (2012) EKL.R.**

Having been persuaded by the applicant in her quest for stay of execution I render my findings as follows.

By the nature of the trial court judgment the respondent is restrained from effecting the terms of the judgment pending the hearing and determination of the appeal. This reinforces a declaration do hereby issue to the prison or police authorities to release the applicant if held in custody in matters or claims arising out of **CMCC No. 3 of 2016** pending further directions from this court. In the event the applicant has commenced to serve any period of detention or sentence the same shall stand suspended forthwith. As the dispute is conceived and maintained under Article 53 of the Constitution and Section 4 of the Children's Act to safeguard and promote the rights and welfare of the children, the appeal be listed on fast track basis by the Deputy Registrar and not later than 30 days from today's ruling. The costs of this application be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF MAY, 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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