**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 64 OF 2019**

**MMW.....APPELLANT/APPLICANT**

**VERSUS**

**JWW,**

**PWM &**

**DKM**

**(Minors suing through MWW Mother and Next Friend).....RESPONDENT**

**RULING**

**Brief facts**

1. The applicant has brought this application dated 15th November 2019, under Order 42 Rule 6 as read with Order 51 Rule 1 of the Civil Procedure Rules and Article 53(2) of the Constitution, seeking for orders for stay of execution of the judgment and decree in Nyeri Children's Case No. 26 of 2019 pending the hearing and determination of the application herein and the appeal.

2. In opposition to the application, the respondent has filed a Replying Affidavit dated 28th November 2019.

3. The applicant further filed a Supplementary Affidavit dated 25th February 2020.

**The Applicant's case**

4. The applicant states that the respondent obtained judgment against him in the trial court in which the court ordered him to pay Kshs. 5,000/- for food and clothing plus Kshs. 500/- for NHIF Medical cover and to cater for the minors' education and educational accessories. He adds that he is a man of limited means and he is not in a financial position to pay the said sums of money. This is so as he earns a net salary of Kshs. 3,000/- and hence he cannot afford to expend Kshs. 5,000/- monthly and cater for the minors' education.

5. The applicant contends that he was burdened with the responsibility of taking care of the respondent's 1st child, JWW who is not his biological child, which responsibility ought to be passed to the minor's biological father.

6. The applicant contends that the respondent also has a duty towards the upkeep of the minors and ought to provide for their food and clothing. He adds that if the judgment is not stayed it will render him incapable of providing for the minors which is not in their best interest.

7. The applicant contends that he has lodged an appeal to this Honourable court and that his appeal has high chances of success. He further adds that if execution occurs, his appeal will be rendered nugatory and that he stands to suffer irreparable loss and damage. He adds that the respondent will not be prejudiced if the orders herein are sought. In the circumstances, he prays that a stay of execution do issue.

**The Respondent's Case**

8. The respondent contends that the applicant has not demonstrated what substantial loss he stands to suffer if the orders herein are not granted. Further, he has not demonstrated that he is willing to offer security for the due performance of the decree.

9. The respondent states that the issue revolves around parental responsibility which is a statutory duty that cannot be avoided as such the applicant cannot run away or claim that the award is unconscionable. Further, the trial court already addressed the issue of parental responsibility over the 1st minor under Section 25 of the Children's Act.

10. Moreover, it is not in the best interests of the minors as envisaged in Article 53(2) of the Constitution and the Children's Act to stay execution in a child maintenance case.

11. The respondent further states that the applicant's appeal is not arguable but it only introduces new evidence on the NHIF medical cover and a purported voluntary offer of payment of school fees which issues were never raised during the trial hearing.

12. The applicant filed a Supplementary Affidavit in which he reiterates what he stated in his supporting affidavit to his application save to add that he is not rendering any new evidence as concerns the NHIF Medical Cover as the minors are currently covered by NHIF and thus he should expend a further Kshs. 500/- for medical expenses.

13. He further adds that he has no objection with paying for the minors' education and education accessories but states that parental responsibility ought to be shared equally and in that regard, the respondent ought to cater for the minors' upkeep.

14. For the above reasons, the respondent prays that the application be dismissed with costs.

15. Parties hereby disposed of the application by written submissions. A summary of their rival submissions is as follows:-

**Applicant's Submissions**

16. The applicant submits that in determining an application for stay of execution in a children's case, Order 42 Rule 6 of the Civil Procedure Rules must be complemented by an overriding consideration of the best interest of the child in accordance with **Article 53(2) of the Constitution of Kenya. K.W.M. vs R.N. [2015] eKLR.** The applicant adds that the best interests of the child will be maintained if an order of stay is issued herein because the orders of the trial court as they stand greatly destabilize the applicant as he could be committed to civil jail if he does not adhere to the said orders. The applicant states that he has already being committed to civil jail for failing to raise Kshs. 5,000/- monthly as ordered by the court and thus he cannot be able to provide for his children if he is in custody. As such, it would not be in the best interest of the minors if the applicant is committed to civil jail as the minors stand to lose entirely in the event he loses his job and cannot provide at all.

17. The applicant submits that substantial loss may ensue if the orders of stay are not granted. He relies on the case of **James Wangalwa & Another vs Agnes Nallaka Chesto (2012) eKLR** and states that the respondent will proceed with execution of the decree hence the applicant will be committed to civil jail which will render the appeal nugatory. Further, he stated in court that he is a man of straw with no other means of livelihood. Moreover, the respondent has not stated that she would be in a position to refund the maintenance money should the appeal be successful.

18. On the issue of security, the applicant contends that the court take into account his unique circumstances while making an order of security. He states that he has already been committed to civil jail and managed to raise through well wishers and the community, Kshs. 60,000/- to secure his freedom and to avert the risk of joblessness.

19. The applicant is guided by the cases of **Civil Appeal No. 113 of 2003 Richard Mulu Mutua vs Rhoda Mumbua Mulwa and Kenya Hotel Properties Limited vs Willisden Investments & 4 Others (2013) eKLR** in stating that he has an arguable appeal.

**20.** The applicant further submits that the case herein is one, which warrants the court to issue the orders of stay pending appeal. He relies on the case of **Kenya Engineering Workers Union vs Kenya Marine Contractors EPZ [2014] eKLR.**

21. The applicant contends that it would be in the best interests of the minors if stay is granted considering all the grounds of appeal raised. He adds that he has demonstrated that his grounds of appeal are arguable and thus the appeal has high chances of success.

**Respondent's Submissions**

22. The respondent submits that in determining the application herein, the court ought to bear in mind that since the matter herein is a children's matter, the court is enjoined to **Section 1A and 1B of the Civil Procedure Act** as regards the overriding objectives.

23. The respondent further submits that the applicant has not demonstrated what substantial loss he stands to suffer if stay is not granted. The applicant has raised four issues of which only two could be considered to support his contention of substantial loss. These are the issue that the applicant is catering for a child who is not his biological child and the issue of shared parental responsibility.

24. On the issue of providing for a child who is not the applicant's biological child, the respondent submits that the trial court already dealt with this issue in pursuant to section 25 of the Children's Act. The court was of the view that since the applicant used to provide for the minor even though he was not his biological child, a fact not disputed by the applicant, he acquired parental responsibility.

25. On the issue of shared parental responsibility, the respondent further submits that the trial court was fair and reasonable in arriving at the conclusion that both parents contribute Kshs. 10,000/- for the upkeep of the minors. As such the applicant's share of Kshs. 5,000/- is fair and reasonable and would not lead to any substantial loss as envisaged under Order 42 Rule 6(1) of the Civil Procedure Rules.

**26.** The respondent submits that in determining an application of stay of execution involving children the court ought to consider the best interests of the child while being guided by Order 42 Rule 6 of the Civil Procedure Rules. In saying so, the respondent relies on the cases of **Bhutt vs Bhutt HCCC No. 8 of 2014 (OS) quoted by the High Court of Kenya Kisumu Civil Appeal No. 10 of 2017 M.N. vs M.O.K. & C.A.S [2017] eKLR, Z.M.O vs E.I.M. [2013] eKLR and M.N. vs P.A.S. [2015] eKLR.**

27. The respondent further submits that monthly maintenance is geared towards the upkeep of the minors and the applicant cannot run away from them. Further, the applicant has not demonstrated any payment towards maintenance since the judgment was rendered which is a period of over 1 ½ years. Moreover, the contention by the applicant that he is a man of straw is neither here nor there, as he has conveniently avoided annexing his payslip to indicate his earnings and his loan deductions. As such, the respondent prays that the application is dismissed.

**Issues for determination**

28. After careful analysis, the main issue for determination is whether the applicant has met the perquisite for grant of stay of execution pending appeal.

**The Law & Principles**

29. The principles upon which the court may stay the execution of orders appealed from are well settled. **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.**

30. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

> 1. Substantial loss may result to him unless the order is made;
>
> 2. That the application has been made without unreasonable delay; and
>
> 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

31. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

> 1. **The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.**
>
> 2. **Secondly, 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 the appeal court reverse the judge's discretion.**
>
> 3. **Thirdly, 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. **Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.**

*32. Beyond the requirements of Order 42, this being a matter concerning children, this Honourable Court is enjoined by the Constitution of Kenya 2010 and the Children Act to consider the best interests of the Children. The Constitution of Kenya 2010 provides at* ***Article 53(2)*** *that:-*

> ***A child's best interests are of paramount importance in every matter concerning the child.***

33. The Children Act on the other hand provides at **Section 4(3)** that:

> **In all actions concerning the children, whether undertaken by public or private or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.**

34. As was observed in **Bhutt vs Bhutt Mombasa HCCC No.8 of 2014 (OS),** In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 Rule 6 of the Civil Procedure Rules must be complemented by an overriding consideration of the best interests of the child in accordance with Article 53 (2) of the constitution which provides:-

**35. In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 Rule 6(2) of the Civil Procedure Rules to be satisfied that:-**

> **a) The applicant will suffer substantial loss if stay is not granted;**
>
> **b) The application for stay has not been brought without undue delay; and**
>
> **c) The applicant has provided security for the due performance of the decree.**

36. Similarly in **Z.M.O vs E.I.M. [2013] eKLR** Musyoka J. stated:-

**37. "As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind, once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable.**

38. Having said that, we shall examine whether the applicant in the case herein has satisfied the above-discussed conditions.

**Substantial loss**

39. Under this head, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of **Shell Ltd vs Kibiru and Another [1986] KLR 410 Platt JA** set out two different circumstances when substantial loss could arise as follows:-

> **"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages….It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts…."**

The learned judge continued to observe that:-

> **"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 when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.**

Earlier on, Hancox JA in his ruling observed that:-

> **"It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would…render the appeal nugatory.**
>
> **This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-**
>
> **"I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. "**
>
> **As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."**

40. On keenly perusing the applicant's application, it is clear he simply states in his affidavit that substantial loss will occur in the event that he is committed to civil jail and thus will not be in a position to provide for the minors. Notably, the applicant has stated what substantial loss may occur to him if the stay orders are not granted. However as noted earlier, the best interests of the child are more paramount than that of the parties. The children's interests supersede those of the parties. In saying so, I am persuaded by the case of **C.K.K vs C.M.M. [2016]**

**eKLR** where the Judge stated:

> **"In the circumstances of this case it is Baby CMM and not the two protagonists who stands to suffer loss since we are not dealing with a material claim."**

41. Likewise, in the instant case, it is the children and not the applicant who stands to suffer substantial loss if the orders sought are not granted. The rights of the children override the rights of the applicant and the applicant has not demonstrated to this court what substantial loss the children stand to suffer if the orders for stay are not granted.

42. Furthermore, it has not been refuted by the applicant that he has not honoured the court's orders since judgement was rendered.

**Whether this application has been made without unreasonable delay.**

43. The judgment herein was delivered on 28th October 2019. The applicant filed his Memorandum of Appeal on 14th November 2019 and the application herein for stay on 15th November 2019. I am of the opinion that the application has been filed timeously.

**Security of costs**

44. The applicant ought to satisfy the condition of security. In saying so, I rely on the following persuasive authorities. In **Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:-

> **"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor…..Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."**

45. While in **Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR** it was stated that:-

> **"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay."**

46. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same.

47. In the instant application, the applicant has not offered any form of security, he only contends that the court ought to take into consideration his peculiar circumstances when making an order to security.

48. I hold the opinion that in the instant case, stay of execution would militate against the best interests of the children herein. I rely **on section 76 (2) of the Children Act** which sets out the general principles with regard to proceedings concerning children. It provides:-

> **In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.**

49. I am also persuaded by the decision of **Z.M.O. vs E.I.M [2013] eKLR** where the court held:-

> **"The solution ideally lies in expediting the disposal of the appeal and staying the matter before the children's court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before the arguments are heard from both sides on the merits of the same."**

50. It is my considered view that this application is not merited and I dismiss it accordingly

51. There will be no order as to costs.

**52.** It is hereby so ordered **.**

**DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF JUNE 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 17th day of June 2021**