



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CIVIL APPEAL NO 16 OF 2019**

(Being an Appeal from the judgment of Hon. B. Kiptoo, Senior Resident Magistrate delivered at Sotik on 2<sup>nd</sup> July 2019 in Sotik Principal Magistrate's Children's Case No. 23 of 2016)

**NKK.....APPELLANT**

**VERSUS**

**ECS....RESPONDENT**

**RULING**

**Brief facts/Background**

1. By Notice of Motion dated 2<sup>nd</sup> February, 2021 and filed on 4<sup>th</sup> February 2021, the Applicant seeks the following orders:-

- i. That the Application be certified as urgent (Spent)
- ii. That there be a temporary Stay of Execution of the judgment of the trial court delivered on 23 February 2018 together with any subsequent decrees or orders pending the hearing of the current Application inter partes.
- iii. That there be a Stay of Execution of the judgment of the honourable court delivered on 23 February 2018 together with any subsequent decrees or orders pending the determination of the Appeal.
- iv. That the Defendant/Applicant continues to pay school fees and provide medical cover for the minor pending the hearing and determination of the current Appeal, and;
- v. That the necessary directions be issued.

2. The Notice of Motion is filed together with the Applicant's supported by the Applicant's sworn affidavit dated 2<sup>nd</sup> February 2021 and is based on the following grounds:-

- i. That there was an error in law and fact where the lower court failed to consider the relevant principles for setting aside *ex-parte* judgment and failed to consider the relevant laws together with the Applicant's submissions and reasons for his failure to attend court.
- ii. That the lower court erred in law and fact in allowing procedural failures and mistakes of the Applicant's Counsel to be the basis for determining its decision *ex-parte*, thereby failing to administer substantive justice.
- iii. That the lower court failed to consider the entire circumstances of the case and the resultant effect of the judgment on the Applicant.
- iv. That the lower court erred in law and fact by failing to set aside the *ex-parte* judgment of the Applicant and denied him a chance to be heard.

3. The background to the application is a suit filed by the Respondent against the applicant in the magistrate's court seeking maintenance for their minor child. In a judgment delivered on 23<sup>rd</sup> February 2018, the court apportioned parental responsibility between the parties whereby the Applicant was required inter alia to pay Kshs.10,000/= towards the monthly upkeep of the minor.

4. The Applicant averred that he was unable to raise the Kshs.10,000 on a monthly basis as maintenance costs and pay school fees and medical costs for the minor. Additionally, he stated that the decision of the lower court was not informed by evidence from the two parties and that the court failed to call for the affidavit of means from both himself and the Plaintiff/Respondent in order to ascertain their economic and financial capabilities, thus rendered itself wrongfully in deciding as it did.

5. The Application was urged through written submissions. The main contention of the Applicant is that the lower court dismissed his Application dated 24/7/2019 for stay of execution of the ex parte judgment pending the determination of his appeal in the High Court. That without a stay order, he would be greatly prejudiced and risked committal to civil jail as he was unable to meet the stipulated terms.

6. He relied on the principles under Order 42 Rule 6 (2) of the Civil Procedure rules and stated that he would suffer substantial loss if the order was not granted as his salary could not sustain the maintenance costs. He also outlined the reasons as to why the Application and the Appeal were filed out of time and relied on the case of *JMM vs. PM (2018) eKLR*.

7. The Respondent submitted that the Applicant sought to deny her a chance to enjoy the fruit of her judgment and that there were no sufficient grounds for setting aside the ruling of the lower court. She also stated that the Application was made in bad faith as she had been solely taking care of the child since the delivery of the judgment because the Applicant had stopped paying fees from May 2019. The Respondent relied on *NA (child suing through mother and next friend) SHB vs. HOW, Malindi HC Civil Appeal No 37 of 2017* and *LAO vs. OK Arap M, Mombasa High Court of Kenya Civil Appeal No. 9 of 2018*.

8. The only issue for consideration is whether stay should be granted.

9. Order 42 Rule 6 of the Civil Procedure Act provides:-

**(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 order set aside.”**

**(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.**

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”**

10. In *Anti-Counterfeit Authority vs. Francis John Wanyange & 4 Others (Civil Application No. 127 of 2019) (2019) eKLR*, the Court of Appeal restated the principles that in exercising its jurisdiction to grant stay of execution, the court must satisfy itself that:-

i. The applicant will suffer substantial loss if stay is not granted;

ii. The Application for stay has been brought without undue delay; and

iii. The Applicant has provided security for the due performance of the decree; and further,

iv. Where such an Applicant has also filed an appeal against the judgment for which he or she seeks stay, the court must be satisfied that the intended appeal is arguable, it must not be frivolous and lastly, if argued successfully, the intended appeal will be rendered nugatory where stay is not granted.

11. In *Ishmael Kagunyi Thande vs. Housing Finance of Kenya Limited Civil Application No. Nairobi 157 of 2006*, the Court of Appeal further underscored the discretionary nature of the stay orders in the following terms:-

**“The jurisdiction of the court under rule 5(2) (b) is not only original but discretionary. Two principles guide the court in the exercise of that jurisdiction. These are now well settled. For an application to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”**

12. The principles require that an Applicant must raise at least one arguable point, even if the same will not succeed as held in the case of *Kenya Tea Growers Association & Another vs. Kenya Planters & Agricultural Workers Union, Civil Appeal No. 72/2001* where the Court of Appeal stated as follows:-

**“He (the Applicant) need not show that an appeal is likely to succeed. It is enough for him to show that there is at least one**

**issue upon which the court should pronounce its decision..... It is trite that demonstration of existence of even one arguable point will suffice in favour of the Applicant. See also Housing Finance Company of Kenya vs. Sharok Kher Mohammed Ali Hirji & Another [2015] eKLR quoting the case of Kenya Railways Corporation vs. Ederman Properties Limited, Civil Appeal No. 176 of 2021 & Ahmed Musa Ismael vs. Kumba Ole Ntamourua & 4 Other, Civil Appeal No. Nairobi.**

13. The Applicant in this case asserts that he has a right to be heard and his circumstances considered adequately alongside the Respondent. He has also provided copies of his payslip demonstrating his gross income and net income. He stated that a net salary of Kshs.25,000 was not sufficient to cater for family and elderly parents who are under his care as well as sustain a monthly maintenance of Kshs.10,000 in satisfaction of the lower court's judgment. Finally, it was his contention that the lower court did not look into both his and the Respondent's financial status to ascertain whether he could manage to pay the stipulated maintenance amount, which greatly prejudiced him.

14. It is clear from the submissions above that the Applicant indeed has an arguable case. This is especially so because parental responsibility is a shared responsibility and it is important for the court to ascertain the financial status and contribution of each parent. I agree with Onyiego J. in **Miscellaneous Application 133 of 2017, FGN vs GWN (2018) eKLR** that, **"No parent should be subjected to suffer pain and lose interest in life because of unattainable children's demands or needs. The best interest of a child must be calculated and accommodated within the reasonable means of the parents."**

15. In considering this application, I am further guided by **Article 53 of the Constitution** which provides as follows:-

**1. Every child has the right –**

**(e) to parental care and protection, which includes equal responsibility of the mother and the father to provide for the child, whether they are married to each other or not.**

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

16. Of relevance also is the **Children's Act No 8 of 2001** which provides as follows:-

**93. Financial Provisions:**

**The Court may order the person against whom a maintenance order is made to make financial provisions for the child by –**

**i. periodical payments; or**

**ii. such lump sum payment as the court shall deem fit, to the person in whose favour the order is made or to any other person appointed by the court.**

**98. Other maintenance Provisions:**

**A court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to matters relating to the provision of education, medical care, housing and clothing for the child and in this behalf may make an order for financial provisions for the child.**

17. The above legal principles remain overarching in every matter that involves a minor. In considering whether to grant a stay of execution in the present Application, the principles under Order 42 Rule 6 are applicable together with the cardinal rule of considering the best interests of the child as held in **Bhutt vs. Bhutt Mombasa HCCC No. 8 of 2014 (O.S.)**

18. The Applicant in his supporting affidavit and submissions stated that he was willing to continue paying school fees for the minor and had enrolled him as a dependent under his medical scheme as provided by the employer. He has however not provided any proof to demonstrate his assertion. In addition, he states that he is willing to continue paying school fees for the minor.

19. On the other hand, the Respondent avers that she has solely been taking care of the minor and the Applicant last paid school fees for the minor in May 2019. Indeed there is no record from the Applicant rebutting this assertion or demonstrating to the court that he has been making payments towards the minor's fees. Thus, it is not verifiable whether, given the chance he will actually commit to paying the fees pending the determination of the Appeal.

20. I have come to the conclusion that the Applicant has demonstrated an arguable case. However, I am persuaded that a stay order would not serve the best interest of the child. I agree with the reasoning of Musyoka J. in **Z.M.O. vs. E.I.M. (2013) eKLR and M.N. vs. P.A.S. (2015) eKLR** that suspending a maintenance order would not be in the child's best interest especially where issues of paternity were not in question.

21. Having taken all factors into consideration, it is my finding that the application lacks merit. It is dismissed with no order to costs.

22. The Applicant is directed to file his record of appeal for the expeditious disposal of the appeal.

23. Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED THIS 21<sup>ST</sup> DAY OF JULY, 2021**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of J.K Mutai (Absent) for the Applicant, Mr. Bii for the Respondent and Kiprotich (Court Assistant).**