



AOA v SFA (Family Appeal E022 of 2021) [2021] KEHC 9769 (KLR) (5 November 2021) (Ruling)

Neutral citation: [2021] KEHC 9769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E022 OF 2021
JN ONYIEGO, J
NOVEMBER 5, 2021**

BETWEEN

AOA APPELLANT

AND

SFA RESPONDENT

RULING

1. Mr AOA (hereinafter the applicant) filed children case No 3011/2020 before Tononoka Children's court against his estranged wife SFA (hereinafter the respondent) seeking legal and actual custody of their only child born the year 2014. Contemporaneously filed with the plaint is a notice of motion through which the trial court granted temporary custody orders of the child to the applicant but with unlimited access to the mother (respondent).
2. However, after hearing the main suit, the court found that the subject was a child of tender age and that as a general rule, the mother was entitled to custody. The court further found that there were no exceptional circumstances to warrant custody of the child to the father.
3. Having held as above, the learned magistrate directed and ordered as follows;
 1. There be equal parental responsibility between the plaintiff and defendant towards the subject minor.
 2. There be joint legal custody of the minor between parents;
 3. Actual custody of the minor to vest with the defendant/mother with unlimited access to the plaintiff /father half of the school holidays and whenever he visits the child in Eldoret.
 4. The child to be handed over to the mother immediately schools close on July 16, 2021 for the child to go back to his former school Eldoret.



5. The plaintiff to cater for the child's education fully in the child's school in Eldoret or in a school to be agreed on by parents from time to time near the defendant's residence directly to the school and to the child.
 6. The defendant to cater for the child's shelter and food while with the child
 7. Medical expenses to be shared equally by the parents as and when the same may arise or to register the child on a medical cover.
 8. Clothing to be shared equally and in any event not less than twice in a year.
 9. Parents to provide for the child's entertainment while with the child.
 10. Either party to be at liberty to apply.
 11. No order as to costs.
4. Aggrieved by the said decision, the applicant filed a memorandum of appeal dated July 27, 2021 and filed the same day. Contemporaneously filed with the memorandum of appeal is a notice of motion the subject of this ruling seeking; stay of execution of the judgment and subsequent decree/order pending hearing and determination of the application interpartes; applicant be allowed to file memorandum of appeal out of time; the memorandum of appeal filed herein be deemed as duly filed upon paying necessary court fees and, any other relief that the court may deem fit.
 5. The application is supported by grounds stipulated on the face it together with averments contained in the affidavit sworn on July 27, 2021 by the appellant AOA.
 6. It is the applicant's case that prior to the delivery of judgment, he had custody of the child with whom he had bonded and was schooling in a school within Mombasa. That the child will greatly be prejudiced and psychologically affected by change of environment and school. He further averred that he had filed an application for review before the trial court and that the same was slated for hearing on August 4, 2021.
 7. He deposed that the stay of execution orders if granted would enable him pursue his appeal in the interest of justice. When the application was placed before the duty judge on August 4, 2021, directions to serve and file submissions for interpartes hearing on September 30, 2021 were made and interim stay orders granted.
 8. In response, the respondent filed a replying affidavit on August 25, 2021 stating that; the application amounts to an abuse of the court process, it is frivolous, vexatious, baseless and fatally defective as no application for children matters can be filed under the Civil Procedure Rules. She further averred that the application ought to have been filed as a chamber summons and not a notice of motion.
 9. She contended that despite the court making orders of custody, the same have not been complied with as the applicant has sworn not to obey the order. That despite the court directing the police to trace the child and hand him over to her, the applicant had fled court's jurisdiction by fleeing to Lunga Lunga Kenya Tanzania border.
 10. She further averred that the minor's whereabouts is not known as the applicant has left his place of abode to an unknown destination hence the minor is not in school and therefore the need to vacate the interim orders.
 11. Regarding the delay in filing an appeal, the respondent averred that the same was inordinate and that she should not be denied the fruits of her judgment. That the applicant has not demonstrated any



prejudice likely to be suffered should the orders be vacated. That stay order cannot be granted since there is no appeal in place.

12. In his rejoinder, the applicant filed a further affidavit sworn on September 3, 2021 stating that an application for stay and leave to appeal out of time can be filed concurrently. He denied fleeing court's jurisdiction and that the child is not in school. He attached a letter from Mombasa Shining Academy nursery and primary school dated August 9, 2021 confirming that the child was enrolled in their school (annexure AON-10). He contended that his appeal has high chances of success and that the child has been schooling in Mombasa and incase the appeal succeeds he should not be disturbed by being brought back again.

Submissions

13. The applicant filed his submissions through the firm of Marende Nechesa Advocates on September 15, 2021 contending that the impugned judgment was delivered on June 21, 2021 and his appeal filed on July 27, 2021 translating to reasonable delay. That the delay in filing the appeal was occasioned by the change of advocates. Learned counsel contended that the appeal has high chances of success and that it is in the best interests of the child that leave to appeal out of time and stay orders be granted.
14. It was submitted that the court has wide discretion to grant the orders sought considering the length of time taken in filing the appeal; the reason for the delay; chances of appeal succeeding and degree of prejudice. To buttress this proposition, counsel relied on the decision in the case of *Paul Musili Wambua v Anthony Gerald and Others* (2015) e KLR.
15. As to the element of proof whether the appellant will suffer prejudice, counsel made reference to the holding in the case *BRO v WINW (suing as mother and next friend of DJO (minor))* (2020) e KLR
16. On her part, the respondent filed her submissions dated August 27, 2021 through Isiaho and company advocates. Basically, counsel reiterated the averments contained in the replying affidavit. Counsel submitted that the application is defective as it was filed pursuant provisions of the *Civil Procedure Rules* under which children matters are not filed. In support of this position counsel referred to the decision in the case of *Jiwa Nadmudan Dhanji v Teborah Naliaka Wabwayi and another* (2006) e KLR.
17. Learned counsel submitted that the principles set under Order 42 rule 6 of the *Civil Procedure Rules* have not been satisfied. That a successful litigant is entitled to the fruits of his judgment. To support this fact, counsel placed reliance on the holding in the case of *Machira T/A Machira & Company Advocates v African standard* ((No) (2002) KLR 63 where the court held that a successful party is entitled to the fruits of his judgment.
18. It was further urged that before granting orders of stay in children matters, the best interests of a child should be taken into account. In that regard reference was made to the holding in the case of *MNN v MOK and another* (2017) e KLR. Lastly, counsel opined that the applicant will not suffer any prejudice if the order of stay is granted.

Analysis and determination

19. I have considered the application herein which is double faced. Firstly, leave to appeal out of time and secondly, stay of execution pending appeal. I have also considered the affidavit in support and response thereto plus oral submissions.
20. Issues that emerge for determination are;



1. Whether the applicant has met the criteria for enlargement of time
2. Whether the applicant has met the threshold for stay of execution

Whether the appellant has met the criteria for enlargement of time.

21. The appellant is seeking extension of time to appeal out of time. section 79G of the [Civil Procedure Act](#) provides;

“Every appeal from a subordinate court to the high court shall be filed within a period of thirty days from the date of the decision or order appealed against, excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decision or order”.
22. It is worth noting that the power to grant a prayer for enlargement of time to file an appeal out of time is discretionary and the same is subject to proof that; the delay is not inordinate; there is reasonable excuse for the delay; chances of the appeal succeeding are high and that, there will be no prejudice to be suffered by the respondent.
23. In the case of [Annah Mwihaki Wairuru v Hannab Wanja Wairuru](#) (2017) e KLR the court while quoting with approval the holding in the case of [Leo Saily Mutiso v Rose Hellen Wangari Mwangi](#) (Civil application No Na 255/1997 (UR) rendered itself that the decision as to whether to extend time is essentially discretionary and that generally, the matters for consideration are ; length of the delay; reason for the delay; chances of appeal succeeding and, degree of prejudice the respondent is likely to suffer.
24. The impugned judgment was delivered on June 21, 2021 and the draft memorandum of appeal filed on July 27, 2021. The instant application was filed on the same day. Therefore, the memorandum of appeal was filed six days outside the period within which an appeal should be filed. By all standards the delay is not inordinate.
25. It is trite law that parties have an inalienable right to exhaust their legal redress through the right of appeal hence should be facilitated where justified. I do not find any prejudice likely to be suffered by affording the appellant an opportunity to appeal out of time.
26. Accordingly, leave to extend time is granted and the draft memorandum of appeal herein filed is deemed as duly filed upon paying the requisite fee.

Whether the appellant has met the threshold for grant of stay orders

27. The application for stay of execution has been brought under Order 42 rule 6 of the [Civil Procedure Rules](#). Before I endeavor to handle the issue of stay, I wish to address the issue raised by counsel for the respondent that the application is brought under wrong provisions of the law as [Civil Procedure Rules](#) do not apply in children matters.
28. From the onset, courts should be more concern with substantive justice and not want of form. Quoting a wrong provision of the law cannot on its own lead to dismissal of a suit. Further, article 159 (2) (d) of the [Constitution](#) provides that courts are duty bound to determine matters on merit and not resort to undue technicalities. Therefore, titling the application as notice instead of chamber summons is want of form which is not fatal.
29. Besides, LN 77/2002 on general rules and regulations provides that nothing contained in the rules and regulations shall limit or otherwise affect the inherent power of the court to make such orders as may



be necessary for the ends of justice to be made or to prevent abuse of the court process. In view of these provisions, I do not find the application of provisions of the Civil Procedure Rules where appropriate fatal. In fact, even order 42 itself is not provided in the general rules and regulations for children yet we do apply the same daily.

30. Turning to the point on whether the appellant has met the conditions under Order 42 rule 6, it is incumbent upon the appellant to prove that; He is likely to suffer substantial loss if the order for stay is not granted; the application for stay has been filed timeously and that security for the due performance of the decree has been furnished. However, it must not be lost that the power to grant stay or not to grant is discretionary after due exercise of reasonable balancing of the scales of justice of both parties.
31. See the case of *Absolom Dova v Tarbo Transporters* (2013) e KLR where the court had this to say;

“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 besides the prospect 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....”
32. Similar position was held in the case of *Kenya Shell Limited v Kibiru* (1986)e KLR 44 where the court held that it would be a rare case where an appeal will be rendered nugatory by some other event if there is no proof of substantial loss. That substantial loss is the cornerstone of litigation. However, it is worth noting that, the purpose of stay of execution order is to preserve the subject matter. See *H G E v SM* (2020) eKLR. From the face of it, the application was filed within reasonable time and the furnishing of security is not appropriate in the circumstances of this case.
33. In the instant case, at the inception stage of the trial proceedings before the trial court, the child was staying with the appellant. On the interim basis, the court granted actual custody to the applicant with limited access to the mother pending hearing and determination of the main suit. It was at the conclusion of the suit that the court found that custody of a child of tender age as a general rule should be given to the mother. When the matter came before the duty Judge, interim stay orders were granted effectively maintaining the status quo.
34. The contentious issue is actual custody of the child. According to the applicant, he had custody of the baby before the suit was instituted and even after. He argued that the child has settled in Mombasa hence changing him to Eldoret will interfere with his routine environment and studies.
35. Indeed, if the child is released now to the respondent, and after conclusion of the appeal the child is given back to the appellant, what will happen to his studies. Obviously, there will be interruption in moving the child back and forth. If the appeal succeeds, it will be prejudicial to keep moving the child from one location and school to other. In my view it is in the best interest of the child that the *status quo* be maintained pending hearing and determination of the appeal. I do not find any prejudice that the respondent will suffer if the *status quo* is maintained.
36. Although by the very nature of the suit involving a minor there is no specific substantial loss to be suffered by any of the parties directly whether the stay order is granted or not, the appeal has raised an arguable issue (appeal) regarding the question of custody of the child on allegations child of mistreatment and that the child is comfortable staying with the father than the period when he was staying with the mother and a step father who was formally his friend. Therefore, the need for proof of direct substantial loss may not necessarily apply but rather the best interests of the child requires



that we do not keep interfering with his living environment and shool now and again hence the need to hold the movement pending the hearing and determination of the appeal on merit.

37. In view of the sensitivity of the matter, I do not wish to dwell on the merits of the appeal. Determining the issue of custody will prejudice the outcome of the main appeal. The only remedy is to maintain the *status quo* and then first track the appeal.
38. Regarding the question that an application for stay should not be filed before leave is granted, there is no prejudice in canvassing the two concurrently.
39. Accordingly, the application is allowed with orders that;
 1. Leave to appeal out of time is granted.
 2. The draft memorandum of appeals is deemed as duly filed subject to paying court fees.
 3. Interim orders to remain in force pending hearing and determination of the appeal
 4. The appellant to file a record of appeal within 30days
 5. The in charge Tononoka children's court to facilitate typing of the proceedings and furnish the same together with the court file within 30 days from the date of this ruling.
 6. Mention on December 6, 2021 for further directions.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF NOVEMBER 2021

J. N. ONYIEGO

JUDGE

