



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KERICHO**

**HIGH COURT CIVIL APPEAL NO.E005 OF 2020**

**KB.....APPELLANT**

**VERSUS**

**BC.....RESPONDENT**

**J U D G M E N T**

1. The Application coming for consideration in this ruling is the one dated 23/10/2020 seeking the following orders:-

**(i) SPENT**

**(ii) THAT the applicant be granted leave to file an appeal out of time and further that the draft memorandum of appeal herein be deemed duly filed upon payment of the requisite fees.**

**(iii) THAT there be an order of stay of Execution of the Judgment of the Resident Magistrate's Court dated 19/5/2020 and all consequential orders arising therefrom pending the hearing and determination of the application.**

**(iv) SPENT.**

**(v) THAT there be an order of stay of Execution of the Judgment of the Resident Magistrate's Court dated 19/5/2020 and all consequential orders arising therefrom pending the hearing and determination of the intended appeal.**

**(vi) THAT costs of this application to be in the cause.**

**(vii) Any other orders the Court may deem fit to grant in the circumstances.**

2. The Application is supported by the Affidavit of the Applicant dated 21/10/2021 in which he has deposed that he was not aware that the Judgment was delivered on 19/5/2020 since he is currently deployed in Somalia as part of the [Particulars Withheld].

3. The Applicant further stated that he has a second wife and two children and further that if the Magistrate's ruling is implemented, it would invariably mean that he will not be able to adequately provide for his second wife and their two children.

4. He further said that he will suffer irreparable loss and further the appeal will be rendered nugatory if this application is not allowed.

5. The Respondent opposed the application dated 23/10/2020 and she filed a Replying Affidavit dated 19/1/2021 in which she deposed that the applicant was aware of the delivery of the Judgment and further that the same was delivered virtually.

6. The Respondent also deposed that the Trial Court was duly guided by the best interest of minors in making the Judgment and further that the minors will suffer irreparably if leave to appeal and stay of Execution are granted.

7. Further, the Respondent stated that the applicant's undertaking to continue paying Kshs.15,000/= per month is pretentious since the applicant is already in arrears.

8. The parties filed written submissions in the application dated 23/10/2020 which I have duly considered. The Applicant submitted that in order to succeed in the present Application, the applicant must:-

**(a) Give an explanation for the delay in filing the Appeal.**

**(b) The Application must be filed without undue delay.**

**(c) The Application should not prejudice the Respondent.**

9. The Applicant submitted that he was out of the country and was not aware that the Judgment had been delivered.

10. The Respondent submitted in writing that the Applicant in seeking to enlarge time to file an appeal must show that he has a good cause for doing so and further that the Court must guard itself against the danger of being led away by sympathy and the appeal should be dismissed by being time-barred.

11. The Respondent further submitted that the Judgment was delivered on 19/5/2020 electronically and this ruling was filed on 23/10/2020 which was five months later and therefore the delay is inordinate.

12. The Respondent further submitted that this being a matter concerning children, the Court is enjoined by the Constitution of Kenya, 2010 and the Children Act to consider the best interests of the child.

13. The issues for determination in this application are as follows:-

**(i) Whether the applicant should be granted leave to appeal out of time.**

**(ii) Whether the Applicant should be granted stay of Execution pending appeal.**

**(iii) Who pays the costs of the application?**

14. On the issues as to whether the applicant should be granted leave to appeal out of time, I find that the Court has a discretion to allow the appellant to appeal out of time if good and sufficient cause is shown why the appeal was not filed in time.

15. In the current case, I find that it is not in dispute that the Applicant is based in Somalia and further that the judgment was delivered electronically.

16. The factors to be considered when granting leave to appeal out of time were set out in the case of **FIRST AMERICAN BANK OF KENYA LTD V GULAB P. SHAH & 2 OTHERS [2002] 1 EA65** as follows;

**(i) The explanation for the delay.**

**(ii) Whether the appeal is arguable.**

**(iii) Whether the Respondent can adequately be compensated in costs for any prejudice that he may suffer by the exercise of the Discretion in favour of the Applicant.**

17. I find that the Applicant gave a valid reason for the delay and it has not been shown that the Respondent has suffered prejudice that cannot be compensated by an award of costs.

18. On the issue as to whether stay of Execution should be granted pending appeal, I find that this case involves minor children and it is not the best interest of the minor children to grant stay of Execution.

19. I rely on the case of **ZMO V EIM [2013] eKLR** where justice Musyoka said as follows;

*“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 is not two way about it. Suspension of a maintenance order is not in the best interest 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. The solution ideally lies in expediting the disposal of the appeal...”*

20. I find that Order 42 (6) provides for stay of Execution pending appeal but in cases involving minor children the best interest of the child is of paramount importance and every court and institution handling children’s matters is mandated to uphold the same.

21. In the current case, I allow the applicant leave to appeal out of time on the following conditions;

**(i) THAT the appeal be filed within 30 days of this date.**

**(ii) THAT the Applicant continues to pay Kshs.15,000 per month and also complies with all the orders made in the judgment dated 19/5/2020 pending the hearing and determination of the appeal.**

**(iii) The Applicant to pay the costs of this Application.**

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 5TH DAY OF NOVEMBER, 2021.**

**A. N. ONGERI**

**JUDGE**