



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 164 OF 2019

JKT.....APPLICANT

-VERSUS-

PJ.....RESPONDENT

RULING

[1] The application that is the subject of this ruling is the Notice of Motion dated **8 January 2020**. It was filed herein by the Appellant/Applicant, **JKT**, under a Certificate of Urgency pursuant to the provisions of **Sections 3A, 63(e)** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**, as well as **Order 42 Rule 6** and of the **Civil Procedure Rules, 2010** for orders that:

[a] (Spent)

[b] That there be interim orders of stay of execution of the Ruling and Orders of **Hon. Rosemary K. Onkoba**, Resident Magistrate, issued on **8 October 2019** as well as further proceedings in **Eldoret Children Case No. 148 of 2016** pending the hearing and determination of the application *inter partes*;

[c] That there be temporary orders of stay of execution of the Ruling and Orders of **Hon. Rosemary K. Onkoba, Resident Magistrate**, issued on **8 October 2019** as well as further proceedings in **Eldoret Children Case No. 148 of 2016** pending the hearing and determination of the appeal;

[d] That the costs of the application be in the cause.

[2] The application is predicated on the grounds that orders were issued in **Eldoret Children Case No. 148 of 2016** vide a Ruling delivered on **8 October 2019**, allowing the Respondent's application dated **3 May 2019**; thereby extending parental responsibility beyond the minors' 18th birthday. It was further averred that the Applicant has filed this appeal challenging the said Ruling and Orders; and that his application before the subordinate court seeking stay of the orders was disallowed on **20 December 2019**; whereupon the Court issued a Notice to Show Cause for **9 January 2020**. It was therefore the contention of the Applicant that he risks being placed in civil jail and yet his appeal has high chances of success. It was therefore his prayer that the orders issued in the lower court matter be stayed pending the hearing and determination of the appeal.

[3] The application was placed before the Duty Judge, **Hon. E.M. Muriithi, J.** on **8 January 2020** and directions were then made that the application be served for *inter partes* hearing on **15 January 2020**. In the interim prayer [b] above was granted, in effect staying the Notice to Show Cause dated **20 December 2019**. By **15 January 2020**, the Respondent had filed and served her Grounds of Opposition herein, contending that:

[a] The Applicant has not met the grounds for granting stay as stipulated by the Civil Procedure Rules;

[b] The prayers sought in the application cannot be granted on an interim basis;

[c] The Applicant is guilty of unreasonable delay;

[d] The application has been brought in bad faith and therefore ought to be struck out;

[4] In support of the application, the Applicant relied on his affidavit sworn on **8 January 2020** wherein he amplified the grounds set out in his application. He also exhibited a copy of his stay application before the lower court as well as a copy of the Notice to Show Cause dated

20 December 2019. Hence, there is no dispute that the Applicant faces the risk of being committed to civil jail unless he pays the sum of **Kshs. 166,597/=** for the maintenance and upkeep of the minors as ordered by the subordinate court.

[5] For purposes of applications for stay of execution pending appeal, **Order 42 Rule 6 of the Civil Procedure Rules** provides that:

"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..."

[6] Thus, an applicant for stay of execution of decree or order pending appeal is under obligation to satisfy the conditions set out in **Rule 6(2) of Order 42** aforementioned, namely:

[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay.

[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[7] The rationale for the conditions aforementioned was aptly given in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63**, thus:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[8] In addition, it is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the child in question be given utmost consideration. In Mombasa HCCC No. 8 of 2014: **Bhutt vs. Bhutt**, for instance, the Court took the view, which I entirely agree with, that:

"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 interest of the child in accordance with the injunction of Article 53(2) of the Constitution..."

[9] Bearing the foregoing principle in mind, I have carefully considered the application for stay but find absolutely no basis for issuing the orders sought. The Applicant's only complaint is that the lower court extended parental responsibility beyond the minors' 18th birthday. He therefore did not offer any justification at all as to why payment, as ordered by the Children's court should not be made by him. Thus, although, the application was filed without undue delay, I am far from convinced that substantial loss will be visited on the Applicant if the orders sought are declined. Indeed, the welfare of the subjects dictates that the lower court order be complied with until and unless set aside on appeal. Thus, I would adopt the position taken by **Hon. Muriithi, J.** in **K.W.M. vs. R.N.** [2015] eKLR wherein he took the view that:

"...it is in very rare cases that courts grant stay of maintenance orders in cases involving minor children, where the duty to maintain a child is imposed on a parent by statute, as it is not in the best interests of the child to suspend a maintenance order particularly where parentage is not in dispute and that an expedited hearing of the main appeal might be a solution where there is a challenge on quantum of maintenance rather than staying the orders of the trial court pending appeal..."

[10] In the result, I find no merit in the application dated **8 January 2020** and would dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF JANUARY 2020.

OLGA SEWE

JUDGE