REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 67 OF 2018

KMM.....APPELLANT

VERSUS

CMK.....RESPONDENT

(Being an appeal from the Judgment and Orders of Hon. Z.W. Gichana (Mrs) Senior Resident Magistrate on 31st May 2018).

RULING

1. In **Japheth Pasi Kilonga & 8 Others – v- Mombasa Autocare Limited[2015]eKLR,** the Court of Appeal observed as follows:-

> **"The single most drawback in the administration of justice in this jurisdiction is the delay in the determination of cases, resulting in overwhelming case backlog. Adjournment has been identified as the leading contributing factor to this. Lord Denning, M.R. in oft. cited case of Fitzpatrick –v- Batger & Co. Ltd [1967] 2 All ER 657 warned that –**
>
> **'Public policy demands that the business of the courts should be conducted with expedition.'**
>
> **Like never before this policy is emphasized more as it is underpinned in the Constitution. Article 159(2)(b) and (d) enjoins courts to ensure justice is not delayed and is administered without undue regard to procedural technicalities. Sections 14(5) of the Supreme Court Act, 3A and 3B of the Appellate Jurisdiction Act and 1A and 1B of the Civil Procedure Act have also enacted the overriding objective which require the courts to facilitate the just, efficient, expeditious, proportionate and affordable resolution of disputes. Order 17 rule 1 of the Civil Procedure Rules requires, as a general rule, that hearing of suits once commenced continue from day to day. It stipulates:-**
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> > **'(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfied the court that it is fair to grant the adjournment.**
> >
> > **(2) When the court grants an adjournment it shall give a date for further hearing or directions.'**
>
> **It is therefore possible for the court to demand expedition in the disposal of cases and do justice at the same time; balancing the scales of justice."**

2. A trial court has the discretion to allow or not to allow an adjournment. The discretion has to be exercised judicially, bearing in mind the need for expedition and the particular circumstances of each case, including the nature of that case. The reasons given for the application to adjourn; how far, if at all, the other side is likely to be prejudiced by the adjournment; and how far such other party can be reasonably compensated by the applicant in costs; are some of the reasons that will determine the exercise of the discretion to adjourn.

3. The background of this case is that the appellant KMM and the respondent CMK are husband and wife, but are no longer living together. They have two children. In Nairobi Children Court Case No. 1145 of 2012 the respondent sued the appellant seeking actual custody and maintenance of the children. The appellant filed a defence and a counterclaim. He sought that custody of the children be granted to him. The respondent listed the matter for hearing on 11th April 2018, and served a hearing notice on the appellant. On the hearing day, counsel for the appellant sought an adjournment. The reasons were that the hearing date had been taken unprocedurally without him being invited to take a mutually acceptable date; and that he could not proceed because he had other matters before other courts and could not therefore be available. The application was opposed on the basis that the date had been served. The respondent argued that the request was intended to

delay the matter. The court declined to adjourn and allocated time for the hearing of the case. When the time came, the applicant and his advocate were absent. Hearing proceeded. A judgment was delivered on 31st May 2018 in favour of the respondent. She was granted custody of the children. The appellant was ordered to provide school/college fees as well as other related expenses for the children until such time that they had their undergraduate degrees. He was to provide Kshs.15,000/= monthly, being his contribution towards the maintenance of the children. The appellant was aggrieved by the judgment and decree and filed an appeal.

4. In the appeal, he filed the present application under **Order 42 rule 6** of the **Civil Procedure Rules** seeking the stay of the execution of the decree pending the hearing and determination of the appeal. At the time of the application the respondent had taken out a notice to show cause why the appellant should not be committed to civil jail for not paying the ordered monies. He was in arears. The appellant swore that he would suffer substantial loss if the application was not allowed. This is because he would be jailed for the failure to pay the ordered amount, and yet his income would not meet the amount sought. He stated that he had, nonetheless, been paying some fees and upkeep towards the children.

5. In the appeal, he will be arguing that his right to be heard in the suit was compromised when the court ordered the matter to proceed without the participation of his counsel who was engaged elsewhere and had unsuccessfully sought to adjourn the matter to another date.

6. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules**, the appellant has to show that, if the application for stay is not allowed, he will suffer substantial loss. Further, he has to show that the application has been brought without undue delay. Lastly, he has to provide security for the due performance of the decree that may ultimately be binding on him.

7. There is no dispute that no security was offered. This is critical because, if the whole judgment and decree are stayed, what shall happen to the education and upkeep of the child until the appeal is heard and determined? Under **section 4(3)** of the **Children Act (Cap. 141)** and **Article 53(2)** of the Constitution, this court is enjoined to treat the interests of the children as the first and paramount consideration. The substantial loss that the applicant states he may suffer has to be weighed against the children's right to education and maintenance, which cannot be postponed.

8. Lastly, the application for stay was filed on 16th January 2019, about eight (8) months following the judgment and decree being appealed against. There was no explanation for the delay. For a party who states that he was aggrieved by the decision of the lower court, the delay to bring the application was both unreasonable and inordinate.

9. I have considered all the facts that this application has presented. I am not persuaded that the appellant has made a case for stay. The application is consequently dismissed with costs.

DATED and DELIVERED at NAIROBI this 6TH day of FEBRUARY, 2020

A.O. MUCHELULE

JUDGE