REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 172 OF 2018

SM.....APPELLANT

VERSUS

GK.....RESPONDENT

(Being an appeal from the Ruling of Hon. N.M. Kyanya Nyamori in Thika CMCC Children Case No. 95 of 2018)

R U L I N G

1. The Appellant herein **SM** is aggrieved by the orders of the subordinate court in **Thika CMCC 95 of 2018** made on 5th December 2018 extending parental responsibility in respect of **GK** (Respondent) beyond 18 years and requiring him to pay fees and related expenses as well as upkeep of KShs.49,000 per semester in relation to the Respondent's accommodation and other related expenses. He has appealed to this court seeking to set aside the said orders.

2. He also filed a motion the subject of this ruling, to stay execution of the orders pending the hearing of the appeal. The application, filed on 15th January, 2019 is supported by the Appellant's Affidavit stating *inter alia* that he will suffer irreparably and his appeal will be rendered nugatory if the orders are executed. He has annexed, among other material a document (**annexure "SM4")** being a demand letter from the Respondent's advocate dated 11th January 2019 seeking a sum of KShs.49,000/= being upkeep , payment of fees in respect of the Respondent's education as stated in the fees structure **(annexure "SM5")** and costs in the lower court amounting to KShs.15,000/=.

3. On his part the Respondent who filed notice to act in person, rather than file a Replying affidavit filed his own application on 27th August 2019, which primarily seeks an order to compel the Appellant to comply with the orders of the lower court pending appeal. The Respondent swore a supporting affidavit reiterating the order of the lower court in his favour and asserting that the Appellant had refused to comply, as a result of which he had been unable to undertake his studies at the university due to lack of fees and financial support. The court takes this application to be the Respondent's response to the Appellant's application.

4. The Appellant's application was canvassed by way of written submissions. The Appellant's submissions basically repeat in prose, the depositions in his affidavit and raises matters which properly belong to the appeal. Ditto for the Respondent's submissions.

5. The court has considered the material canvassed by the parties. The Appellant's motion is founded upon the provisions of Order 42 R 6(2) Civil Procedure Rules which state that:

> **"(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".**

6. In the famous decision of **Butt v Rent Restriction Tribunal (1979) e KLR, Madan JA** stated that**:**

> **"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another remedy , which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.**
>
> **It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule**

ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59."

7. At this stage, the court is not concerned with the merits of the grounds of appeal which the Appellant has addressed in submissions. The application herein was filed timeously. Has the Applicant demonstrated likelihood of suffering substantial if stay is denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] KLR 410**.

Holdings 2,3 and 4 therein are particularly relevant. These are that:

"1. …..

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5 ….."

8. In the case of **Kenya Shell v Kibiru and Another (1986) KLR 410, Platt Ag. JA** (as he then was) observed that:-

"It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money." (emphasis added)

Earlier on, **Hancox JA** in his ruling observed that:

"It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would… render the appeal nugatory…..

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

9. In this case, the Applicant's appeal will no doubt be rendered nugatory if an order of stay is not granted, as the trial court will proceed with execution if the Applicant defaults in complying with the impugned orders of the lower court. In my estimation, that is sufficient cause for granting an order of stay.

10. The order of the lower court extended parental responsibility upon the Appellant which came with substantial financial implications. In order to comply the Appellant would have to fork out sums amounting to at least KShs.80,000/= per semester on the Respondents fees and allied expenses. In his affidavit, the Respondent indicates that he is impecunious, which is not surprising, as he asserts that he is a student. Thus, even if the appeal were to resolve in the Appellant's favour, he would encounter difficulties recouping payments made, rendering his appeal nugatory.

11. In my view, the words stated in **Nduhiu Gitahi and Another –Vs**

Anna Wambui Warugongo [1988] 2 KAR, citing the decision of **Sr. John Donaldson M. R.** in **Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** remain relevant in an application of this nature:

"We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff……It is our duty to hold the ring even-handedly without

prejudicing the issue pending the appeal……"

That too is the import of part of the court's observations in **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR** and the **Shell** case above.

12. In my considered view, on the facts of this case, the justice of the case justifies the conditional issuance of an order to stay execution for a limited period so that the Respondent's interests are not altogether prejudiced. Consequently, the court hereby grants an order to stay execution of the orders of the lower court on conditions that :

a) The Appellant is to deposit a sum of KShs.50,000/= (Fifty Thousand only) into court as security for the performance of the decree. Such deposit is to be made within 21 days of today's date.

b) The Appellant is to file his record of appeal within 60 (sixty) days of today's date, failing which the appeal will stand automatically dismissed and the Respondent at liberty to execute. In this regard, it is noted that the lower court file has already been forwarded to his court and proceedings have been typed. Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the presence of:

Mr. Njehu holding brief for Mr. Njoroge for the Appellant

Respondent – In person

Court Assistant – Ndege/Nancy