



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS CIVIL APPLICATION NO. 114 OF 2019**

**GKL.....APPLICANT**

**-VERSUS-**

**FK (minor suing through his mother and guardian ad litem WJ).....RESPONDENT**

**RULING**

[1] The Notice of Motion dated **27 May 2019** was filed herein on **10 June 2019** by the applicant, **GKL**, under **Section 79G** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, for orders that leave be granted to him to file an appeal out of time from the ruling of **Hon. H.M. Nyaberi, SPM, in Iten Children's Case No. 1 of 2014**; and that in the meantime, there be stay of execution in that matter. He also prayed that costs of the application be provided for. The application was premised on the grounds that the applicant is dissatisfied with the whole proceedings and ruling of the lower court dated **30 January 2019**; and that he has an arguable appeal therefrom.

[2] The application was supported by the applicant's own affidavit, sworn on **27 May 2019**. He explained therein that he was unable to file the appeal without a typed copy of the proceedings and ruling, which he requested for in time, but which took a while to be supplied by the lower court. He also averred that he was unable to raise the requisite legal fees in time due to his meagre income; and that by the time this was done, a warrant had been issued for his arrest. He annexed copies of the lower court proceedings and ruling, Draft Memorandum of Appeal and Warrant of Arrest in support of his application.

[3] About three months down the line, the applicant filed another application, dated **18 September 2019** under a Certificate of Urgency, seeking, *inter alia*, for orders that he be released from **Tambach G.K. Prison** pending the hearing and determination of his application *inter partes*; and thereafter the hearing and determination of his first application, dated **27 May 2019**. He had contended then that he risked losing his job, having been committed to civil jail for six months by the lower court in enforcement of its orders. In support of his averments in respect of the second application, the applicant annexed to his affidavit a copy of his Warrant of Committal to Civil Jail dated **16 September 2019** and a Production Order of even date.

[4] The respondent opposed the application on the ground that the parties executed a consent before the lower court dated **13 March 2014**, by which the applicant covenanted to not only pay the minor's school fees, but also contribute towards his upkeep in the sum of **Kshs. 4,000/=** per month. According to her, it was that consent that was adopted as an order of the lower court in the presence of and with the approval of both parties; and that when the applicant later failed to adhere to the terms of their consent, she sought the court's intervention by way of attachment of the applicant's salary and, in the alternative, by his committal to civil jail.

[5] The respondent further averred that, although the applicant made attempts to have the consent order set aside, his application to that effect bore no fruit, as the same was found by the lower court to be devoid of any merit and was dismissed on **30 January 2019**. Thus, she averred that, looking at the conduct of the applicant, it is plain that his intention is to frustrate the welfare of the minor, granted that he had accrued arrears to the tune of **Kshs. 223,080/=**. In the respondent's view, the applicant is not deserving of the discretion of the Court. She annexed to the Replying Affidavit a copy of the Consent as **Annexure WJ1**, along with the proceedings and ruling of the lower court, to buttress her averments.

[6] The two applications were consolidated for purposes of hearing, and were canvassed by way of written submissions. In his written submissions dated **10 December 2019**, **Mr. Chemwok** for the applicant made reference to **Order 42 Rule 6** of the **Civil Procedure Rules** and urged the Court to find that the applicant has satisfied the conditions laid down therein. He took the view that there was ample proof that the applicant has been paying school fees for the minor and that the lower court merely ignored this fact. He further submitted that the mode of execution chosen by the respondent, namely, his arrest and imprisonment, had the potential of occasioning the applicant substantial loss as it may result in loss of his job and source of income; and that the minor is likely to suffer too. Hence, he urged the Court to not only grant the applicant leave to appeal but to also grant stay of execution pending the hearing and determination of the appeal.

[7] On behalf of the Respondent, it was the submission of **Ms. Chepkurui** that no justification was given for the delay between **30 January**

2019 when the lower court's ruling was delivered, and **10 June 2019** when the first application was filed herein; and that the truth of the matter is that, upon delivery of the said ruling, the applicant went and slept on his rights, and was only awakened by the warrant of arrest that was issued against him. It was further submitted that the intended appeal stands no chance of success, taking into account that the foundation of the ruling was a consent order which is yet to be set aside. Counsel relied on **Hiram vs. Kassam** [1952] 19 EACA 131 and **East African Portland Cement Co. Limited vs. Superior Homes Ltd** [2017] eKLR to support this assertion.

[8] With regard to the requirements of **Order 42 Rule 6** of the **Civil Procedure Rules**, it was the submission of **Ms. Chepkurui** that no basis was laid by the applicant to enable the Court make an assessment as to whether there is a risk of the applicant suffering substantial loss. She cited **Nairobi High Court Civil Case No. 224 of 2001: Andrew Kuria Njuguna vs. Rose Kuria** for the proposition that the applicant was bound to place before the Court such material and information to enable it form the conclusion that he stood a risk of suffering substantial loss. Counsel further submitted that, inasmuch as the Court has discretion to make a determination as to the nature of security that it considers appropriate and just in the circumstances, it ought to be borne in mind that this matter involves the welfare of a minor; and that no sign of good faith has been forthcoming from the applicant in this regard. She cited **Kenya Shell Ltd vs. Kabiru & Another** [1986] KLR and **Machira T/A Machira & Co. Advocates vs. East Africa Standard No. 2** [2001] KLR 63 and accordingly urged the Court to dismiss the two applications.

#### **On Enlargement of Time to File an Appeal:**

[9] Section 79G of the **Civil Procedure Act** stipulates that:

**"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal."**

[10] Consequently, an appeal from the impugned orders of the lower court dated **30 January 2019** ought to have been filed at the latest by **2 February 2019**. The applicant herein concedes that he took no action until **27 May 2019** when his Advocate prepared the application for leave; and even then, the said application was not filed until **10 June 2019**; some 13 or so days thereafter. According to the applicant, he was unable to take action because he was not promptly supplied with typed copies of the proceedings and ruling by the lower court. He also claimed that he did not have sufficient funds to pay his lawyer; and while I find both explanations implausible, I do appreciate that, in such matters, the Court's discretion is unfettered; and that an application for extension of time may nevertheless be allowed even where no explanation is proffered. Hence, in **Banco Arabe vs. Bank of Uganda [1999] 1 EA 22** that:

**"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."**

[11] Hence, I would be inclined to extend time for filing appeal from the ruling of **Hon. H.M. Nyaberi, SPM, in Iten Children's Case No. 1 of 2014** as prayed in the Notice of Motion dated **27 May 2019**.

#### **On Stay Pending Appeal:**

[12] For purposes of stay 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..."**

[13] In the premises, 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.**

[14] It cannot be gainsaid that a successful litigation is entitled to the fruits of his judgment. Thus the exposition in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)** [2002] KLR 63, is apt, namely, that:

**"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."**

[15] I have consequently perused the proceedings of the lower court and confirm that indeed the applicant acknowledges his parental obligation towards the subject minor. It is also manifest that, on that account, he did not dispute the respondent's claim before the lower court. Indeed, the matter was settled by consent and an order made on **13 March 2014** adopting the said consent. The record further shows that, in the course of time, subsequent consent orders were made by the trial court as were negotiated and approved by the parties, with the best interest of the minor in view. It is also manifest that, many a time the applicant failed to adhere to those settled terms of engagement, and therefore fell behind in paying the sums due from him either as school fees or maintenance; and that it was on this account that the lower court resorted to his committal to civil jail.

[16] Thus, whereas there is no denying that the second application was filed within two days of the applicant's incarceration, there appears to be no justifiable explanation for the delay between **30 January 2019** when the ruling of the lower court was delivered and **10 June 2019** when the first application was filed. Although the delay was blamed on the lower court for not availing a copy of proceedings in time, there was no supporting document to demonstrate exactly when the proceedings and ruling were applied for, and when the same were supplied by the lower court. Allegations, per paragraph 6 of the Supporting Affidavit filed with the first application, to the effect that the applicant did not have sufficient funds to instruct a lawyer cannot amount to a plausible excuse, granted the fact that he had the option of filing the application *pro se*.

[17] Secondly, and most importantly, 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..."**

[18] Bearing the foregoing principle in mind, I have carefully considered the application for stay; and while I cannot, for now discern why the lower court opted for the applicant's arrest and imprisonment as opposed to attachment of his salary, which was the respondent's prayer, there is absolutely no justification as to why execution should be stayed. Thus, although the 2<sup>nd</sup> 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 subject 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..."**

[19] Nevertheless, there is considerable merit in the applicant's stance that he risks losing his job as a teacher and therefore his source of livelihood and means of support should he be arrested and imprisoned. It is therefore imperative that before arrest and imprisonment, alternative modes of execution be employed by the Respondent.

[20] In the result, the orders that commend themselves to me in respect of the application dated **27 May 2019**, and which I hereby grant are as hereunder:

[a] That leave be and is hereby granted to the applicant to file his appeal out of time as prayed, and that the proposed appeal be filed within 21 days from the date hereof;

[b] The application for stay is however declined. For the avoidance of doubt, it is hereby ordered that the Respondent is at liberty to move ahead with the execution in whatever manner she deems fit, save that arrest and imprisonment be employed as a last resort.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 14<sup>TH</sup> DAY OF MAY 2020**

**OLGA SEWE**

**JUDGE**