



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO 145 OF 2019

LMN.....APPELLANT/APPLICANT

VERSUS

FWM AND JWM (minors suing through their mother) JWM.....RESPONDENT

RULING

1. On 9th September 2019 the subordinate court at Thika delivered judgment in **Thika Children Case No 48 of 2019**, *inter alia* awarding **JWM** (the Respondent) maintenance at the rate of KSh.15,000/= pm against **LMN** (the Appellant/Applicant). The Applicant and Respondent are the estranged parents of the two minors, namely, **FWM** and **JWM** and the suit in the lower court had been filed by the Respondent on their behalf.

2. Aggrieved with the outcome of the suit, the Applicant filed an appeal to this court, on 4th October 2019. The motion filed on 24th January 2020 by the Applicant was prompted by the commencement of enforcement proceedings in the lower court. By the said motion, expressed to be brought under Order 22 rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In light of the prayers sought therein the correct to invoke would be Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. The live prayer in the motion seeks an order to stay execution of the judgment and decree in the lower court case, pending the determination of the appeal. The application is premised on the grounds on the face thereof and the supporting affidavit on the Applicant. The gist thereof being that given the Applicant's personal circumstances, the order for maintenance was excessive; that he was at risk of committal to civil jail for non-compliance with the maintenance order and that his appeal will be rendered nugatory if the court declines the application.

3. In a brief replying affidavit, the Respondent takes issue with the 5 – month delay in bringing the motion which she views as an afterthought. She asserts that the judgment of the court was rendered after parties adduced evidence and that other obligations shouldered by the Appellant, including providing for his other children cannot displace the needs of the couple's children.

4. During oral canvassing of the motion, the Applicant's counsel highlighted the fact that the Applicant's net salary is about KShs.27,000/= pm, that the Applicant supports another family of his and hence cannot afford the maintenance ordered and is therefore at risk of being committed to civil jail for non-compliance. Counsel for the Respondent on her part asserted that the timing of the application is calculated to defeat justice; that there is no evidence that the Applicant has another family; that the pay-slips proffered by the Applicant appear dubious and that the Applicant's other commitments cannot override those of the children in this case; that there can be no possibility of substantial loss occurring when a parent is required to maintain his own children who stand to suffer if the stay is granted.

5. The court has considered the material canvassed in respect of the motion. In considering such a motion the court must remain alive to the provisions of Article 53 of the Constitution and Section 4 of the Children's Act, the latter which provides that:

“(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child; (b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest. (4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."

9. The principles upon which the court may stay the execution of orders appealed from are settled. The Applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also offer to furnish security for the performance of the decree in the event the appeal does not succeed. These are the requirements stipulated in Order 42 r 6(2) of the Civil Procedure Rules.

10. The decision appealed from was delivered in September 2019 but it was not until January 2020 that the Applicant rushed to court with the instant motion, prompted by service of the execution process. The delay in bringing the motion, albeit not inordinate, was not explained.

11. In the quintessential decision of the Court of Appeal in **Shell Ltd v Kibiru and Another [1986] KLR, Platt JA** set out two different circumstances when substantial loss could arise as follows:

"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI

Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts..."

The learned Judge continued to observe 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)

12. 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 questions of whether to refuse it would,.....

render the appeal nugatory.

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

"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 rendered 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."

13. What I hear the Applicant emphasize is not so much that he may be unable to recover the monthly payments as ordered by the lower court if the appeal succeeds. But rather, that he will suffer difficulty in making the payments ordered in light of the total responsibilities he shoulders in respect of the minor children herein and others. It may well be that the Applicant has not proved the alleged financial responsibilities to other alleged children in his care, but on the basis of the pay-slip copies annexed to his affidavit, the Applicant's net salary is about KShs.27,000/=. This fact is not controverted, and while it is true that some of his pay is going towards loan repayments, there is no evidence that these loans were taken to defeat the maintenance orders.

14. The court must be careful in dealing with an application of this nature to uphold the best interest of the minors, but also to avoid determining the merits of the appeal at this stage. The fact, stated from the bar, that the Applicant was able to pay the outstanding decretal sum and therefore avoid imprisonment does not necessarily prove that the Applicant has means to pay the maintenance on a monthly basis as ordered but deliberately refuses to do so. Undoubtedly, the Applicant is responsible for the payment of school fees and related expenses in respect of the minor children in this case who are students in **P.A**, a private school. To this the children are entitled. On the other hand, the Applicant should not be driven on distraction by a financial burden that may be too heavy in the present circumstances.

15. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt:

"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.....”

(See also **James Wangalwa & Another –Vs- Agnes Naliaka**

Cheseto [2012] eKLR.)

16. Weighing all the relevant matters, I am persuaded pending determination of the appeal, to allow a partial conditional stay of the order for payment of KShs.15,000/= per month for food and allied expenses. The stay will be in respect of KShs.3,000/= out of the sum ordered, so that the Applicant will henceforth be liable to pay a sum of KShs.12,000/= [TWELVE THOUSAND ONLY] per month for the provision of food and children. The stay order does not in any way affect the order against the Respondent for payment of the minors’ school fees and related expenses, but is granted upon the following conditions:

- a) Within 21 days of today’s date, the Applicant is to clear any arrears of maintenance payments due under the judgment appealed from, by way of mobile money transfer.
- b) Effective from June, 2020 , the Applicant will pay a sum of KShs.12,000/= monthly through the same means in (a) above to the Respondent, being provision for food and allied expenses. **The payment is to be made on or before the 5th day of each succeeding month until the appeal is determined.**
- c) The Applicant is to file the record of appeal within 90 days of today’s date to facilitate the speedy determination of the appeal, which should be fully prosecuted within 12 months of admission.
- d) The stay order will be vacated in the event of default on any of the above conditions. For the avoidance of doubt, the order for payment of school fees and related expenses by the Applicant remains in place in the terms ordered by the lower court. The costs of this application will abide the outcome of the appeal. Parties are at liberty to apply.

SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 12TH DAY OF MAY 2020

C. MEOLI

JUDGE