



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 16 OF 2018

PMM.....APPLICANT

VERSUS

MK.....RESPONDENT

RULING

1. **PMM**, the Applicant by way of Notice of Motion dated **3rd August, 2018**, seeks stay of execution of a decree issued by **Hon. J. Aringo R M** on **13th April, 2018** pending hearing and determination of the Appeal.
2. The application is premised on grounds that Judgment was entered in disregard of evidence on record and an Appeal was filed on the **14th May, 2018**. Unless the order of stay sought is granted the Appellant's personal liberty shall be violated; the Appeal shall be rendered nugatory; the Appellant shall suffer irreparable loss and damage that cannot be compensated in monetary terms; That the Applicant/Appellant is willing to abide with conditions to be imposed by the Court and the Respondent shall not suffer any prejudice if the order sought is granted. And, the application which is in the interest of justice has been made without any unreasonable delay.
3. The application is supported by an affidavit sworn by the Applicant. He deposes that after entry of the Judgment on the **13th June, 2018** he received a copy of a letter dated **7th June, 2018** and a Decree indicating that the Respondent was ready to file a Notice to Show Cause for his committal to Civil Jail unless he satisfied the Decree. That the Judgment issued failed to address satisfactorily circumstances in which liability arose; that the application has been made without any unreasonable delay.
4. The Respondent, **MK** filed a Replying Affidavit where she deposed that the application is misconceived as the execution has already been effected through service of the Notice to Show Cause. That the Appellant was ordered to be paying a monthly installment of **Kshs. 5,000/=** per month for the upkeep of minors, fees for the children plus costs and interest of the Lower Court an order that the Appellant has failed to honour. That the Appellant has failed to pay school fees for his children, **JWM** the 2nd born has school fees arrears in the sum of **Kshs. 46,329/=** and it is only reasonable that he pays the decretal sum of **Kshs. 22,208/=** together with the school fees balance on the sum of **Kshs. 46,329/=** and **Kshs. 15,000/=** being three (3) months maintenance sum, making it a total sum of **Kshs. 84,070/=** before the Appeal is heard and determined. That the Appellant is capable of paying the sum and it is in the interest of justice that the minors be allowed to enjoy the fruits of the Judgment.
5. It was urged further that the Applicant has not demonstrated the nature of irreparable loss he shall suffer and has not furnished the Court with any security. That the Appeal filed was intended to delay the children from enjoying the fruits of the Judgment; As a biological father of the minors he is required to protect, maintain and educate them.
6. The application was canvassed by way of written submissions that I have duly taken into consideration.
7. Principles of granting stay of execution are enunciated in **Order 42 Rule (6)** of the **Civil Procedure Rules. Rule 6(1)** and **(6)** provide thus:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate

jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

8. The Applicant is required to establish that:

- a) If the order is not made a substantial loss shall result.
- b) The application is made without unreasonable delay.
- c) That willingness to provide security that may be ordered by Court for due performance of the order.

9. In the case of **Joseph Gachie t/a Joska Metal Works vs. Simon Ndeti Muema (2012) eKLR** it was held that:

“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that status quo should remain as it were before judgment and that would be denying a successful litigant of the fruits of judgment which should not be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay.”

10. It is urged by the Applicant that if the order sought is not granted he shall suffer substantial loss. The substantial loss alluded to is violation of his right to liberty and that he will not recover the money. The Applicant herein is the biological father of the minors aged **14 years, 13 years and 3 years** respectively. The trial Magistrate ordered the Respondent to provide the children with shelter, clothing, medical costs and food in an endeavour to ensure parental responsibility was shared. In exercising the discretion bestowed upon me I must consider what will be in the best interest of the children.

11. The Applicant was ordered by the Court to pay a sum towards their basic requirements. It is urged and not disputed that he has not made an attempt of supporting the children. As a result school fees is in arrears. He has not even made an effort of paying the required **Kshs. 5,000/=** per month. If the money is paid it will go towards discharge of his duty as a parent. In the case of **ZMO vs. EIM (2013) eKLR** it was stated thus:

“as a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal”.

12. Granting such an order would be tantamount to encouraging the Applicant to abdicate his responsibility as a parent.

13. The Applicant's conduct of not wanting to carry out his responsibility is further demonstrated by the fact that he offered no security for due performance of the Decree.

14. In the circumstances, I find the application lacking merit which I dismiss with costs to the Respondent.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 17th day of January, 2019.

L. N. MUTENDE

JUDGE