



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.122 OF 2018

KKPM..... APPELLANT

Versus

SWWRESPONDENT

RULING

1. The Application coming for consideration is the one dated 24.11.2018 seeking the following orders;

(i) THAT the Applicant be granted leave to file the appeal out of time.

(ii) THAT Stay of Execution of the order made on 27.3.2018 be issued only in respect of payment of upkeep in MILIMANI Children's Case No. 110 of 2018 pending the hearing and determination of the Appeal.

2. The Application is based on the grounds on the face of it and supported by the Affidavit of the Applicant in which he has deposed that failure to file the appeal within time was necessitated by delay in having typed proceedings.

3. The Applicant has further deposed that the amount he was ordered to pay is excessive and that he is currently paying School Fees and related Expenses and that he is experiencing financial difficulties.

4. The respondent filed a Replying Affidavit in which she deposed that the Applicant is trying to run away from Parental responsibilities.

5. The Parties filed written submissions which this court has duly considered. I find that as observed in ***Bhutt v. Bhutt*** Mombasa HCCC NO. 8 of 2014 (O.S.), 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 a an overriding consideration of the best interest of the child in accordance with the injunction of Article 53 (2) of the Constitution –

6. In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 rule 6 (2) of the Civil Procedure Rules to be satisfied that –

(i)The applicant will suffer substantial loss if stay is not granted;

(ii)The application for stay has been brought without undue delay; and

(iii)The applicant has provided security for the due performance of the decree or order appealed against.

7. In the circumstances of this case, which involves minor children of the parties, there is additional consideration imposed by Article 53 (2) of the Constitution which requires that **“a child's best interests are of paramount importance in every matter concerning the child.”** The best interests of a child are superior to rights and wishes of parents, and they incorporate not just the physical comfort of the child but the welfare of the child in its broadest sense. The orders sought would result in depriving the minor of the maintenance amount which in my view would militate against the best interest of the child.

8. The applicant/Appellant has not yet filed his appeal and granting a stay order cannot be in the best interests of the child. This issue will best be considered at the hearing of the intended appeal.

9. In this regard, I am persuaded by Musyoka, J. in the **ZMO v EIM [2013] eKLR** where he observed as follows with regard to stay pending appeal:

“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. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”

10. I agree that where the duty to maintain a child is imposed on a parent by statute, 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 appeal might be a solution where there is a challenge on quantum of maintenance rather than staying the orders of the trial court .

11. Having taken all factors into consideration I draw the conclusion that the grant of the orders sought herein would not be in the best interests of the child.

12. My findings are as follows;

i. There is good reason why the Applicant did not file the Appeal on time. I grant the Applicant 30 days to file the same.

ii. However, on the issue of stay of execution of the order made by the trial court, I find that it is not in the best interest of the child to stay an order for maintenance. The said prayer is disallowed and instead the applicant is urged to expedite the appeal.

iii. Each party to bear its own costs of this Application.

Orders accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 1ST DAY OF FEBRUARY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI