



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 156 OF 2018

GKK.....APPLICANT

-VERSUS-

GK (Minor suing through AJ)....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **3 December 2018**. The application was filed by **G K K**, the Applicant herein, under **Article 53(2)** of the **Constitution, Sections 1, 1A, 3, 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] Spent

[c] That there be stay of execution of the Decree and subsequent orders in **Eldoret Chief Magistrate's Children Case No. 64 of 2017** pending the hearing and determination of this appeal;

[d] That the costs of the application be in the cause.

[2] The Application is supported by the Applicant's affidavit, sworn on **30 December 2018**, in which he averred that he was partially aggrieved by the Judgment of the lower court dated **20 August 2018** and has consequently filed an appeal herein after his application for review was dismissed by the lower court. That pending the hearing and determination of the appeal, he seeks that the Judgment and Decree of the lower court be stayed; and that his appeal raises serious and weighty legal issues for determination and will be rendered nugatory unless orders of stay are issued.

[3] The application was resisted by the Respondent vide the Replying Affidavit of **AJ**, sworn and filed on **14 December 2018**. Her posturing was that the application is an afterthought as the Applicant is a man of means and capable of complying with the order of the lower court without any difficulty. She further averred that the orders granted by the lower court are for the minor's welfare and are incapable of being stayed; and that, in any event, the Applicant has not only failed to satisfy the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules**, but also made no effort to comply with the orders of the lower court in the interim.

[4] The brief background to the application, as can be gleaned from the Memorandum of Appeal and the affidavits filed herein, is that the Applicant had been sued in **Eldoret Chief Magistrate's Children Case No. 64 of 2017** for custody and maintenance; and that after hearing the parties, the Learned Trial Magistrate, **Hon. N. Moseti, RM**, found in favour of the Respondent in a Judgment delivered on **20 August 2018**. Accordingly, custody of the minor was given to the *Guardian Ad Litem* and mother, **AJ**. The court further ordered the Applicant to pay **Kshs. 10,000/=** monthly to the Respondent as maintenance in addition to paying for school fees and enrolling the minor in his staff medical scheme to ensure her medical needs, as a special needs child, are met without any difficulty.

[5] In his Supporting Affidavit, the Applicant contends that he earns only **Kshs. 11,000/=** per month and is therefore incapable of complying with the order of the lower court as he had another family to take care of. He produced copies of his pay slips as exhibits. Hence, in his appeal, which he says raises weighty issues of law for consideration by the Court, it was averred, inter alia, that the Learned Trial Magistrate erred by failing to consider the Applicant's financial ability thereby making an erroneous order.

[6] In the written submissions, filed on his behalf herein by **M/s Lusinde Khayo & Company Advocates** on **5 February 2019**, the Applicant propounded the argument that an order in the best interest of the minor should not be oppressive to the parties; and that there is

need for balance to ensure that the interests of justice are met. He proposed a monthly payment of **Kshs. 4,500/=** pending the hearing and determination of the appeal, given his other financial responsibilities; adding that he is prepared to comply with the other orders, including the order to ensure the minor was accorded medical treatment as required.

[7] On the Respondent's part, written submissions were filed by **M/s Nyairo & Company Advocates** on **12 February 2019** wherein emphasis was laid on the best interest of the child as the paramount consideration in line with **Article 53(2)** and **Section 4(3)** of the **Children Act, No. 8 of 2001**. Reliance was also placed on **Bhutt vs. Bhutt Mombasa HCCC No. 8 of 2014 (OS); KWM vs. RM [2015] eKLR** and **LAO vs. OK arap M [2018] eKLR**. Counsel urged the Court to disregard the Applicant's offer to pay **Kshs. 4,500/=** contending that it was too low an amount to take care of the special needs of the child.

[8] In respect of applications for stay of execution 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..."

[9] Thus, the conditions an applicant for stay of execution of decree or order needs to satisfy, as set out in **Rule 6(2) of Order 42** aforementioned, are:

[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.

[10] The rationale for the conditions aforementioned was aptly given in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63**, thus:

"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."

[11] In addition, 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 **Bhutt vs. Bhutt**, this principle was expressed thus:

"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..."

[12] There is no dispute that the child in question is a special needs child. The Applicant, as the father of the child has expressed willingness to provide her with the necessities of life; but contends that he is presently unable to pay the sum ordered by the lower court. He offered to pay **Kshs. 4,500/=** pending the hearing and determination of the appeal. While it remains to be determined whether the lower court did consider his income before the order in question was arrived at, it is noteworthy that he relied on pay slips for **March** and **May 2018** in support of his application dated **3 December 2018**, without proffering an explanation as to why his latest pay slip was not availed. Additionally, whereas he deposed that he had been paying **Kshs. 4,500/=** even prior to the Judgment of the lower court, there is no indication that he has continued the payments in the best interest of the child.

[13] Accordingly, although, the application was filed without undue delay, I am far from convinced that substantial loss will be visited on the Applicant unless the orders sought are given. Indeed, the welfare of his daughter mandates that the lower court order be complied with in every aspect thereof, pending further orders of the Court upon the hearing and determination of the appeal.

[14] In the result, I find no merit in the application dated **3 December 2018** and would dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF MAY 2019

OLGA SEWE

JUDGE