



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 15 OF 2019

ORIGINAL CIVIL SUIT CHILDREN'S 387 OF 2012

JR.....APPELLANT

VERSUS

LN.....RESPONDENT

RULING

1. Vide a Chamber Summons dated 18th February 2019 and filed the same day pursuant to Articles 53(1) (a), (e) and (2) of the Constitution, Sections 6, 13, 23, 70 (1), & (2), (3), 81, 87, 88, 90, 96 and 99 of the Children's Act, 2001 Regulations 1, 5 and 7 of the general rules and Regulations 2002, Section 1A and 1B of the Civil Procedure Act (Cap 21), Order 1, rule 10 and Order 45 rule 6, 2 (1) of the Civil Procedure rules, the appellant sought orders as follows:

(a) Spent.

(b) That this honourable court orders a stay orders No. 4 and 5 of the decree issued by Hon. Gitonga on 21st January 2019 as the Appellant/Applicant is not financially in a position to single handedly cater for the school fees and related expenses, the single most expensive item for the parties.

(c) That this honourable court be pleased to order that all needs of the children be added up together and divided on 50/50 basis pending the hearing of this application interpartes and subsequently pending the hearing and determination of the appeal filed herein.

(d) That the respondent be ordered to file her pay slip in court as the only one available to the lower court was filed in 2012 and is not indicative of her currently earning and financial standing.

(e) That costs of this application be provided for.

2. The application is predicated upon grounds set out on the body of the application and affidavit in support sworn by the appellant on 18th February 2019. Contemporaneously filed with the application is a memorandum of appeal challenging the judgment and decree of Hon. G.M. Gitonga SRM Milimani Children's Court in Children Case No. 387/2012 delivered on 21st January 2019.

3. The gist of the application herein and the orders sought is a culmination of the aforesaid judgment in which the Court made orders as follows:

(1) That joint legal custody of the children named as A.N. and A.J. be granted to the parties herein.

(2) That actual custody, care and control of the younger child A.J. is hereby granted to the plaintiff/mother and that the other child who is an adult shall make decisions on whom she wishes to stay with as she undertakes her undergraduate studies.

(3) That the defendant/father is granted unlimited but reasonable access to the younger child A.J. in the following terms:

(i) Saturday at 10.00am to Sunday at 5.00pm.

(ii) Half of all school holidays.

(iii) Alternate major holidays of Easter, Christmas and new year, so that if one party spends the holidays with the child this year, the other party will spend the said holidays with the child the following year.

(4) That the defendant/father shall take care of the children's school/university fees and related expenses at their current schools without fail.

(5) That the defendant shall make an immediate inquiry at the either child's university to find out the fees status and pay the same or make arrangements to pay.

(6) That the plaintiff/mother shall take care of all other needs of the children during the time they shall be in her custody.

(7) That each party shall bear its own costs this being a family case.

4. Being aggrieved by the said orders, the applicant/appellant sought stay of orders No. 4 and 5 and that all expenses be added together and the same be shared out equally. In his calculation, the appellant argued that cumulatively he was ordered to pay Kshs.339,045.80 on school fees, school related expenses and upkeep of the children per month whereas the respondent will be spending a meagre sum of Kshs.33,000/= hence overburdening him while offending Article 53 (1) (d) of the Constitution on equal parental responsibility.

5. It is the appellant's case that he has been out of formal employment since 2016 thus left to depend on his rental income of Kshs.105,000/= per month while the respondent is earning Kshs.300,000/= per month from her employment. He averred that it would be fair and just for both parents to share expenses equally.

6. He further stated that he quit his employment the year 2016 so that he could concentrate on his PHD studies. He contended that despite informing the court of his financial constraints, the trial court did not bother to listen. He attached pension withdrawal slips (JR3) to prove that he had depleted all his sources of income and investments. To prove that the respondent is a person of means, he attached her payslip marked as JR7.

7. To bolster his claim for equal parental responsibility, the applicant attached a Children Officer's report marked JR8 wherein the report recommended that both parents meet their children's requirements equally.

8. In response, the respondent filed a replying affidavit sworn on 30th April 2019 stating that the respondent is a person of means as he controls 99% of matrimonial property some of which are generating rental income. She further alleged that it was the applicant who voluntarily resigned from a well paying job wherein he was earning Kshs.800,000/= per month as a Managing Director. She attached a letter of his resignation letter dated 18th March 2017 marked LM1.

9. The respondent contended that the application was filed in bad faith arguing that the applicant deliberately resigned to run away from responsibility. She dismissed the claim that her expenses amounted to Kshs.33,000 considering that she was paying rent, buying clothes, children's school related expenses, medical expenses among others.

10. During the hearing, M/s Kayugira reiterated the contents of the averments contained in the affidavit in support of the application. She submitted that the application was filed within reasonable time and that unless the stay orders are granted, the applicant is likely to suffer substantial loss. She urged the court to find that parental responsibility is a shared role on 50% to 50%.

11. In response, M/s Wambugu also adopted the averments contained in the replying affidavit. Counsel submitted that stay orders will not be in the best interest of the children as it will affect their studies. She asserted that the applicant deliberately resigned from his job to punish his children and run away from responsibility. Mrs. Wambugu stated that the applicant was seeking for final orders in an application. She stated that the applicant will not suffer any substantial loss in paying school fees for his children.

12. To support her submissions on the best interest of a child, Mrs. Wambugu referred the court to the case of **MK vs CKK (2015) eKLR** and **ZWN vs CMK (2018) eKLR**.

Determination

13. I have considered the application herein together with the memorandum of appeal, supporting and replying affidavits together with oral submissions by both counsel. Issues that emerge for determination are:

(a) Whether the orders sought are final in nature.

(b) Whether the application meets the threshold for grant of stay orders.

(c) Whether the orders sought are in the best interest of the child.

(a) Whether the orders sought are final in nature

14. The applicant prayed for 5 orders. Prayer one is spent. Prayer 2 prays for stay of orders 4 and 5. This prayer is couched with finality as

it is not dependent upon the outcome of the application or appeal. On the other hand prayer 3 is seeking for an order directing payment of school fees and other expenses on equal basis pending the hearing and determination of the application or appeal. This prayer is also couched with finality in the sense that the court would have determined the appeal before it is heard. Prayer 4 seeks an order directing the respondent to produce her current payslip. This order can only apply during the hearing of the appeal when an application for leave to adduce additional evidence can be made.

15. Based on the above analysis I do agree with Ms. Wambugu that the prayers sought cannot issue at an interlocutory stage.

(b) Has the applicant met the threshold for award or grant of stay orders

16. The law governing grant of stay orders pending appeal is Order 42 rule 6of the Civil Procedure rules which provides that an applicant seeking a stay of execution pending appeal must demonstrate the following elements:

(1) Whether substantial loss may result to the applicant unless the order is made.

(2) Whether the application was made without unreasonable delay and

(3) Whether such security as the court can order for the due performance of such decree or order as may ultimately be binding on him has been given.

17. In the instant case, the application was filed on 18th February 2019 about 28 days after delivery of the impugned judgment. To that extent the appeal and the instant application were filed without undue delay. Regarding furnishing of security, this is not a monetary claim to require furnishing of security.

18. Having eliminated the two ingredients I am left with the ground as to whether the applicant is likely to suffer irreparable loss or his appeal rendered nugatory. In the case of **Carter and Sons Ltd vs Deposit Protection Fund Board and two others – Civil Appeal No. 291 of 1997** the court held that:

“...the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay..... the appellant must establish a sufficient cause. Secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security, and the application must of course, be made without unreasonable delay”.

19. What substantial loss is the applicant likely to suffer? According to the applicant, he has since resigned from employment to pursue his PHD degree hence has no formal source of income save for a monthly rental income of Kshs.105,000/=. He therefore argues that, he is likely to suffer loss by being punished for non compliance of a court order. There is no dispute that the applicant has all along been paying school fees for his children. It is common ground that the applicant voluntarily resigned from a well paying job where he was earning well over Kshs.800,000/= per month in order to concentrate on his PHD studies.

20. The key question that arises is how then did he expect his children whom he dearly loves to go to school? Didn't he for a moment ask himself of the fate of the children without his support? I am not convinced that the appellant is likely to suffer substantial loss if the stay orders are not granted. He is the author of his own financial misfortunes and constraints which was obviously calculated at running away from responsibility. This court cannot fall victim of such cheap tricks.

21. Whereas the appellant has raised arguable grounds of appeal, the same can properly be ventilated even without a stay being issued. The appeal will not be rendered nugatory merely because the appellant is being held to continue doing what he has been doing since the year 2012 without a hitch. To deliberately resign from a job while fully aware that his children depends on his salary is to say the least a dishonesty move to seek unwarranted and unjustified sympathy to the detriment of the children's best interest.

(c) Are the orders in the best interest of the child?

22. The cardinal consideration in determining which orders or decisions to make affecting the affairs of a child, is underscored under Article 53 (2) of the Constitution and Section 4 (2) and (3) of the Children's Act (**See MK vs CKK (Supra)** and **RWN vs CMK (Supra)**). If there is any need for variation of the applicant's financial responsibility, that can be canvassed during the appeal.

23. In conclusion, it is my finding that, stay orders in the current scenario will not only paralyse the otherwise smooth learning of the children in their current schools but interrupt the consistency and environmental adaption being enjoyed as compared to a new school if they were to be transferred to meet the low cost expectation of the applicant. It is not in the best interest of the children that they drop out of school for lack of school fees which the appellant deliberately decided to block by resigning from his employment. Application is dismissed with costs. Parties can fast track hearing of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE, 2019.

J.N. ONYIEGO

(JUDGE)