



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISC. APP. NO. 75 of 2019

IN THE MATTER OF THE ESTATE OF BASHIR ALI AND HAMIDA ALI (CHILDREN)

PETER AKRAN MASAI.....APPLICANT

VERSUS

ZAINA WERE.....RESPONDENT

(Being an appeal from the Judgment of Hon. G. M. Gitonga (SRM))

in Nairobi Children's Case No. 986 of 2017)

RULING

1. The Application coming for consideration in this Ruling is the Notice of Motion dated 9.5.2019 seeking the following orders;

(i) THAT this Application be certified urgent, and be heard ex-parte and service be dispensed with in the first instance(spent)

(ii) THAT the Memorandum of Appeal herein be deemed as filed and served upon the Respondent

(iii) THAT this Honourable Court be pleased to enlarge time and grant leave to the Applicant to file and serve the Memorandum of Appeal out of time in Milimani Children's case No. 986 of 2017 delivered on 21st March 2019 in terms of the draft Memorandum of Appeal annexed hereto.

(iv) THAT this Honourable Court be pleased to set aside the Ruling of the Learned Magistrate Honorable G. M. Gitonga (SRM) dated on 21st March 2019 in Milimani Children's case No. 986 of 2017 pending the hearing and determination of this present Appeal.

(v) THAT this Honourable Court be pleased to expressly order a stay of execution of the Ruling and orders against the Applicant herein pending the hearing and determination of this present Appeal.

(vi) THAT this Honourable Court do grant any other further orders as it may deem necessary in the circumstances in the interest of justice.

(vii) THAT the costs of this Application be provided for.

2. The Application is supported by the Applicant's Affidavit sworn on 9.5.2019 in which he has stated that when he was informed about Ruling delivered on 21.3.2018 in Nairobi Children's Case No. 986 of 2017, he instructed his advocate to appeal but the firm inadvertently misfiled his file before making the intended appeal.

3. The Respondent filed grounds of opposition to the said Application stating that the intended appeal is an abuse of the Court process, is statutory time barred and that the same is not arguable.

4. The Parties were directed to file written submissions in the Appeal but the applicant did not comply with the directions of the Court.

5. The Respondent further filed a Replying Affidavit dated 6.6.2019 and stated that the applicant has failed to date to comply with orders

issued in the Children's Case and that he continues to abuse and threaten her and the children.

6. The Respondent filed written submissions dated 26.7.2019 but the applicant did not canvas his application or file any submissions.
7. I find that the powers to grant Stay pending appeal are discretionary. I have considered his Application together with the Affidavit in support of the Application.
8. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“No order for stay of execution shall be made under subrule (1) unless–

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

9. The Court of Appeal in **Butt v Rent Restriction Tribunal**[1982] KLR 417 gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.”

10. The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal.
11. I also find that in matters dealing with maintenance of minors, it is not in the interest of justice to grant Stay orders as the best interest of the child is the guiding principle.
12. I accordingly allow the Applicant to file his intended Appeal within 28 days of this date.
13. However, no Stay order is granted as the same would jeopardize the well being of the minors.
14. If the Applicant does not file his intended appeal within 28 days of this date, the orders extending the period for filing the Appeal to lapse automatically.
15. The costs of this application to abide the appeal.
16. Mention 4.11.2019 for compliance and for further orders.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 4TH DAY OF OCTOBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.