



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 10 OF 2017

M N N..... APPLICANT/APPELLANT

VERSUS

M.O.K AND C.A.S MINORS

SUING THRO' THEIR FATHER H O S.....RESPONDENT

RULING

INTRODUCTION

In a ruling delivered on the 9th January, 2016; the **Children Court Kisumu in case no. 40 of 2016** made orders granting joint custody of minors to the defendant mother and the plaintiff father; the actual custody of the children to the plaintiff father with reasonable access by the appellant and shared maintenance responsibilities among other orders.

Being aggrieved by the said judgment; the defendant mother filed a Memorandum of Appeal dated 24th January, 2017 and a notice of motion dated 25th January, 2017, for stay of execution of the order of the Children's Court and sought specific orders as follows:

1. *THAT this application be certified as urgent and be heard forthwith and ex parte at the first instance and*
2. *THAT pending the hearing and determination of this application inter partes or further orders of the court; this court does grant the applicant an order of stay of execution of the judgment and order made on 9th January, 2016 in **Kisumu Chief Magistrate's Court Children's Case No. 40 of 2016***
3. *THAT pending the hearing and determination of this appeal or further orders of the court; this court does grant the applicant an order of stay of execution of the judgment and order made on 9th January, 2016 in **Kisumu Chief Magistrate's Court Children's Case No. 40 of 2016***
4. *That the costs of this application be provided for*

The application was based on grounds set out in the application as follows:

- a. *THAT the appellant herein being dissatisfied with the judgment of the lower court has filed an appeal against the said judgment*
- b. *THAT the applicant has an arguable appeal with a high probability of success*

- c. THAT if the stay is not granted, the applicant's Appeal shall be rendered nugatory and the applicant and the minors herein will suffer irreparable loss
- d. THAT this application has been made without unreasonable delay
- e. THAT this application has been made with utmost good faith
- f. THAT this application ought to be granted in the interest of equity and justice

The application was supported by the appellant's supporting affidavit sworn on 25th January, 2017 in which she reiterated the grounds on the face of the application. On 27th January, 2017; the respondent filed grounds of opposition and a replying affidavit sworn on the same date. On 1st February, 2017, counsel for parties then made oral submissions and the ruling of the court was, on the basis of urgency, scheduled for the 1st February, 2017.

ISSUE FOR DETERMINATION

The issue for determination in this application is whether in the circumstances of this case the court will grant stay of execution pending appeal.

DETERMINATION

Principles for the grant of stay of execution in children matters

6. 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 Article 53 (2) of the Constitution which provides-

“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 –

- 1. The applicant will suffer substantial loss if stay is not granted;*
- 2. The application for stay has been brought without undue delay; and*
- 3. The applicant has provided security for the due performance of the decree or*

I have noted the opinion of Musyoka, J. in two decisions – **Z.M.O. v. E.I.M. [2013] eKLR** and **M.N. v. P.A.S. [2015] eKLR**, and I, respectfully, agree with the learned judge that it is in very rare cases that courts grant stay of maintenance orders in cases involving minor children, where the duty to maintain a child is imposed on a parent by statute, as 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 main appeal might be a solution where there is a challenge on quantum of maintenance rather than staying the orders of the trial court pending appeal.

Although Counsel for the appellant submitted that his prayer at this stage was for stay only in relation to the grant by the court of actual physical custody of the children to the respondent, the prayers in the Notice of Motion dated 25th January, 2017 seek to stay the entire orders of the court pending the hearing and determination of the appeal, in exact terms that -

“THAT pending the hearing and determination of this appeal or further orders of the court; this court does grant the applicant an order of stay of execution of the judgment and order made on 9th January, 2016 in Kisumu Chief Magistrate's Court Children's Case No. 40 of 2016.

Best Interest of the Child

It appears from the supporting affidavit of the applicant that the grounds put forth to justify her preference, as against the respondent, as the custodian of the children are that the children are of tender age of 5 and 9 years.

As pointed out above quoting ***Bhutt v. Bhutt***, supra, the “*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 widest sense.*”

The respondent has deposed in response that he has since the order for custody, gotten a school near his place of residence and that C.A.Shas already joined Musada Academy as shown by the admission letter marked **HSO 1**.

Mr. Ojulu for the appellant submitted that there were no exceptional circumstances upon which the appellant was denied actual custody of the children. On the other hand; Mr. Kahi for the respondent submitted that the orders granted in ***Kisumu Chief Magistrate’s Court Children’s Case No. 40 of 2016*** have already been executed and that there was nothing to be stayed. He further submitted that the children are already in actual custody of the respondent and that the order of stay will not be in the interest of the children since it will mean that the custody reverts to the applicant thereby interfering with the physical comfort and welfare of the children.

Presumption in favour of the mother of a child of tender years

It is a trite and commonsensical principle that the physical custody of a child of tender years should be with the mother unless the mother is shown to be an unfit person. At this stage; this court will not dwell on the grounds on which the trial court granted actual custody of the minors to the father. A reading of the applicant’s whole affidavit does not show that respondent is an improper or unfit person and that he does not fit in the exception of the general principle. At this stage of the application of stay pending the hearing and determination of the appeal, and so as not to prejudice the hearing of the appeal, the court is not able to make concluded findings as to the suitability of the father for the grant of physical custody of the minor children.

Having read the affidavits filed by the parties in this Court, I am not able to find that the respondent is clearly an unfit person who should not have the custody of the children the subject of these proceedings. I am therefore not persuaded that this court should grant a stay order only on the basis that the children the subjects of this application are of tender age.

The court, therefore, does not find that substantial loss has been established, as it should be, on the part of the child for whose best interests the court is enjoined to always act, or the part of the appellant/applicant.

Moreover, the issue of grant of custody of the child to the mother being one of exercise of discretion to make custody orders under the Children Act, the trial court’s decision may only be interfered with by an appellate court upon the principles set out in ***Mbogo v. Shah*** (1968) EA 93, 96 (per Sir Charles Newbold, P) that –

“[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

The appeal and application were filed without delay but in view of the finding on substantial loss test, the question of security for the stay of execution does not arise.

In the case of **Atwal -v- Amrit [2011] E.A. 20** the Court of Appeal held that

“Article 53(1) (e) and section 24(1) Children Act allow both parties to have equal parental responsibility for the child. Neither has a superior right to the other. The court held that the rights and wishes of parents and fact of parenthood although relevant and important are subordinate to the best interest of the child.

The question of fact as to whether the respondent is a fit person to be granted the custody of the minor children the subjects of the appeal herein is a matter to be resolved upon determination of the appeal. It is a matter which ought not to be finally determined on the basis of disputed facts set out in affidavits filed by the parties at the interim stage.

In these circumstances, I consider that an order for the expedited trial of the appeal will meet the justice of the case so that the appeal is heard and determined expeditiously.

ORDERS

Accordingly, for the reasons set out above, I decline the request for stay of execution of the orders of the **Kisumu Chief Magistrate’s Court Children’s Case No. 40 of 2016** made on 9th January, 2017. In accordance with the general principle for expedition in children matters under Section 76 (2) of the Children Act, I direct that the appeal be heard expeditiously on a date to be fixed on priority basis at a mention for that purpose within 14 days from today’s date. Costs shall be in the Cause. It is so ordered.

DATED AND DELIVERED THIS 3RD DAY OF FEBRUARY 2017

T. WANJIKU CHERERE

JUDGE

In the presence of: -

CC Felix

Applicant in person for the Appellant

Mr. Kahi for the Respondent

T. WANJIKU CHERERE

JUDGE