



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 122 OF 2016**

**T M.....APPELLANT**

**VERSUS**

**L O W.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The applicant/appellant herein T M moved to court through a notice of motion dated 19<sup>th</sup> December, 2016 under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, Order 51 of the Civil Procedure rules, Article 53 (2) of the Constitution and Section 80 of the Children's Act No. 8 of 2001 seeking for the following orders:

1. That application be certified urgent, service be dispensed with and the same be heard exparte in the first instance.
2. That pending the hearing and determination of the said application, the honourable court do order stay of execution of Judgment delivered by the honourable Mrs. Gichana on 8<sup>th</sup> December, 2016 in the Children's Court Milimani Nairobi Children Case No. 1156/2016.
3. That pending hearing and determination of the application, this honourable court be pleased to order that the appellant does have unsupervised access of the minor (child).
4. That pending hearing and determination of this application, this honourable court be pleased to order that the appellant pays 40,000/- as he has been doing towards the maintenance of the minor.

2. The application herein is a culmination of a judgment delivered and orders issued thereof by the honourable Magistrate in Milimani Children's Case No. 1156/2015 in which the court entered judgment against the appellant then the defendant giving physical custody of a minor the subject of the suit herein to the mother (Plaintiff/Respondent).

The learned Magistrate also granted access to the child to the appellant (defendant) on either Saturday or Sunday every fortnight from 9.00am to 4.00pm. However, in making the access directions, the trial court made some condition to the effect that, the child and the father (appellant) were to interact under supervision by either the mother and or maternal grandfather of the child who shall remain in the defendant's compound and or with prior arrangements at the venue where the defendant and the child would be having access to the public or social place.

The learned Magistrate further ordered both parties and the child at a shared cost to attend counseling sessions at an institution to be agreed between themselves and a confidential report to that effect be filed within 4 months from the date of judgment.

Lastly, the appellant was ordered to pay 55,000/= monthly being part contribution to the child's upkeep.

3. Aggrieved by this decision, the defendant now appellant filed a memorandum of appeal dated 19/12/2016 filed in court the same day together with the application herein.

Application filed under certificate of urgency is supported by grounds on the face of it and a sworn affidavit deposed on 19/12/2016 by the applicant and supplementary affidavit dated 2/2/2017.

### **Appellant/Applicant's case**

4. In his supporting affidavit, the appellant averred that, the judgment of the trial court entered on 8<sup>th</sup> December, was unfair and unless stayed, he was likely to suffer exceptional prejudice, loss of integrity and deprivation of paternal care, love and upbringing of his child.

He further contended that, unless the orders herein sought are stayed, he was likely to suffer a miscarriage of justice as proceedings from the trial court were likely to take long in processing for purposes of prosecuting his appeal.

He therefore prayed for stay, vacation and or setting aside the orders, pending determination of the appeal. He however pleaded with the court to allow him continue paying 40,000/= monthly maintenance for the upkeep of the child as it was the case prior to delivery of the judgment now being challenged. By attaching conditions on his access to the child, the applicant opined that the right of the minor will continue to be violated and same amounts to interference to parental care and love.

### **Applicant's Submissions**

5. During the hearing, Mr. Swaka for the applicant/appellant in submission basically reiterated the applicant's averments contained in the affidavit. He urged that, the applicant is already contributing 40,000/= per month towards the upkeep of the child, paying school fees, provided medical cover and meets other expenses. He submitted that, the court erred in attaching supervisory conditions when accessing the child thus rendering the appellant to being a play mate to the child which violates the child's rights.

Learned counsel relied on supplementary affidavit of the appellant in which he attached several photographs where the appellant and the minor appear to be enjoying their happy moments as a sign of love. He also relied on several bank statements in the name of the appellant to prove that the appellant did not have a lot of money to warrant a monthly maintenance of 55,000/=.

Mr. Swaka argues that the trial Magistrate did not demonstrate on how she arrived at a figure of 55,000/= and the conclusion that the appellant was likely to leave the country with the child.

6. In support of his case, Mr. Swaka quoted the case of **ZWN vs MWN Civil Appeal No. 15 of 2011 Embu (2015) eKLR where Judge Muchemi held that:**

**“in determining any children matter, the best interest of a child under Article 53 (2) must be upheld”.**

The learned counsel further quoted constitutional petition **No. 71/2014 Mombasa High Court between KMN v EG (2015) eKLR** in which Judge Muriithi upheld the interest of a child principle under Article 53(2) of the constitution.

Lastly, counsel referred the court to the case of **JKW v MAW Civil Appeal No. 68/2015 Migori High**

**Court EG (2015) eKLR** in which Judge Manjanja upheld Article 53(2) and Section 83(1) of the Children Act which underscores best interest of a child principle and also assessment of the conduct of a parent before awarding custody.

### **Respondent's Case**

7. In reply to the application, the respondent filed a replying affidavit sworn by L A W on the 27/1/2017 in which she deposed that the appellant had not demonstrated substantial loss in the event the orders sought are not granted and that in the alternative, the appellant be ordered to deposit security in due performance of the decree.

She further averred that, the appellant has made similar attempts to have unsupervised access to the child before the trial court and High Court vide HCC No.120/2015 but in vain.

She also contended that, it is in the best interest of the child that the orders granted by the trial court do remain in force.

### **Respondent's Submissions**

8. During the hearing, Mrs. Muraguri equally adopted averments contained in the replying affidavit. She urged the court to uphold the interest of a child against that of the appellant which is inferior. She relied on authorities among them **Governors Balloon Safaris Ltd versus Zacharia W. Baraza t/a Sitimma Auctioneers (2016) eKLR, C.K.K VESUS CMM (2016) eKLR and MNN versus M.S.K. and another (2017) eKLR.**

In all these cases, the best interest of a child principle was emphasized. Miss Muraguri however raised a preliminary objection with regard to production or introduction of new evidence in Para 15, 18 and 19 of the supplementary affidavit by the appellant being photographs and bank statements which were not tendered before trial court. Counsel therefore pleaded with the court to expunge the same under Order 42 rule 27 of the Civil Procedure Rules.

9. After going through the application herein, supporting affidavit, replying affidavit, supplementary affidavit and submissions by both counsels, the court has an enormous duty to evaluate the material placed before it and make a fair determination. Issues for determination are:

#### **a) Whether the court can grant Stay of Execution orders**

The principles for granting stay of execution orders are clearly set out under Order 4 2 rule 6 of Civil Procedure rules which provides in sub-rule 2:

**“No order of stay of execution shall be made under sub-rule (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 orders as may ultimately be binding on him has been given by the applicant”.**

10. In this case, the application herein was filed within reasonable time as it was filed on 19/12/2016 and judgment delivered on 8/12/2016. Regarding deposit of security, this is not a monetary claim. The monetary aspect hinges on the livelihood of the minor hence depositing the same would not serve the best interest of a child as provided under Article 53 (2) of the Constitution and Section 4 (2) (3) of the Children's Act. What substantial loss will the appellant suffer if he paid Kshs.55,000/= instead of 40,000/=. The appellant argues that the respondent is well paid in her employment and that if she made equal contribution, it will be more than sufficient per month a sum he said is unreasonable for the upkeep of one child.

11. The dispute over the access and maintenance amount awarded is the core subject of the main appeal and the court is not in possession of material information including lower court proceedings to be able to determine what the parties said in their evidence and how the court arrived at that figure. It would be premature to determine that ground at a preliminary stage for so to do will amount to disposal of the main appeal before the hearing commences. However the sum of 15,000/= in excess over and above 40,000/= which he is paying in the meantime pending appeal will not amount to any significant/substantial loss regard being the best interest of a child as provided for under **Article 53 (2) of the Kenyan Constitution, UN convention on the right of the child Article 3 and African charter on the rights and welfare of the child under Article 4**. If the court finds that amount is not justified after hearing the appeal, the same can be reduced.

12. In **Civil Appeal No. 48/2015 between Selestica Limited versus Gold Development Ltd Nairobi Milimani Law Courts (2015) eKLR**.

Justice Aburiri held that

**“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.**

**However in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment”.**

13. It is important to note that grant of stay orders is a discretionary power reserved for a Judge or judicial officer which must be applied judiciously in advancing the interest of justice. The discretionary powers should not be used as a whip to chastise the disobedient litigants but rather a balanced judicial mind guided by the principles of natural justice and the rule of law to bestow confidence in the judicial system. The appellant has not demonstrated how he will suffer if he continued paying the said amount as directed.

**b) Whether the Introduction of Additional Evidence by the Appellant is proper**

14. The introduction of the evidence by way of photographs and bank statements which was not part of the evidence for determination before the trial court cannot serve any purpose at this stage as they have not been tested by the respondent on cross-examination. However under Order 42 rule 27 (1) (b) a court to which an appeal is made may allow such evidence if it requires or need arises. That can only arise during the main appeal and not at the preliminary stage if the court deems it necessary.

In the case of **Governors Ballons Safaris Ltd above quoted**, the court expounded on circumstances under which additional evidence can be entertained at the stage of appeal under **Section 78 (1) (d) of the Civil Procedure Act and Order 42 rule 27 of the Civil Procedure rules**. An appellate court allowing such additional evidence must record reasons for so doing if it is in the interest of justice or if the trial court whose decree is being challenged had refused to allow such evidence during the trial.

15. Needless to say, additional evidence at the stage of appeal is allowed at the discretion of the court which must be exercised with caution and therefore sparingly so as to avoid a situation of reopening a full trial through the backdoor thus embarrassing the appellate court with evidence which may raise unnecessary contradictions in the entire appeal hence making it difficult to arrive at a fair decision without offending the other party. Accordingly Paragraph 15, 18 and 19 of the supplementary affidavit made by the appellant are expunged from court record as the same was not produced during the trial and the time for appeal is not yet ripe.

In the circumstances, I will not interfere with the amount awarded at this stage and the appellant shall continue paying as directed until further orders of the court after determination of the appeal.

**c) Whether the applicant should enjoy unsupervised access to the child**

16. The appellant complained that by limiting access to the child to two days a month once every fortnight either on a Saturday or Sunday amounts to a violation of the child's rights as he needs freedom to bond with the father at this formative stage. He submitted that he loves his son who is now 3 years old and that he does not intend to harm him. Similar prayers were made before the trial court for review and the High Court before Judge Muigai who declined to review the same.

17. The appellant does not want to be supervised by the mother and or maternal grandfather. It is worth noting that the child is 3 years old who needs tender care. He has been staying with the mother since birth. It has been stated clearly that the appellant stays in Isiolo, but his status and for how long he will be in the country is not clear to the court as at now. All these issues will properly come out during the main appeal when the trial court proceedings would have been submitted. It is not in the interest of the child to lift the orders of supervised access as the court is not fully seized of the facts of the case to be able to make an independent assessment of the situation and make appropriate orders. Again there is no substantial loss suffered if the mother continued accompanying the minor whenever the father picks him.

18. Unless the appellant complains of interference by the mother or grandfather during the access period, then the arrangement as it is, should remain uninterrupted till the main appeal is heard and determined. It will be unconscionable to make such orders at the application stage given that the status and future of the appellant in Kenya is not clear to the court.

A court at the appellate stage dealing with children matters can only interfere with such orders and order for stay of execution when the orders so complained of are manifestly and outrageously unreasonable taking into account peculiar circumstances and merits of each case.

19. Accordingly, the prayer to lift unsupervised access cannot apply at this stage and the same is disallowed.

In conclusion, application dated 19<sup>th</sup> December, 2016 be and is hereby dismissed. This being a family matter, I will not make any no order as to costs.

Order accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of: Kariuki Advocate holding brief for Swaka

Counsel for the appellant/applicant

No appearance for Counsel for the respondent