



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 102 OF 2016

WINROSE CHEPNG'ENO KOSKE.....APPELLANT

VERSUS

E. C., a minor suing through EKARESPONDENT

(Being an application for stay of execution of the decree of T. M. Olando, Resident

Magistrate, in Eldoret Children's case. 224 of 2013 delivered on 26th May 2016)

RULING

1. The appellant is aggrieved by the decree of the children's court made on 26th May 2016. The tussle in the children's court was over the *custody* of *E. C. [particulars withheld]*, a minor now aged eight years. The disputants are the biological mother (the appellant); and, the child's paternal grandmother (the respondent).
2. After considering the evidence, the learned trial magistrate gave the parties *joint custody*: the grandmother was entitled to custody for *two weeks* during school holidays; the appellant was granted custody during the school term.
3. The appellant filed a memorandum of appeal on 23rd June 2016. Pending the hearing of the appeal, the appellant has presented a notice of motion dated 3rd August 2016 praying for stay of execution of the judgment. It is expressed to be brought under section 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules 2010.
4. The appellant avers that she will suffer substantial loss "*by being asked to hand over the minor to her grandmother*"; that removing the minor to Eldoret is inconvenient and will deny the minor the opportunity to bond with her two younger siblings aged two years and three months respectively; that the decree is not in the best interests of the child; and, that as the only surviving parent of the minor, the appellant is entitled to full custody. In a deposition sworn on 3rd August 2016, the appellant avers that execution is imminent. In that regard, she refers to a letter from the respondent dated 17th June 2016. In a synopsis, she maintains that there are sufficient grounds to warrant stay pending appeal.
5. The motion is contested. The respondent filed a replying affidavit on 9th August 2015. She contends that the appeal is hopeless; and, that the appellant has not demonstrated she will suffer substantial loss. She avers that the appellant abandoned the minor in 2008 when she was an infant; and, that the appellant only showed an interest in the minor when she was six years old and enrolled in school by the respondent. She avers further that the father of the child died on 20th July 2012; and, that the appellant is cohabiting

with another man. She avers that the latter has rejected the child. She contends that she has a role to mentor the minor; and, that the right was not extinguished by the death of her son.

6. The respondent's learned counsel had also given notice of a preliminary objection dated 10th August 2016. The pith of the objection is that the present motion is *res judicata*. The reason being that the appellant had presented a similar motion for stay in the lower court which was dismissed on 25th July 2016.

7. On 17th August 2016, learned counsel made oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the notice of motion, the pleadings, depositions and preliminary objection.

8. The only live issue is whether the appellant deserves a stay of execution pending appeal. From the contested affidavits, the parties are trying to regurgitate the arguments before the children's court; or, to ventilate some grounds in the main appeal. I refuse to be drawn into the merits of the appeal at this stage. That will be the true province of the appellate court.

9. Section 3A of the Civil Procedure Act gives the court wide discretion to grant interlocutory orders to prevent the ends of justice from being defeated. By dint of Order 42 of the Civil Procedure Rules 2010, the court also has power to grant a stay of execution pending appeal. Order 42 Rule 6 provides-

“6.(1) 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.

(2) 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.”

10. In Wilson v Church (No 2) 12 Ch D [1879] 454 at 459, it was held-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”

11. In Butt v Rent Restriction Tribunal [1982] KLR 417 at 419, Madan JA (as he then was), delivered himself thus-

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”

12. At the heart of this dispute is the interest of the minor. Under Article 53 (2) of the Constitution and sections 4 (3) and 83 of the Children Act, the *best interests* of the child must reign *supreme*. In addition, the court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties.

13. The present motion was only presented to court on 3rd August 2016. The impugned ruling was delivered on 26th May 2016. Although there was a delay of over two months, I have considered that the appellant had presented a similar motion to the subordinate court. That application was dismissed on 25th July 2016. I thus find the present motion was brought without unreasonable delay.

14. The preliminary objection does *not* lie. The present application is not *res judicata*. True, a similar motion was presented and dismissed by the children's court. Order 42 Rule 6 expressly provides that *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. The words following that sentence provide that a person aggrieved by a stay granted by the lower court may move the appellate court to set aside the order. No order of stay was granted by the lower court: instead, the appellant's motion for stay was dismissed. See Sirgoi Holdings Limited v Martha Kamunu Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR. I dismiss the preliminary objection.*

15. The key question is whether the appellant has demonstrated *substantial loss*; or, whether the intended appeal will be *rendered nugatory*. The impugned orders required the appellant and respondent to *share* custody of the minor. The paternal grandmother was granted custody for only *two weeks* during the school holidays. The appellant was to be in custody during the ordinary school term.

16. The gravamen of the appeal is that the children's court erred by vesting rights of custody on the guardian *ad litem*; that it failed to take into account the best interests of the minor; or, the rights of the only *surviving* parent. The children's court is also faulted for finding, without evidence, that under *Luhya* customary law, the child *belonged* to her *late* father. Like I stated, I cannot make a conclusive finding on those matters at this stage.

17. I accept that that the key grounds in the memorandum of appeal are *arguable*. It is common ground that the appellant is the only *surviving* parent. The lower court was weighing a delicate balance between her rights and those of the minor's paternal grandmother (the guardian *ad litem*). The court considered Article 53 (2) of the Constitution; and, section 83 of the Children Act. In its opinion, the best interests of the child demanded joint custody.

18. I have noted that the paternal grandmother lived with the minor in her formative years. She remains an important *mentor*. However, the minor has *younger siblings*. She will obviously have to leave them to join her paternal grandmother. One of the siblings is just slightly over two years; the other is a few months old. I am also alive that the appellant is her *biological* mother though cohabiting with a new partner. In my view the question of *substantial loss* in a matter of this nature is distinct from that in ordinary civil suits relating to money decrees for example. It must be looked at through the lenses of the *child* and her *best interests*: not those of the disputants. The disruptions to the minor that will spring from the performance of the decree amount to *substantial loss*. Viewed from that perspective, I am persuaded that the appeal would be rendered *nugatory*.

19. The upshot is that there *shall* be a *stay* of execution of the decree of the children's court dated 26th May 2016. However, I will place conditions to ensure that the appellant does not go into slumber; and, that the best interests of the child are determined with finality. I thus direct that this appeal be *fast tracked*. The stay of execution shall be *conditional* upon the following two matters: first, the appellant shall prepare and serve the record of appeal within *thirty days* of today's date. Secondly, the appellant shall within a *further thirty days* ensure that the appeal is placed before the judge in chambers for *admission*; or, mentioned for *directions* for the *hearing* of the appeal. The court registry is accordingly directed to grant those dates on *priority*.

20. In view of the nature of the dispute; and, in the interests of justice, I make no order for costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 6th day of September 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Tarus for Mr. Kigamwa for the appellant instructed by Wambua Kigamwa & Company Advocates.

Ms. Koech for the respondent instructed by Boinet & Bett Company Advocates.

Mr. J. Kemboi, Court clerk.