



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 6 OF 2015

N O OAPPELLANT/APPLICANT

VERSUS

E B A O.....RESPONDENT

RULING

1. The application for determination before this court is a Notice of Motion dated 22nd January, 2015, brought under **Section 3 & 3A**, of the **Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 42 Rules 5 and 6, Order 51 and Rule 1** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law. The first and second prayers have been spent.
2. The Applicant now seeks orders that pending the hearing and determination of the appeal, this Court be pleased to grant a stay of execution of the orders made on the 8th January, 2015 by the Honourable E. Bhoke (Mrs.), Principal Magistrate, in Children's case No. 170 of 2012, to the extent that it ordered the Applicant to pay School fees of Kshs. 30,000 out of the required Kshs. 38,000. Further that pending the hearing and determination of the appeal herein, this Court be pleased to stay all the proceedings in Children's case No. 170 of 2012 and that the costs of this application be provided for.
3. The application is premised on the grounds that there is imminent danger of the Respondent executing the order granted by the Children's Court in 170 of 2012 on 8th January, 2015, which would render the appeal filed by the Applicant nugatory. That the Applicant stands to suffer irreparable loss if the said orders to pay school fees of Kshs. 30,000 are not stayed and that the Respondent has already paid the School fees and therefore the welfare of the minor will not be prejudiced if the said orders are stayed.
4. The application is supported by the annexed affidavit of N O O, the Applicant herein, sworn on even date. In the affidavit he avers among others that the Respondent chose a School for the child without consulting him or making any proposal of Schools for him to choose from, contrary and in complete disregard of the court's orders dated 29th October, 2014. He also avers that he is not in a position to meet the said amount of School fees as ordered by the trial court as he is already paying School fees for some destitute children in secondary schools.
5. Opposing the application, the Respondent filed a Replying Affidavit on 6th March, 2015 in which she has made several averments. Most notable among them are first, that the Applicant was consulted but refused to agree to any of the alternatives given to him; second that he did not offer any options for consideration; third that the Applicant is a man of means, a holder of multiple businesses and a prominent man in the society and is only seeking to curtail the course of justice

and the best interests of the minor herein. The Respondent further depones that the Applicant has attempted to avoid his parental responsibility by failing to meet the maintenance needs and even denying paternity, as a means to slow down the process of execution and that in any case there is already an application filed in the Children's Court by the Applicant seeking to review, vary and or set aside the orders granted by the said Court.

6. The application was disposed of by way of written submissions. Both the Applicant's and the Respondent's submissions were filed on 20th March, 2015. Having considered the application, the affidavits for and against as well as the rival submissions, I find that the main issue for consideration is whether the applicant herein has made a case for the court to exercise its discretionary powers in his favour.
7. The conditions for granting a stay of execution pending appeal are well settled. An order for stay is a discretionary remedy. The discretion is however, circumscribed by the conditions set out under **Order 42, Rule 6** of the **Civil Procedure Rules**. These are that the application should be made without undue delay; show that substantial loss may be suffered by the applicant unless the order is made and finally that the applicant should offer such security as may be ordered by the court.
8. The orders which the Applicant seeks to stay execution thereof were made on 8th January, 2015 while the instant application seeking stay was filed on 22nd January, 2015, 14 days after delivery of the said orders. In the circumstances, this court is satisfied that the application was made timeously and therefore has met the first limb of **Order 42 Rule 6** of the **Civil Procedure Rules**.
9. On the second limb as to whether the Applicant has shown what substantial loss he stands to suffer, I note that he has merely stated in his supporting affidavit at paragraph 21, that he stands to suffer irreparable loss and damage if the orders of stay do not issue as prayed. He has however failed to establish in what manner the irreparable loss will be occasioned to the satisfaction of this Court. The Applicant has not demonstrated what substantial loss he is likely to suffer, a part from merely stating that he stands to suffer irreparable loss and damage.
10. The decisions which lend themselves to the circumstances of this case are to be found in the case of **Adah Nyabok -vs- Uganda Holding Properties Limited (2102)**, in which Mwera J (as he then was) stated that:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”

and in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, in which **Musinga, J** (as he then was) explained substantial loss in the following terms:

‘...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.’

11. The provisions of the law are very clear and couched in mandatory terms: the Court shall not issue any stay orders unless the two grounds set out in sub-rules (a) and (b) of Order 42 Rule 6 are satisfied. Although, the Applicant has satisfied the ground set out in sub-rule (a) of Order 42 Rule 6, and the Court finds that the application was made without undue delay, he has not demonstrated that he will suffer substantial loss.
12. It is therefore, the considered view of this court that the Applicant has not given sufficient cause to merit the exercise of the discretion of the court in his favour, in granting the order of stay of execution pending appeal. The court must exercise its judicial discretion in the interests of justice, and considering the special circumstances of this particular case, that it is a matter concerning a child, the welfare of the child in issue is of paramount consideration. The court holds that it would

be in the best interest of the said child that the application be dismissed.

13. In view of the foregoing, this court finds that the application is not merited and it is therefore expedient to dismiss it.

Orders accordingly.

SIGNED DATED and DELIVERED in open court this **8th day of May 2015.**

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Appellant

In the presence ofAdvocate for the Respondent