In re NHM (Minor) (Family Appeal E022 of 2024)
[2024] KEHC 8128 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E022 OF 2024

G MUTAI, J

JUNE 28, 2024

IN THE MATTER OF NHM (MINOR)

BETWEEN

AIB ..... APPLICANT

AND

YNM (SUING AS THE MOTHER AND NEXT FRIEND OF NHM (THE MINOR) ..... RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 5th April 2024 vide which the Appellant/Applicant seeks the following orders: -

    a. Spent;

    b. Spent;

    c. That this honourable court be pleased to order stay of execution of the ruling issued on 25th March 2024 virtually in Children's Cause No. E128 of 2022; YNM vs AIB pending hearing and determination of Mombasa High Court HCFA E022; AIB vs YNM;

    d. That the ruling dated 25th March 2024 against the Appellant/Applicant and consequential orders be varied and /or set aside; and

    e. Costs of the application.

2. The application is premised on the grounds therein and the supporting affidavit of the Appellant/ Applicant sworn on 5th April 2024. He stated that he is the biological father of the minor herein and that the Respondent instituted Mombasa Children's Cause No. E128 of 2022 seeking custody and maintenance of the minor. Upon hearing the parties, the trial court delivered its judgement on 11th

August 2023. In its orders, the court gave the Respondent actual custody, and the Appellant/Applicant unlimited access whenever he comes to Mombasa and to have the child for half the period of all school holidays; the Appellant to provide a monthly sum of Kes.10,000/- per month for upkeep, payable on or before the 5th of every month; the Respondent to cater for shelter, utility bills and the house help's salary; the Appellant to continue paying for educational expenses of the child as he had been doing; clothing needs of the child to be catered for by both parties; and the medical needs of the child to be catered by the Appellant through his employer's medical insurance scheme.

3. On 9th January 2024, the Respondent filed Nairobi Misc. No. E007 of 2024 seeking to be allowed to travel with the minor to Cyprus. The application was dismissed on 28th February 2024 for being res judicata. She then filed a similar application dated 29th February 2024, which was allowed by the trial court in its ruling on 25th March 2024. He stated that unless a stay of execution is granted, the respondent will proceed to relocate with the minor to Cyprus. He stands to suffer irreparable loss if his stay is not granted.

4. He further stated that his appeal has a high probability of success and that the application was made without undue delay.

5. In response, the respondent filed a replying affidavit sworn on 22nd April 2024. She termed the application as bad in law, made in bad faith, lacking merit and an abuse of the court process. She stated that since the delivery of the judgement on 11th August 2023, the Appellant/Applicant either made a lesser contribution or made none at all. She urged that he had failed and/or refused to provide educational expenses and medical cover as ordered by the trial court. Further, he has never made any effort to see the minor for over three years despite the orders of access, which shows a lack of interest. As a result, she opted to look for greener pastures to secure the future of the minor.

6. She further stated that granting the orders sought by the applicant would be against the principle of the best interest of a child. She deposed that the Appellant/Applicant was not concerned about the minor's well-being and that there was no relationship between the two. The Respondent further deposed that the Appellant/Applicant had not demonstrated how he would suffer prejudice or loss if the orders sought were not granted. She urged the court to dismiss the application.

7. In response, the Appellant/Applicant filed a further affidavit sworn on 6th May 2024. He termed the Replying Affidavit false and misleading and stated that he has always sent monthly contributions to the Respondent as per the trial court judgement of 11th August 2023. If there has been any default, the Respondent has never complained or initiated a notice to show cause arising from the alleged default.

8. The application was disposed of by way of written submissions.

9. Counsel for the Appellant/Applicant identified two issues as coming up for determination.

10. Regarding the first issue, the Appellant/Applicant's counsel relied on Order 42, Rule 6 of the *Civil Procedure Rules* and submitted that if the Respondent relocates with the minor, he will greatly miss out on the upbringing of the minor and would be denied a chance to witness monuments of the minor's growth. Further, the minor will grow without his constant physical participation. It was submitted that he has always complied with the judgement of the court and that he will not enjoy the order of unlimited access due to the distance between Kenya and Cyprus.

11. Counsel further submitted that if the stay is not granted, the appeal will be rendered nugatory and urged the court to allow the application as prayed.

12. On the second issue whether the application is in the best interest of the child in accordance with Article 53(2) of the Kenyan *Constitution*, counsel relied on the said Article and the provisions of the

Children's Act and submitted that the relocation of the minor is not in his best interest as he has made a lot of friends in Kenya and it will be heard for him to make new friends in a new jurisdiction with foreign languages. Further, it will affect the minor's progression and development as he might be forced to repeat classes. The minor has been occasioned to a good neighbourhood and a good lifestyle in Kenya, as well as family gatherings with his cousins, which will be affected if he moves to Cyprus and ends up being exposed to a new environment and strangers. It is in the best interest of the minor that he remains in a familiar environment without disruptions in his life. He urged the court to allow the application.

13. The Respondent, through her advocates Kathambi Bwito & Company Advocates, filed her written submissions dated 3rd May 2024. Counsel submitted on the two orders sought.

14. On the first one, counsel submitted that the Applicant had not satisfied the conditions for grant of stay as set out in Order 42 Rule 6(2) of the *Civil Procedure Act*. She urged that the Applicant would not suffer any loss if the appeal succeeds. Counsel urged the court to dismiss the application with costs.

15. On the second issue, counsel submitted that the learned Magistrate did not misdirect nor misguide himself in his decision to warrant orders for variation or setting aside. It is trite law that children of tender years ought to be with their mother except in exceptional circumstances. The best interest of the minor, as well as his welfare, will be served if the orders of 25th March 2024 are upheld.

16. I have ave considered the application and the responses and am now tasked to determine whether the orders sought should be issued.

17. Article 53 (2) of *the Constitution*

> " A child's best interests are of paramount importance in every matter concerning the child."

Section 8(1) of the *Children's Act* 2022

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

    a. the best interests of the child shall be the primary consideration;

    b. the best interests of the child shall include, but shall not be limited to, the considerations set out in the First Schedule.

18. Further the court in the case of *AM v MAM* [2012] eKLR stated,

> " In deciding children's matters it is incumbent upon the courts to bear in mind that children are vulnerable members of society and are therefore susceptible to physical, psychological and other types of abuses. The courts remain the upper guardians of children's rights and interests, and where necessary, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of sensitive interests that relate to family status and touch on private lives of individuals."

19. On Stay of execution, the *Civil Procedure Rules* 2010 Order 42 rule 6 (1) and (2) provides;

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

20. From the provision above it's evident that in issuance of stay of execution orders the court has to consider three factors namely:-

   i. Substantial loss;

   ii. The application has been made without unreasonable delay; and

   iii. Security.

21. In discussing substantial loss the court in the case of *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012]eKLR stated:-

> "No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process.
>
> The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the *CPR* and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:
>
> > "...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

22. Besides consideration of the principles laid in Order 42 Rule 6(2) (a) (b) in issuing orders for stay of execution the court has to consider the best interest of a child principle where the subject matter is a child. I am guided by the case of *LDT vs PAO* [2021] eKLR where the court stated:-

> "While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted...
>
> The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense."

23. In this case the focus by the Appellant/Applicant is on what he will suffer as a father if the child moves to Cyprus with the mother. The loss he has mentioned, affecting the child is tangential. Children can easily adapt to new environments and make new friends. It has not been shown how the minor, in this case, will be different from the norm. In any case, since the mother is relocating, justice will be served by the expedited hearing of the hearing. Therefore, it's my finding that the applicant has not established substantial loss, which is the main principle for consideration in the issuance of a stay of execution.

24. I must note that the applicant has tried to introduce new issues in his submissions on the substantial loss the child will suffer which can be termed as trial by ambush as it is trite law that all parties are bound by their pleadings.

25. The issue of whether the application herein was filed without unreasonable delay has not been disputed; therefore, I will not delve into it, as well as the issue of security for costs for due performance, which, in my view, does not apply in this case, this being a children's matter.

26. I must also add that a stay of execution is not normally granted in children matters.

27. The upshot of the foregoing is that it is the opinion of the Court that the application lacks merit. The same is dismissed.

28. As this is a matter regarding a child, award of costs is not an appropriate remedy. Each party will therefore bear own costs.

29. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JUNE 2024. DELIVERED VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Kariuki for the Applicant;

Ms Achieng holding brief for Ms Kathambi for the Respondent; and

Arthur – Court Assistant.